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New Jersey State Library

THE UNIVERSITY OF CHICAGO

Notice of Appeal.

NOTICE OF APPEAL.

Filed September 18, 1937.

New Jersey Supreme Court

UNION COUNTY.

10

ANNA KINDERVATER (by her next friend Rudolph Kindervater), ANNA KINDERVATER, individually, and RUDOLPH KINDERVATER, individually,

Plaintiffs,

vs.

MOTORISTS CASUALTY INSURANCE Co. (also known as the Motor Club Insurance Company) and now known as the Atlantic Casualty Insurance Company,

Defendant.

Action at Law.

Notice of Appeal.

20

To: Henry H. Eisenberg, Esq.,
Attorney for Plaintiffs.

SIR:

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TAKE NOTICE that the defendant, Motorists Casualty Insurance Co. (also known as the Motor Club Insurance Company) and now known as the Atlantic Casualty Insurance Company, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

Dated: September 13th, 1937.

Respectfully,

HARRY GREEN,
Attorney for Defendant.

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Notice of Appeal.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 17th day of September, 1937.

HENRY H. EISENBERG,
Attorney for Plaintiffs.

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Grounds of Appeal.

GROUNDS OF APPEAL.

Filed October 13, 1937.

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

10

ANNA KINDERVATER (by her next
friend Rudolph Kindervater),
ANNA KINDERVATER, individu-
ally, and RUDOLPH KINDER-
VATER, individually,
Plaintiffs-Respondents,
vs.

*Action
at Law.*

MOTORISTS CASUALTY INSURANCE
Co. (also known as the
Motor Club Insurance Com-
pany) and now known as the
Atlantic Casualty Insurance
Company,
Defendant-Appellant.

*Grounds
of Appeal.* 20

To: Henry H. Eisenberg, Esq.,
Attorney for Plaintiffs-Respondents.

SIR:

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TAKE NOTICE that the following are grounds of appeal which the defendant-appellant hereby assigns and upon which it will rely at the hearing of said appeal:

1. The Supreme Court was in error in holding that the question before the court for decision was: "Can the admission of liability by the Assured to the Brodskys, which breached the policy as to them, be also considered a breach of the policy as to these plaintiffs?"; the 40

Grounds of Appeal.

only question being whether there has been a breach of the policy.

10 2. The Supreme Court was in error in holding that Provision C of the policy was not without ambiguity and that the effect of a breach thereof was open to 2 constructions.

3. The Supreme Court was in error in holding that Provision C clearly provided that the Assured shall not voluntarily assume any liability *except at his own cost*.

20 4. The Supreme Court was in error in holding that the penalty for a voluntary assumption of liability under Provision C was not unequivocally a forfeiture of the policy in toto, but a forfeiture by the Assured of all his rights against the Insurer under the policy as to that liability for which he has assumed responsibility.

30 5. The Supreme Court was in error in holding that the Insurer may escape liability, but not necessarily by a forfeiture of the policy, for the policy may well remain in full force and effect as to those losses sustained by the Assured where the conditions of the policy have been met, while recovery may be defeated as to a particular loss in connection with which the Assured was remiss in the performance of his obligations under the contract.

6. The Supreme Court was in error in holding that the statements (assuming liability relative to the Brodskys' claim) of the Assured to third persons are not competent to establish the defense as against these plaintiffs.

40 7. The Supreme Court erred in holding that the assumption of liability by the Assured was not a breach of the policy so far as plaintiffs are concerned.

Grounds of Appeal.

8. The Supreme Court erred in giving judgment in favor of the plaintiffs-respondents and against defendant-appellant.

Respectfully, etc.,

HARRY GREEN,
Attorney for Defendant-Appellant. 10

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 8th day of October, 1937.

HENRY H. EISENBERG,
Attorney for Plaintiffs-Respondents.

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Notice of Cross Appeal.

NOTICE OF CROSS APPEAL.

Filed September 29, 1937.

NEW JERSEY SUPREME COURT.

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UNION COUNTY.

ANNA KINDERVATER (by her next
friend Rudolph Kindervater),
ANNA KINDERVATER, individu-
ally and RUDOLPH KINDER-
VATER, individually,
Plaintiffs,

vs.

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MOTORISTS CASUALTY INSURANCE
Co. (also known as the Motor
Club Insurance Company)
now known as the Atlantic
Casualty Insurance Company,
Defendant.

*Action
at Law.*

*Notice of
Cross
Appeal.*

To: Harry Green, Esq.,
Attorney for Defendant.

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SIR:

TAKE NOTICE that the plaintiff, Rudolph Kindervater, individually, appeals to the New Jersey Court of Errors and Appeals from so much of the judgment entered in this cause on September 20, 1937 as adjudges that: A general verdict is hereby rendered in favor of the de-

Grounds of Cross Appeal.

GROUND OF CROSS APPEAL.

Filed October 23, 1937.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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ANNA KINDERVATER (by her
next friend Rudolph Kinder-
vater), ANNA KINDERVATER,
Individually and RUDOLPH
KINDERVATER, Individually,
Plaintiffs,

vs.

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MOTORISTS CASUALTY INSURANCE
Co. (also known as the Motor
Club Insurance Company)
and now known as the At-
lantic Casualty Insurance
Co.,

Defendant.

*Action
at Law.*

*Grounds of
Cross
Appeal.*

To: Harry Green, Esq.,
Attorney for Defendant-Appellant.

SIR:

30 TAKE NOTICE that the following are the grounds
of Cross-Appeal which the plaintiff-appellant,
Rudolph Kindervater, Individually, hereby as-
signs and upon which he will rely at the hearing
of said Cross-Appeal.

1. The Trial Court was in error in holding
that the judgment of the said Rudolph Kinder-
vater, individually, for medical expenses and
damages arising out of the loss of his daughter's
earnings, medical expenses expended in curing
40 his wife, loss of the consortium of his wife and

Grounds of Cross Appeal.

monies expended for household help to replace his said wife, were not comprehended within the provisions of the policy of insurance and were not recoverable thereunder, whereas all of said judgment was clearly comprehended within the terms of said policy.

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2. The Trial Court erred in rendering a verdict in favor of the defendant-appellant with respect to the claim of Rudolph Kindervater, Individually, because said claims were clearly comprehended within the terms and provisions of the policy of insurance issued to the assured by the defendant-appellant herein, and there should have been a verdict in favor of said plaintiff-appellant, Rudolph Kindervater, individually.

HENRY H. EISENBERG,
Attorney for Plaintiff-Appellant,
Rudolph Kindervater, Individually.

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Service of the within and copy acknowledged
this 21st day of October, 1937.

HARRY GREEN,
Attorney for Defendant-Appellant.

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Summons.

SUMMONS.

(Filed March 18, 1933.)

State of New Jersey to Motorists
Casualty Insurance Co.:

10 (SEAL) YOU ARE SUMMONED to answer the
annexed complaint of Anna Kinder-
vater (by her next friend Rudolph
Kindervater), Anna Kindervater, individually,
and Rudolph Kindervater, individually, in an ac-
tion at law, in the New Jersey Supreme Court.

20 AND TAKE NOTICE that unless you file your an-
swer to said complaint with the Clerk of the said
New Jersey Supreme Court, at Trenton within
twenty days after service upon you of this writ
and the annexed complaint, the plaintiffs may
proceed in said suit and judgment may be entered
against you.

Witness, THOMAS J. BROGAN, Chief Justice of
our New Jersey Supreme Court, at Trenton, this
7th day of March, Nineteen Hundred and Thirty-
three.

FRED L. BLOODGOOD,
Clerk.

30 FREDERICK SIMAN,
Attorney.

Complaint.

COMPLAINT.

(Filed March 18, 1933.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

ANNA KINDERVATER (by her next
friend Rudolph Kindervater),
ANNA KINDERVATER, individu-
ally, and RUDOLPH KINDER-
VATER, individually,

Plaintiffs,

*Action
at Law.*

vs.

MOTORISTS CASUALTY INSURANCE
Co.,

Defendant.

20

The plaintiffs residing in the City of Elizabeth, County of Union and State of New Jersey, say that:

FIRST COUNT.

1. The defendant is a corporation or stock company and as such is authorized to issue policies of insurance and indemnity in the State of New Jersey, and to transact its business in the State of New Jersey.

30

2. Said defendant issued a policy of insurance to William Simoni under and by terms thereof it was agreed for and in consideration of the premium paid that said defendant Motorists Casualty Insurance Co. would become liable for damages imposed by law for bodily injuries and property damage caused as the result of the

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Complaint.

ownership, maintenance, operation and/or use of the automobile in said policy described.

3. Under said policy of insurance it was further agreed that said defendant should pay all taxed costs and interest upon any judgment obtained against the assured.

10

4. On July 11, 1931, the automobile so described in the policy issued by the defendant was being operated by William Simoni, and in which car the infant plaintiff Anna Kindervater, and her mother Anna Kindervater, were invited passengers.

5. While said automobile so insured was so being driven by said William Simoni, it ran into and collided with an automobile owned by David Doyle and further collided with an automobile owned and driven by Hyman Brodsky.

20

6. Thereafter an action was instituted in the Union County Court of Common Pleas by the plaintiffs against said William Simoni and David Doyle for the injuries sustained by said plaintiff, Anna Kindervater, by her next friend Rudolph Kindervater, and trial being had upon the issues on February 3, 1933, the jury rendered a verdict in favor of said plaintiff, Anna Kindervater, by her next friend Rudolph Kindervater against William Simoni, in the sum of SEVENTY-FIVE HUNDRED (\$7500.00) DOLLARS, and no cause of action against the defendant David Doyle; a verdict in favor of said plaintiff Anna Kindervater against William Simoni, in the sum of FIVE HUNDRED (\$500.00) DOLLARS, and no cause of action against the defendant David Doyle; a verdict in favor of Rudolph Kindervater against William Simoni, in the sum of EIGHT HUNDRED (\$800.00) DOLLARS, and

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Complaint.

no cause of action against the defendant David Doyle.

7. No payment of said judgment was made and execution was issued against the defendant William Simoni and returned unsatisfied on March 4, 1933.

8. Under Chapter 153 of the Pamphlet Laws of New Jersey of 1924 and the various supplements and amendments thereto, it is specifically provided that the bankruptcy or insolvency of the person liable to pay a judgment obtained will not relieve an insuring company of its responsibility to make payment up to the amount limited by said policy, and in pursuance of said statute the clause to the same effect was inserted in the policy of insurance aforesaid.

9. Said policy issued as aforesaid is dated September 17, 1930, and bears #A. P. L. 18319 and its limits are as follows:

Limits of liability for bodily injuries.

- (a) Limit for one person, \$5,000.00.
- (b) Limit for one accident, \$10,000.00.
- (c) Limit for liability for damage to property of others, one accident, \$1,000.00.

The plaintiff Anna Kindervater, by her next friend Rudolph Kindervater, demands payment to the extent of the limit of the policy as to her, which is FIVE THOUSAND (\$5,000.00) DOLLARS and interest thereon from February 3, 1933, and costs of suit of said judgment, levy and execution.

SECOND COUNT.

1. The plaintiff Anna Kindervater repeats the matters and things set out in paragraphs 1 to 9 inclusive of the first count and makes them part hereof.

Complaint.

The plaintiff Anna Kindervater demands payment in the sum of FIVE HUNDRED (\$500.00) DOLLARS and interest thereon from February 3, 1933, and costs of suit of said judgment, levy and execution.

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THIRD COUNT.

1. The plaintiff Rudolph Kindervater repeats the matters and things set out in paragraphs 1 to 9 inclusive of the first count and makes them part hereof.

2. The plaintiff Rudolph Kindervater alleges that, as a matter of law, the judgment procured by him as aforesaid is payable from the limit and fund of the policy referring to property damages.

20

The plaintiff Rudolph Kindervater demands payment in the sum of EIGHT HUNDRED (\$800.00) DOLLARS and interest thereon from February 3, 1933, and costs of suit of said judgment, levy and execution.

FREDERICK SIMAN,
Attorney of Plaintiffs.

To the Within Named Defendant:

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PLEASE TAKE NOTICE that if you intend to make a defense in the above entitled matter, the plaintiffs hereby demand that you file an affidavit of Merits within ten days of service upon you of this summons and complaint and in default thereof, judgment will be entered against you.

FREDERICK SIMAN,
Attorney of Plaintiffs.

40

*Answer.***ANSWER.**

(Filed March 18, 1933.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

ANNA KINDERVATER (by her next
friend Rudolph Kindervater),
ANNA KINDERVATER, individu-
ally, and RUDOLPH KINDER-
VATER, individually,

*Plaintiffs,**vs.*

MOTORISTS CASUALTY INSURANCE
Co.,

*Defendant.**Action
at Law.*

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The defendant, Motorists Casualty Insurance Co., now known as Motor Club Insurance Company, a corporation organized under the insurance laws of the State of New Jersey, in answer to complaint filed herein says that:

FIRST COUNT.

1. It admits the allegations in paragraph 1.
2. It denies the allegations of paragraphs 2 and 3 and more specifically refers to the policy of insurance issued to William Simoni.
3. It has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 4, 5 and 6 and leaves plaintiffs to their proof.
4. It denies the allegations of paragraphs 7 and 8.

30

40

Answer.

5. It denies the allegations of paragraph 9 and more specifically refers to the policy of issuance issued to William Simoni.

SECOND COUNT.

10 It repeats the allegations of paragraphs 1 to 9 inclusive of the first count and makes the same a part hereof as if fully repeated herein.

THIRD COUNT.

1. It repeats its answers to paragraphs 1 to 9 inclusive of the first count and makes same a part hereof as if fully repeated herein.

2. It denies the allegations of paragraph 2.

20 FIRST SEPARATE DEFENSE TO ALL COUNTS.

1. Plaintiffs are not comprehended within the terms of said policy and are not entitled to sue thereon.

2. There is no liability whatsoever on the part of the defendant to plaintiffs under and by virtue of said policy, the statutes of the State of New Jersey or otherwise.

30 3. Defendant is not and has not become bound to the plaintiffs on said policy or otherwise.

SECOND SEPARATE DEFENSE TO ALL COUNTS.

40 1. On September 17th, 1930, defendant issued its policy of automobile liability limit for one person, \$5,000.00 and limit for one accident \$10,000.00, property damage \$1,000.00 for one accident, to William Simoni covering a certain

Answer.

automobile, beginning twelve o'clock, September 17th, 1930, and ending twelve o'clock noon, September 17th, 1931.

2. Said policy of insurance provided among other things that:

Notice of Accidents and Settlements. The assured shall give immediate written notice of any accident covered by this policy, and like notice of any claim and/or suit resulting therefrom, and such notice together with every summons or other process must be forwarded to the Home Office of the Company or to its authorized representative. The Company reserves the right to settle any claim or suit. Whenever requested by the Company the Assured shall aid in effecting settlements, securing information and evidence the attendance of witnesses and in prosecuting appeals. The Assured shall at all times render to the Company all cooperation within his power. Except as herein elsewhere provided for the Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceedings without the consent of the Company previously given in writing.

3. Said William Simoni voluntarily and in writing assumed liability for said accident.

4. Said William Simoni failed to aid in securing information and the attendance of witnesses in defending suit commenced against him by the plaintiffs herein, although requested to do so by this defendant.

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Answer.

5. Said William Simoni failed and refused to cooperate with this defendant although requested to do so and interfered with legal proceedings commenced by plaintiffs and further acted in concert with the plaintiffs herein.

10 6. Said William Simoni failed to cooperate with defendant and attorneys for defendant although requested to do so and was very hostile to the interests of defendant at the time of trial referred to and testified contrary to statements and affidavit under oath given to this defendant.

20 7. Said judgment recovered by the plaintiffs in the Union County Court of Common Pleas is not comprehended within the terms of the policy of insurance.

8. As a result said William Simoni violated and breached the terms and conditions of said policy and neither he nor the plaintiffs are entitled to recover thereunder.

9. Plaintiffs are subject to the same defenses which this defendant has against William Simoni.

THIRD SEPARATE DEFENSE TO ALL
COUNTS.

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There is no privity of contract existing between the plaintiffs and this defendant, and plaintiffs have no right of action by virtue of the policy or the statutes of this State or otherwise.

FOURTH SEPARATE DEFENSE TO ALL
COUNTS.

40 1. Judgment recovered by plaintiff, Rudolph Kindervater, is not comprehended within the

Answer.

terms of the policy of insurance which merely insured William Simoni against loss by reason of the liability imposed by law for damages on account of the bodily injuries, including death, at any time resulting therefrom to any person or persons, and this defendant did not insure or agree to insure said William Simoni for damages comprehended within said judgment of Rudolph Kindervater. 10

2. As a result this defendant is not liable on policy of insurance for alleged claim of Rudolph Kindervater.

NELSON K. MINTZ,
Attorney for Defendant.

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*Reply.***REPLY.**

(Filed September 19, 1933.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

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ANNA KINDERVATER (by her next
friend Rudolph Kindervater),
ANNA KINDERVATER, individu-
ally, and RUDOLPH KINDER-
VATER, individually,

*Plaintiffs,**vs.*

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MOTORISTS CASUALTY INSURANCE
Co.,

*Defendant.**Action
at Law.*

The plaintiffs replying to the Answer of the defendant, say that:

1. They deny the allegations contained in the first separate defense to all counts of the Answer.
2. They deny the allegations contained in the second separate defense to all counts of the Answer.
3. They deny the allegations contained in the third separate defense to all counts of the Answer.
4. They deny the allegations contained in the fourth separate defense to all counts of the Answer.
5. They reserve the right to strike out the allegations contained in the following paragraphs

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Reply.

of the Answer on the day of trial of the above cause of action, to wit:

(1) Paragraphs 1, 2 and 3 of the first separate defense to all counts of the answer on the ground that the same are sham and/or frivolous.

(2) Paragraph 3 of the second separate defense to all counts of the Answer on the ground that the same is sham and/or frivolous, and that whatever writing was signed by William Simoni was not executed in connection with or on account of plaintiffs' right of action and is not applicable to the plaintiffs' claim. 10

(3) Paragraph 7 of the second separate defense to all counts of the Answer on the ground that the same is sham and/or frivolous.

(4) Paragraph 1 of the third separate defense to all counts of the Answer on the ground that the same is sham and/or frivolous. 20

(5) Paragraph 1 of the fourth separate defense to all counts of the Answer on the ground that the same is sham and/or frivolous.

FREDERICK SIMAN,
Attorney for Plaintiffs.

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Stipulation of Facts.

**STIPULATION OF FACTS FOR TRIAL
WITHOUT A JURY.**

(Filed September 2, 1937.)

NEW JERSEY SUPREME COURT,
UNION COUNTY.

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ANNA KINDERVATER (by her next
friend Rudolph Kindervater),
ANNA KINDERVATER, individu-
ally, and RUDOLPH KINDER-
VATER, individually,

Plaintiffs,

vs.

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MOTORISTS CASUALTY INSURANCE
Co.,

Defendant.

*Action
at Law.*

*Stipulation
of Facts.*

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It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel that the above entitled cause be and the same is hereby submitted to the Court for determination without a jury and upon the following agreed facts.

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1. On or about September 17th, 1930, the defendant, Motorists Casualty Insurance Co., issued its automobile public liability policy with limits of \$5,000 for one person, \$10,000 for one accident, and \$1,000 for property damage, one accident, to William Simoni covering a 1929 Chevrolet Coupe, for a period of one year from that date. A true copy of the policy is hereto annexed, made part hereof and marked Schedule "A."

Stipulation of Facts.

2. On or about July 11th, 1931 while the plaintiffs (Mrs.) Anna Kindervater and her daughter, (Miss) Anna Kindervater were invitees in the automobile driven by the assured Simoni, the automobile was involved in a three-car accident, at or near the intersection of Victory Bridge and Scott Avenue, South Amboy, New Jersey, colliding with motor vehicles, one being owned and operated by one David Doyle, the other owned by George Brodsky (who was not in the car) and operated by Moe Brodsky. The said plaintiffs suffered personal injuries. 10

3. On or about July 27, 1931, while at the home of the Brodskys (George Brodsky not being at home at the time, he being an unmarried member of the family residing with his parents at their address), the daughter of Moe Brodsky, who was a sister of George Brodsky, said that Simoni should come into the other room and sign a statement about the accident, so that she could send it to her insurance company. The statement reads as follows: 20

“William Simoni do admit colliding, damaging and injuring the occupants in automobile operated by Moe Brodsky on the highway to the Victory Bridge named Scott Avenue, namely an Oldsmobile coach and my car, a Chevrolet coupe. Accident occurring on July 11th, 1931. I admit liability in the above mentioned accident. 30

(Signed) WILLIAM SIMONI,
152 Magnolia Avenue,
Elizabeth, N. J.,
Elizabeth 3-6526.”

4. This statement was procured from the assured, William Simoni, without the knowledge, 40

Stipulation of Facts.

consent, participation or acquiescence in any way whatsoever of the Kindervaters, the plaintiffs herein; the Kindervaters were total strangers to the Brodskys; the said statement was never received or used by the Kindervaters, its existence being unknown to the Kindervaters until apprised thereof by the answer of the Motorists Casualty Insurance Co. in this suit on the policy of insurance.

5. Upon ascertaining the existence and execution of the above statement by Simoni, the defendant, Motorists Casualty Insurance Co. on or about November 27th, 1931, forwarded a letter to Simoni advising him that because of the fact that he had signed such a statement in writing and for other reasons, the policy was definitely breached and at an end and this defendant was disclaiming all liability in the matter. A copy of said letter is annexed hereto, made part hereof and is marked Schedule "B."

6. On December 7th, 1931, Simoni called at the office of the defendant in response to the letter of November 27th and was again advised of defendant's disclaimer and the offer of this defendant to defend under a non-waiver agreement was repeated to Simoni, and he was given such an agreement.

7. On or about December 7th, 1931, suit was instituted in the Court of Common Pleas of Union County on behalf of (Miss) Anna Kindervater (by her next friend Rudolph Kindervater), (Mrs.) Anna Kindervater, individually and Rudolph Kindervater, individually, against both the assured, William Simoni, and David Doyle. The action by (Miss) Anna Kindervater by her next friend was for personal injuries and loss of

Stipulation of Facts.

earnings; the action by (Mrs.) Anna Kindervater was for personal injuries; and the action of Rudolph Kindervater was for medical expenses for his wife and daughter as well as for damages arising out of the loss of earnings of (Miss) Anna Kindervater, loss of consortium of (Mrs.) Anna Kindervater and for household help to replace (Mrs.) Anna Kindervater. 10

8. On or about the time of the delivery of the summons and complaint to the defendant, Motorists Casualty Insurance Co. by its assured, William Simoni, namely on December 23rd, 1931, the defendant, Motorists Casualty Insurance Co., not having received back the non-waiver agreement executed, forwarded another letter to its assured, William Simoni, relative to the prior disclaimer and future course of action by this defendant. A true copy of said letter is annexed hereto, made part hereof and marked Schedule "C." 20

9. On or about December 28th, 1931, up to which time this defendant had not taken any steps to defend the action against Simoni, preferring to stand on its disclaimer, William Simoni had another interview with a representative of Motorists Casualty Insurance Co. relative to the suit then pending, and as a result of that conference, Simoni executed the non-waiver agreement whereby the defendant, Motorists Casualty Insurance Co. agreed to defend Simoni without prejudice. A true copy of said non-waiver agreement is annexed hereto, made part hereof and marked Schedule "D." 30

10. As a result of the execution of the aforesaid non-waiver agreement, this defendant undertook to and did defend William Simoni in the 40

Stipulation of Facts.

actions commenced against him by these plaintiffs as well as other actions already commenced against him by the Brodskys, all of whom claimed either personal injuries or property damage arising out of the accident of July 11th, 1931.

- 10 11. On or about April 19th, 1932, in the District Court for the First Judicial District of the County of Union, in the suit of George Brodsky against William Simoni, a judgment was rendered against the said Simoni in the amount of \$400.00, which judgment this defendant refused to pay, and on April 22nd, 1932, the defendant, Motorists Casualty Insurance Co. forwarded another letter to Simoni. A true copy of said letter is annexed hereto, made part hereof and marked Schedule "E."
- 20 12. On or about August 22nd, 1932, after this defendant had refused to pay the judgment of George Brodsky on the ground that it had previously disclaimed all liability and preferred to stand on the disclaimer at the time, the said George Brodsky instituted suit against this defendant on the policy of insurance involved herein, in the District Court of the First Judicial District of the County of Essex.
- 30 13. On or about May 26th, 1933, in the suit of George Brodsky against this defendant, a judgment in the amount of \$423.68 was rendered and on or about June 5th, 1933, this defendant appealed from said judgment to the New Jersey Supreme Court, which court, on January 26th, 1934, handed down a decision reversing the judgment of the trial court. The decision is reported in 112 N. J. Law 211.
- 40 14. On appeal from that decision by the said George Brodsky to the Court of Errors and

Stipulation of Facts.

Appeals, that Honorable Court in 114 N. J. Law 154 affirmed the Supreme Court.

15. On or about February 3rd, 1933, a jury in the Kindervaters' suit against the assured, Simoni, and Doyle, in the Union County Common Pleas Court rendered a general verdict against William Simoni as follows: In favor of the plaintiff (Miss) Anna Kindervater (by her next friend Rudolph Kindervater), in the amount of \$7,500, in favor of the plaintiff (Mrs.) Kindervater in the amount of \$500, and in favor of Rudolph Kindervater in the amount of \$800, and no cause of action against Doyle, which judgment this defendant refused to pay, it having disclaimed on the policy as hereinbefore set forth.

16. On March 3rd, 1933, the plaintiffs herein through their then attorney caused execution to be issued out of the Union County Court of Common Pleas, accompanying the request for the issuance of the execution with a letter reading, "Please return execution against Wm. Simoni unsatisfied." The execution was received by the Sheriff of Union County on March 3rd, 1933, and returned "unsatisfied" on the same day.

17. The foregoing judgments are final judgments and remain unsatisfied, although payment thereof was demanded from the assured, Simoni, and the Motorists Casualty Insurance Co., his insurer.

18. The statement executed by the assured, William Simoni, as set forth in paragraph 3, was not offered or introduced in evidence at the original damage suit of Kindervaters against the assured Simoni and David Doyle.

Stipulation of Facts.

19. The instant suit was then brought by the present plaintiffs against this defendant on March 7th, 1933.

10 20. On February 25th, 1935, the plaintiffs' action against the Motorists Casualty Insurance Co. was tried before a jury in the Supreme Court, Union County, with Judge Newton H. Porter presiding. At the conclusion of the plaintiffs' case, the defendant moved for a non-suit on the ground of improper issuance of execution, which was granted.

20 21. Subsequently an appeal was taken to the Court of Errors and Appeals by the plaintiffs from said non-suit so granted by Honorable Newton H. Porter. The Court of Errors and Appeals on October 2nd, 1936, reversed the ruling entered by Judge Porter and awarded a venire de novo. Said decision is reported in 117 N. J. Law, page 131, 187 Atl., page 362.

22. The defendant, Motorists Casualty Insurance Co. now waives the defense of lack of cooperation, except as hereinabove set forth in paragraph 3 of this stipulation.

30 HENRY H. EISENBERG,
Attorney for Plaintiffs.

HARRY GREEN,
Attorney for Defendant.

Dated: January 18th, 1937.

Schedule "A."

Schedule "A."

Automobile Public Liability Policy

MOTORISTS CASUALTY INSURANCE CO.

Motor Club Building, Central Avenue and West

Market Street, Newark, New Jersey

10

A STOCK COMPANY

HEREINAFTER CALLED THE COMPANY

DOES HEREBY AGREE in consideration of the premium herein, the Schedule of Declarations and compliance with the provisions hereinafter mentioned;

GENERAL INSURANCE AGREEMENTS

1. To INSURE the Assured against loss by reason of the liability imposed by law upon the Assured for damages on account of

20

(a) *Bodily injuries, including death*, at any time resulting therefrom, to any person or persons.

(b) *Damage to property*, including the loss of such property, excluding however, property of the Assured and/or property of others in the custody of the Assured and/or any property carried in or upon any automobile described in this policy (Coverage under (b) is eliminated if either Declaration No. 8 or the line in the Premium Table marked "Damage to Others' Property" is answered by the words "not covered" or by words of similar effect).

30

Accidentally suffered or Alleged to have been suffered while this policy is in force by reason of

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Schedule "A."

the ownership, maintenance or use within the limits of the United States of America (exclusive of Alaska, the Philippine and Hawaiian Islands and other "possessions") or Canada of any automobile described in the Declarations.

10 2. *To defend* in the name and on behalf of the Assured, any suits, even if groundless, brought against the Assured to recover damages on account of such accidents as are covered under this policy.

20 3. *To pay*, irrespective of the limits of liability hereinafter mentioned, all costs taxed against the Assured in any legal proceeding defended by the Company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of said limits of liability and the expense incurred by the Assured for such immediate medical and surgical relief as is imperative at the time of the accident, together with all expenses incurred by the Company for investigation, adjustment and defense.

30 4. *Additional Assureds.* The Insurance provided by this policy is so extended as to be available, in the same manner and under the same provisions as it is available to the Named Assured, to any person or persons while riding in or legally operating any of the automobiles described in the Declarations or to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant except that the extension provided for in this condition shall not be available

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Schedule "A."

to. (1) *any* public garage, automobile repair shop, automobile sales agency, automobile service station or the agents or employees thereof, (2) the purchaser, transferee or assignee of any of the automobiles described in the Declarations, except by the written consent of the Company endorsed hereon.

10

The unqualified term "Assured" wherever used in this policy shall include in each instance the named Assured and any other person, firm or corporation entitled to insurance under the provisions and conditions of this policy, but the qualified term "Named Assured" shall apply only to the Assured named and described in Declaration No. 1. Any insurance under this policy shall be applied first to the protection of the Named Assured and the remainder, if any, to the protection of any other Assured.

20

5. *Bankruptcy or Insolvency of Assured.* The Company is bound to the extent of its liability under this policy to pay and satisfy and protect the Assured against the levy of execution upon any final judgment that may be recovered upon any claim covered by this policy as in the policy set forth and limited and an action may be maintained upon such judgment by the injured person or persons or such other party or parties in whom the right of action vests to enforce such liability of the Company as in the policy set forth and limited.

30

PROVISIONS

A. *Limits.* Regardless of the number of Assureds involved the Company's limit of liability applied separately to each automobile described hereunder, for loss from an accident resulting

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Schedule "A."

in bodily injuries to or in the death of one person is limited to the sum stated in Declaration No. 7 (a); and subject to the same limit for each person the Company's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to the sum stated in Declaration No. 7 (b); and the Company's total liability for damage to property, including the loss of use of such property, as a result of any one accident is limited to the sum stated in Declaration No. 8.

In the event of an accident which results in more than one claim all sums paid by the Company in settlement of claims arising therefrom, whether in suit or not, shall be accounted in diminution of the Company's total liability on account of such accident.

B. Exclusions. This policy does not cover (1) any obligation assumed by or imposed upon the Assured by any Workmen's Compensation agreement, plan or law, (2) injuries or death to any employee of the Assured while engaged in operating or caring for any automobile insured hereunder, (3) injuries or death of any employee of the Assured engaged in the usual course of trade, business, profession or occupation of the Assured.

And the policy does not cover while any automobile insured hereunder is being (4) used for any purpose other than specified in Declaration No. 9, (5) driven or manipulated by any person in violation of law as to age, and if there is no legal age limit, then under the age of 16 years, (6) driven or manipulated in any race or contest, (7) used for towing or propelling any trailer or any other vehicle used as a trailer,

Schedule "A."

(8) rented or hired to others or being used to carry passengers for a consideration.

C. Notice of Accidents and Settlements. The Assured shall give immediate written notice of any accident covered by this policy, and like notice of any claim and/or suit resulting therefrom, and such notice together with every summons or other process must be forwarded to the Home Office of the Company or to its authorized representative. The Company reserves the right to settle any claim or suit. Whenever requested by the Company the Assured shall aid in effecting settlements, securing information and evidence, the attendance of witnesses, and in prosecuting appeals. The Assured shall at all times render to the Company all co-operation within his power. Except as herein elsewhere provided for, the Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceedings without the consent of the Company previously given in writing.

D. Right of Action. No action shall lie against the Company to recover for any loss under this policy, unless it shall be brought after the amount of such loss shall have been fixed or rendered certain by final judgment against the Assured after trial of the issue. In no event shall any such action lie unless brought within Twelve months after the right of action accrues as herein provided, except, however, in the event that any statutory provisions provides for a definite minimum period, then the statutory minimum provisions shall govern, irrespective of Provision H of this policy.

Schedule "A."

10 *E. Subrogation.* In case of payment of loss or expense under this policy, the Company shall be subrogated to all of the Assured's rights of recovery to the extent of such payment and the Assured shall execute any and all papers required and shall co-operate with the Company to secure such rights.

20 *F. Other Insurance.* If the Named Assured carries other insurance covering concurrently a loss covered by this policy, he shall not recover from the Company a larger proportion of any such loss than the sum hereby insured bears to the whole amount of valid and collectible insurance applicable thereto, and if such other insurance be that of this Company, the Named Assured must elect under which policy of the Company all claims arising out of such loss shall be treated and thereafter the Company shall not be liable to the Named Assured in connection with such loss under any other policy. If any Assured other than the Named Assured is covered by valid and collectible insurance against a loss covered hereby, such Assured shall have no right to recover under this policy.

30 *G. Cancellation.* This policy may be cancelled at any time at the request of the Named Assured in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary rate premium for the expired term. This policy may be cancelled at any time by the Company by giving the Named Assured notice of cancellation stating when thereafter cancellation shall be effective, and the earned premium shall be adjusted pro rata which refund if not tendered with the
40 cancellation notice shall be refunded on demand.

Schedule "A."

Notice of cancellation mailed to the address of the Named Assured stated in this policy shall be a sufficient notice. The Company's check or the check of any duly authorized representative of the Company tendered to the Named Assured in the manner hereinbefore provided for the service of cancellation notice shall be sufficient tender of any unearned premium. 10

H. Statutory Provision. If any of the provisions or conditions of this policy shall conflict with or are inconsistent with the law of the State where this contract is entered into, then such provisions and conditions shall be inoperative in such State and State law shall prevail.

I. Waiver. No provision or condition of this policy shall be waived or altered, except by written endorsement attached hereto and signed by the President or Secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the Company unless such person, firm or corporation is authorized in writing as such agent by the President or Secretary. 20

J. Declarations. Declarations 1 to 11, inclusive, are made a part of this policy and are warranted by the Assured to be true. 30

Automobile Public Liability Policy
Motorists Casualty Insurance Company

DECLARATIONS.

1. Name of Assured—William Simoni.
2. Address of Assured—132 Magnolia Avenue,
Elizabeth, N. J. 40

Schedule "A."

3. Assured is—Individual
4. Assured's occupation or business is—pipe-fitter
5. The term of this policy begins at 12.00 o'clock noon—September 17, 1930
- 10 Standard time at Assured's address and ends at 12.00 o'clock noon—September 17, 1931
6. A full description of each automobile to which this insurance is applicable is given below:

	Year Built	Trade Name	No. of Cylind.	Model Series	Type of Body
Car No. 1	1929	Chevrolet	6	International	Coupe
				Factory and Motor Number	
				E#2AC75499	
				M#970932	

- 20 7. Limits of Liability for Bodily Injuries including death
- (a) Limit for one person..... \$5,000
- (b) Limit for one accident....\$10,000
8. Limit of Liability for Damage to Property of Others, one accident.....\$ 1,000
9. The above described automobiles will not be rented or used to carry passengers for a consideration or used to tow or propel a trailer or vehicle used as a trailer, and the purposes for
- 30 which they will be used are,
- (a) *Private passenger type automobiles*—pleasure and business purposes.
- (b) *Commercial vehicles*—only in the business as described in Declaration No. 4, including, incidental pleasure use for the Named Assured's family, except as follows: No exceptions.
- 40 10. The above described automobiles are and will be principally garaged in the city named in

Schedule "A."

Declaration No. 2, except as herein stated..
No exceptions.

- 11. No insurance Company has cancelled or refused to issue automobile insurance to the Named Assured, except as herein stated—
No exceptions

10

PREMIUM TABLE

	CLASS	CAR No. 1	
		Premiums	Limits
	Liability	20.88	5/10
The Premium for this Policy is as follows:	Damage to Property	7.92	1,000
	Collision	None	
	TOTAL	28.80	

IN WITNESS WHEREOF the MOTORISTS CASUALTY INSURANCE COMPANY, by its President and Secretary, has executed these presents, but this policy shall not be valid unless countersigned by an authorized representative of the Company and then valid only for the period stated in Declaration No. 5.

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HARRY GREEN,
President.

WILLIAM GREEN,
Secretary.

30

Countersigned at Newark, N. J.,
this 17th day of September, 1930.
Former Policy No.....

MOTOR CLUB OF NEW JERSEY,
By William Green, Agent.

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Schedule "A."

IMPORTANT

10 *YOU* are required under the terms of this policy to *report each accident PROMPTLY*, whether trivial or not, and whether or not you think you are at fault. If possible, first telephone immediately the representative of the company nearest the city where the accident occurs, then follow up with a completed notice promptly thereafter

Obtain names and addresses of witnesses, at the time of the accident

AUTOMOBILE PUBLIC
LIABILITY POLICY

Policy No., A. P. L. 18319

20

Motorist Casualty
Insurance Co.

Motor Club Building, Central
Ave., & W. Market St.
NEWARK, N. J.

MCIC (cut)

ISSUED TO

Expires.....19....

30

Owned and Operated by Members
of the
MOTOR CLUB OF NEW JERSEY
(cut)

IMPORTANT

Please Read Your Policy

40

Schedule "B."

Schedule "B."

November 27th, 1931.

Mr. William Simoni,
132 Magnolia Avenue,
Elizabeth, N. J.

10

Dear Sir:

On September 17th, 1930 this company issued policy of insurance #18319 to you, covering a Chevrolet Coupe.

On or about July 10th, 1931 the said automobile is alleged to have been in an accident as a result of which the automobile of one, George Brodsky was damaged and certain injuries alleged to have been sustained by Anna Kindervater and Mrs. Anna Kindervater.

20

On or about November 23rd, 1931 we learned for the first time that you had given a signed statement to the Brodskys in which statement you assumed liability for the accident and admitted that same was your fault.

We call your attention to the following provisions of your policy:

"Notice of Accidents and Settlements. The assured shall give immediate written notice of any accident covered by the policy and like notices of any claim and/or suit resulting therefrom and such notice together with every summons or other process must be forwarded to the Home Office of the Company or to its authorized representative.

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* * * Whenever requested by the Company the assured shall aid in effecting settlements, securing information and ascertaining the addresses of witnesses and in

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Schedule "B."

10 prosecuting appeals. The assured shall at all times render to the company all co-operation within his power. * * * The assured shall not voluntarily assume any liability, settle any claim or incur any expenses except at his own cost or interfere with any negotiations of settlement, or legal proceedings, without the consent of the Company previously given in writing."

Since said provisions and other provisions of the insurance policy have been violated by you, we are compelled to deny liability on said claims and suit, without waiving the benefit of any other terms, provisions or conditions of the policy.

20 However for the purpose of preserving the rights of all concerned and without waiving, prejudicing or invalidating our position in any way and/or the benefits of said policy, we are willing to investigate the facts and circumstances in connection with the alleged accident and to defend said suit, at our own costs and expense, without however, being liable to you in any manner whatsoever in connection with said investigation and defenses, except of course for wilful
30 neglect. It being understood and agreed that you at all times, have control of any litigation which may ensue and may employ private counsel in association with counsel for this company to assist in the defense of suit commenced against you and that you may make such settlement or other disposition of the case with claimants as you may desire, without, however, in any manner binding the company.

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Schedule "C."

We regret that we are compelled to take this course.

Very truly yours,

MOTORISTS CASUALTY INS. CO.

By L. G. WORNE,

Claim Manager.

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Schedule "C."

December 23rd, 1931

Mr. William Simoni,
132 Magnolia Avenue,
Elizabeth, N. J.

Dear Sir:

You delivered summons and complaint in suit commenced against you in the Union County Court of Common Pleas, by Anna Kindervater and others, which summons was served upon you on December 11th.

20

On November 27th, you were advised that because of the violation of certain provisions of the policy of insurance issued to you, that we denied liability on any and all claims which resulted from this accident, without, however, waiving the benefits of any other terms and provisions and conditions of the policy.

30

We further advised you that for the purpose of preserving the rights of all concerned and without waiving, prejudicing or invalidating our position in any way and/or the benefits of said policy, we were willing to investigate the facts and circumstances in connection with the alleged accident and to defend suit, at our own costs and expense, without however, being liable

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Schedule "C."

10 to you in any manner whatsoever in connection with said investigation and defenses, except of course for wilful neglect. It being understood and agreed that you at all times, have control of any litigation which may ensue and may employ private counsel in association with counsel for this company to assist in the defense of suit commenced against you and that you may make such settlement or other disposition of the case with claimants as you may desire, without, however, in any manner binding the company.

20 In response to said letter you called to see us on December 7th and were handed a form of agreement in accordance with our letter which you were to sign and return to us at once. We are handling this suit in accordance with the letter and agreement and suggest you communicate with us immediately upon receipt of letter.

Very truly yours,

MOTORISTS CASUALTY
INSURANCE CO.

L. C. WORNE,
Claim Manager.

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Schedule "D."

Schedule "D."

Agreement to Defend Without Prejudice.

1. WHEREAS, WILLIAM SIMONI, (hereinafter called "Assured") of 132 Magnolia Ave., Elizabeth, N. J. is the assured in Automobile Public Liability Policy #18319 issued by the Motorists Casualty Insurance Company (hereinafter called "Company"); and 10

2. WHEREAS, said Company has served notice upon said Assured that it repudiates liability under said policy in connection with claims asserted by the Brodskys, Kindervaters or anyone else, by reason of accident alleged to have occurred on or about July 11th, 1931 on the ground that said Assured breached the conditions of said policy; and 20

3. WHEREAS, the Assured desires the Company and the Company is willing, to investigate and defend said action, but the Company does not desire to waive, prejudice or invalidate any of its rights under said policy, neither does the assured.

It Is Therefore Agreed As Follows: 30

(a) The Company will investigate the aforementioned accident, and defend said action, at its own cost and expense without in any manner whatsoever waiving, prejudicing and/or invalidating its rights under the policy and/or its repudiation of liability or liabilities under said policy, and shall not be liable in any manner whatsoever to the Assured, in so investigating and defending the matter, except for wilful neglect; it being understood and agreed that the 40

Schedule "D."

Assured has control of the litigation at all times and may employ private counsel in association with counsel of the Company to assist in the defense of the action and may make such settlement or other disposition of the case with claimant as Assured may desire, without in any manner binding the Company.

(b) The Assured does not waive any of his rights by the signing of this agreement.

4. The intent of this agreement is to preserve the rights of all parties hereto, and to provide for an investigation of the facts and circumstances in connection with the accident, and for the defense of the suit commenced in connection therewith, in order that neither of the parties hereto may be prejudiced.

5. And the Company, its agents and employees, are hereby authorized and empowered to make and prosecute any such examination and investigation and to engage counsel to defend said action, at its cost and expenses, and the Assured shall co-operate with the Company and its counsel in defending said action.

We, witness our hands and seals, in duplicate, this 28th day of December 1931.

WILLIAM SIMONI,
Assured.

Witness: HAROLD FARKAS.

Motorists Casualty Insurance Co.,

DAVID GREEN,
Vice President.

Schedule "E."

Schedule "E."

April 22, 1932

Mr. William Simoni,
132 Magnolia Avenue,
Elizabeth, N. J.

Dear Sir:

10

Re: George Brodsky *v.* William Simoni
Our #9932

Our attorneys inform us that judgment was entered on April 19th, 1932, in the suit of George Brodsky against you in the sum of \$400.00.

As you know, this case, as well as the others now pending against you, was handled by us in accordance with our letter of November 27th to you, as well as agreement to defend without prejudice, which was executed by you on December 28th, 1931.

20

Our attorneys inform us that at the trial of this case you were very hostile to our interests, as well as your own, and testified, among other things, that your brakes were not in good condition, notwithstanding the fact that on July 20th, 1931, you executed a statement to the effect that your brakes prior to the accident were in very good condition.

30

In view of the above and our previous advices to you, we do not propose to pay the judgment recovered against you, and it will be necessary for you to make your own arrangements in the matter.

Very truly yours,
MOTORISTS CASUALTY
INSURANCE COMPANY,

By L. G. WORNE,
Claim Manager.

LGW:G:2

Registered Mail

Return Receipt Requested

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*Postea and Findings of Fact.***POSTEA AND FINDINGS OF FACT.**

(Filed September 13, 1937.)

NEW JERSEY SUPREME COURT,
UNION COUNTY.

10

ANNA KINDERVATER (by her next
friend Rudolph Kindervater),
ANNA KINDERVATER, individu-
ally, and RUDOLPH KINDER-
VATER, individually,

*Plaintiffs,**vs.*

20

MOTORISTS CASUALTY INSURANCE
Co. (also known as the
Motor Club Insurance Com-
pany) and now known as the
Atlantic Casualty Insurance
Company,

Defendant.

*Action
at Law.
Postea.*

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This case was submitted to the Court without a Jury, at Elizabeth, New Jersey, in the New Jersey Supreme Court, Union County, upon a Stipulation of Facts submitted and agreed upon by the attorneys of the respective parties. The Opinions and Conclusions of the Court are as follows:

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“In September of 1930, the defendant, Motorists Casualty Insurance Company issued its automobile public liability policy with limits of Five Thousand (\$5,000.00) Dollars for one person; Ten Thousand (\$10,000.00) Dollars for one accident and One Thousand (\$1,000.00) Dollars

Postea and Findings of Fact.

for property damage, one accident, to William Simoni for a period of one year.

On July 11, 1931, while the plaintiff, Mrs. Anna Kindervater and her daughter Anna Kindervater, were invitees in the automobile driven by the Assured, the automobile was involved in a three-car accident in South Amboy, colliding with a motor vehicle operated by one David Doyle and a vehicle owned by George Brodsky and operated by his father, Moe Brodsky, the plaintiffs suffered personal injuries. 10

Later in the same month, the Assured, at the request of a sister of George Brodsky, signed a statement admitting liability for the damages sustained by the Brodskys as a result of the collision. This statement was procured without the knowledge, consent, participation or acquiescence in any way whatsoever of the plaintiffs in the case at bar, its existence being unknown to them until they were apprised thereof by the answer of the defendant in this suit on the policy of insurance. 20

On December 7, 1931, suit was instituted in the Court of Common Pleas of Union County on behalf of Miss Anna Kindervater, by her next friend, Rudolph Kindervater, Mrs. Kindervater, individually, and Rudolph Kindervater, individually against the Assured and David Doyle. The action by Miss Kindervater by her next friend was for personal injuries and loss of earnings; the action by Mrs. Kindervater was for personal injuries; and the action by Rudolph Kindervater was for medical expenses and damages arising out of the loss of his daughter's earnings; loss of the consortium of his wife, and for household help to replace her. 30 40

Postea and Findings of Fact.

The assured having first signed a non-waiver agreement with the Company, the defendant insurer undertook to and did defend the Assured in the action instituted against him by these plaintiffs as well as other actions already commenced against him by the Brodskys.

10

George Brodsky recovered judgment against the Assured but the defendant insurer refused to pay the judgment on the ground it had previously disclaimed all liability. Consequently, in August 1932, George Brodsky instituted suit against the defendant on the policy, in the District Court for the First Judicial District of the County of Essex. Judgment was rendered in favor of the plaintiff, Brodsky, but on appeal to the New Jersey Supreme Court, the judgment was reversed. The decision is reported in 112 L. 211. The Court of Errors and Appeals affirmed the Supreme Court in 114 L. 154.

20

On February 3, 1933, a jury in the Kinderwater suit against the Assured, Simoni, and Doyle, in the Union County Common Pleas Court rendered a general verdict against Simoni as follows: In favor of plaintiff Miss Anna Kintervater, by her next friend, in the amount of \$7,500.00, in favor of plaintiff Mrs. Anna Kindervater, in the amount of \$500.00; and in favor of Rudolph Kindervater in the amount of \$800.00, and no cause of action against Doyle, which judgment this defendant refused to pay, having disclaimed on the policy.

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Plaintiffs caused execution to be issued, which was returned 'unsatisfied' at the request of counsel, and on March 7, 1933, the instant suit was instituted by the present plaintiffs against this defendant.

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Postea and Findings of Fact.

In February, 1935, the action was tried before a jury in the Supreme Court, Union County Circuit. At the conclusion of plaintiff's case, defendant moved for a non-suit on the ground of improper issuance of execution, which was granted. On appeal to the Court of Errors and Appeals, the judgment of non-suit was reversed, and a venire de novo granted. The decision is reported in 117 L. 131, 187 Atl. 362. 10

The question now before the court is: "Can the admission of liability by the Assured to the Brodskys which breached the policy as to them, be also considered a breach of the policy as to these plaintiffs?" The Court of Errors and Appeals in its opinion reported in 117 L. 131 reversing the judgment of non-suit, might seem to intimate that such a breach does not affect these plaintiffs. That Honorable Court says: 20

"Finally respondent urges that what appears to be tantamount, to the proposition that the contract of insurance is void and unenforceable by any and all parties because of the finding of the Supreme Court in Brodsky against it, 112 L. 211, affirmed by this Court, 114 L. 154. *But this is not so.*"

However, in view of the fact that the case was before the Court on appeal from a judgment of non-suit granted at the close of plaintiff's case, and before the question of assumption of liability was so presented to the trial court as to become a part of the record before the Court of Errors and Appeals, I do not understand the opinion of that court to go any further than a decision that its ruling in the Brodsky case is neither res judicata of the issue involved in the case at bar nor does it establish the law of the 40

Postea and Findings of Fact.

instant case. So far as this litigation is concerned, the Brodsky case must be considered wholly distant and irrelevant.

10 It is clear that the party injured has no greater rights under a policy of insurance in a suit against the insurer than has the Assured in a suit by him against the insurer. *Suydam v. Public Indemnity Co.*, 161 A. 499. The question is, whether or not, if the Assured were plaintiff in this case, he could recover. The plaintiffs herein are not entitled to go beyond the terms of the policy, and unless, if Simoni had paid the judgments against him, he could have recovered from the defendant insurer, plaintiffs cannot recover. *Hutt v. Travelers' Insurance Co.*, 110 L. 57; *New Amsterdam Casualty Co. v. Mandel*, 115 Eq. 198. The answer to the question before the Court must be found in the construction and interpretation of the contract of insurance entered into by the assured and the defendant insurer.

30 The attempt of the defense is to defeat recovery by these plaintiffs on the ground that a forfeiture has occurred under the conditions of the policy by reason of the fact that the Assured voluntarily assumed liability for the Brodsky damages. Provision C of the policy, for breach of which defendant contends the policy has been forfeited and become void and ineffective, reads in pertinent part as follows:

40 “* * * Except as herein elsewhere provided, the Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceedings without the con-

Postea and Findings of Fact.

sent of the Company previously given in writing.”

It cannot be said that the provision is without ambiguity; that the effect of a breach thereof is clearly to void the policy for all purposes, to nullify it as between the Assured and the insurer. 10
It is fairly open to two constructions, the effect of one of which is to create a forfeiture depriving the Assured of all rights thereunder against the insurer. The other construction, favorable to the Assured, defeats a forfeiture as to the claims of these plaintiffs.

The rule as to forfeiture in insurance policies is settled. They are not favored in law. *Michler v. New Amsterdam Casualty Co., Inc.*, 104 L. 30, aff'd. 104 L. 603. Our Courts say: 20

“It has become a settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed to uphold the contract; and conditions contained in them which create forfeitures will be construed most strongly against the insurer and will never extend beyond the strict words of the policy.”
Carson v. Jersey City Insurance Co., 43 L. 300; *Snyder v. Insurance Co.*, 30 L. 544. 30

The court will never seek for a construction of a forfeiture clause in a policy which will sustain it, if one which will defeat it is reasonably deductible from the words used to express it. *Hampton v. Hartford Fire Insurance Co.*, 65 L. 265. The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties so viewed it. A result thus obtained 40

Postea and Findings of Fact.

- is exactly what is obtained from the cardinal rule of intention. And if there be doubt as to the sense in which the parties employed the language in question, and it is fairly susceptible of two interpretations, the one more favorable to the Assured will be adopted. It is a secondary rule of construction that where words bear more than one reasonable meaning, that interpretation is adopted which operates more strongly "contra proferentem." "He who speaks should speak plainly, or the other party may explain to his own advantage." *State v. Worthington*, 7 Ohio 171. This is a corollary, in aphoristic style, of the stated secondary rule of construction applicable where ambiguous language is employed to express the understanding.
- 20 The provision clearly provides that the Assured shall not voluntarily assume any liability, except at his own cost. The penalty, then, for a voluntarily assumption of liability—and it is significant that Provision C is the only one for which an express penalty is provided—is not unequivocally a forfeiture of the policy in toto, but a forfeiture by the Assured of all his rights against the insurer under the policy as to that liability for which he has assumed responsibility.
- 30 This construction is not only fair and eminently reasonable, and the one undoubtedly in the mind of the parties at the time of contracting, but the provision more readily lends itself to this construction, favorable to the Assured. The Assured was undoubtedly remiss in the performance of his obligations under the policy with respect to the Brodsky claim, and consequently, as the result of the Brodsky case indicates, his rights against the defendant company with respect
- 40 thereto were forfeited. But the policy does not

Postea and Findings of Fact.

clearly provide that such non-compliance with its terms shall work a forfeiture effective as to the claims of all injured persons. The assured was not remiss in his obligations to the insurer so far as these plaintiffs are concerned. The insurer may escape liability, as it did in the Brodsky case, but not necessarily by a forfeiture of the policy, for the policy may well remain, and I find it did so remain, in full force and effect as to those losses sustained by the Assured where the conditions of the policy have been met, while recovery may be defeated as to a particular loss in connection with which the Assured was remiss in the performance of his obligations under the contract. The Assured was not the agent or representative of the plaintiffs. Plaintiffs had a right of action to recover under the terms of the policy, and statements of the Assured to third persons are not competent to establish the defense as against these plaintiffs. The burden is upon the defendant insurance company to prove a violation by the Assured of a condition of the policy which cancels its mutual obligations for all purposes, and particularly so far as these plaintiffs are concerned. That, the defendant has failed to do.

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The policy insured Simoni against loss by reason of the liability imposed by law upon him for damages on account of bodily injury and damages to property including the loss of use of much property. Obviously, the husband received "no bodily injury" from the loss of his daughter's earnings, nor from the loss of his wife's consortium, nor is his wife or his daughter "his property" so that an injury to their persons is an injury to his property.

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Postea and Findings of Fact.

In *Smith v. Red Top Taxicab Co.*, 111 L. 439, the court held that claims for medical expenses and loss of earnings incident to a personal injury are not separate causes of action, but are incidents of the main cause of action, the personal injury. So, in the instant case, the husband's claim flows from the main cause of action, injury to his wife and daughter. They cannot be construed as damages to property, and clearly are not within the term "bodily injury," so that plaintiff Rudolph Kindervater is not comprehended within the policy or the statutes in effect at the time the policy was issued. The legislature, recognizing the soundness of such a construction of previous statutes, and in order to obviate the distinction, later enacted a law providing that policies of insurance shall be deemed to insure against loss or damage arising out of claims for loss of services of the person injured, unless there is express provisions therein in bold type, to the contrary. P. L. 1931, C. 194."

A general verdict is hereby rendered against the defendant and in favor of the plaintiff, Anna Kindervater (by her next friend Rudolph Kindervater), in the sum of Five thousand (\$5,000.00) Dollars together with interest thereon from February 3, 1933 to the date hereof amounting to Thirteen hundred eighty dollars and eighty-three cents (\$1,300.83), together with the taxed costs and interest thereon of the original judgment recovered against the assured in the Union County Common Pleas, and the costs of appeal therefrom from the said Court of Common Pleas to the Supreme Court, aggregating One hundred seventy dollars and seventy-three cents (\$170.73), making in all a total of sixty-five hundred fifty-one dollars and fifty-six cents

Postea and Findings of Fact.

(*\$6,551.56*) in favor of said plaintiff, Anna Kindervater (by her next friend Rudolph Kindervater).

And a general verdict is hereby rendered against the defendant and in favor of the plaintiff, Anna Kindervater, individually, in the sum of Five hundred (*\$500.00*) Dollars together with interest thereon from February 3, 1933 to the date hereof, amounting to One hundred thirty-eight dollars and eight cents (*\$138.08*), making a total of Six hundred thirty-eight dollars and eight cents (*\$638.08*) in favor of the said Anna Kindervater, individually. 10

A general verdict is hereby rendered in favor of the defendant and against the plaintiff, Rudolph Kindervater, of no cause of action, costs to be taxed against the losing parties. 20

FRANK L. CLEARY,
Judge.

Dated: September 10, 1937.

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*Judgment.***JUDGMENT.**

(Entered September 13, 1937.)

NEW JERSEY SUPREME COURT.

10	ANNA KINDERVATER (by her next friend Rudolph Kindervater), ANNA KINDERVATER, individu- ally,	}	<i>Plaintiffs,</i> <i>vs.</i> <i>Defendant.</i>	<i>Action at Law.</i>
20	MOTORISTS CASUALTY INSURANCE Co. (also known as the Motor Club Insurance Co.),			

Judgment: Entered September 13, 1937

Damages: Anna Kindervater

(By her next friend, etc.).....\$6,551.56

Anna Kindervater, individually..\$ 638.08

\$7,189.64

Costs\$ 107.78

\$7,297.42

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FRED L. BLOODGOOD,

Clerk.

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12 FEB.T.1938

13 FEB.T.1938

52 A

Judgment.

JUDGMENT.

(Entered September 20, 1937)

NEW JERSEY SUPREME COURT.

RUDOLPH KINDERVATER,
individually,

Plaintiff,

vs.

MOTORISTS CASUALTY
INSURANCE CO. (also known
as the Motor Club Insurance Co.),

Defendant,

Action
at Law.

Judgment: Entered September 20, 1937 for Defendant.

FRED L. BLOODGOOD.

Clerk.

13 FEB.T.1938

13 FEB.T.1938

52 A

Judgment

Judgment

JUDGMENT.

(Entered September 20, 1937)

NEW JERSEY SUPREME COURT.

10	ANNA KINDERVATER	Plaintiff	vs.	MOTORISTS CASUALTY INSURANCE CO. (also known as the Motor Club Insurance Co.)	Defendant	10
Action at Law.						

1937 21 Judgment: Plaintiff's Judgment for Defendant.

Damages: Anna Kindervater	\$1,000.00
(By her next friend)	\$1,000.00
Anna Kindervater Individually	\$2,000.00
Costs	\$100.00
	<hr/>
	\$3,100.00

FRED I. BLOODGOOD.

Clerk.

FRED I. BLOODGOOD.

Clerk.

Substitution of Attorney.

SUBSTITUTION OF ATTORNEY.

(Filed Oct. 18, 1937.)

NEW JERSEY SUPREME COURT,

UNION COUNTY.

<p>ANNA KINDERVATER (by her next friend Rudolph Kindervater), ANNA KINDERVATER, individu- ally, and RUDOLPH KINDER- VATER, individually,</p>	}	<i>Action at Law.</i>	10
<p style="text-align: center;"><i>Plaintiffs,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>MOTORISTS CASUALTY INSURANCE Co.,</p>		<i>Substitution of Attorney.</i>	20
<p style="text-align: center;"><i>Defendant.</i></p>			

Nelson K. Mintz and Green & Green, attorneys in the above entitled matter, hereby consent to the substitution of Harry Green, as attorney in their place and stead.

GREEN & GREEN,
Attorneys for Defendant.

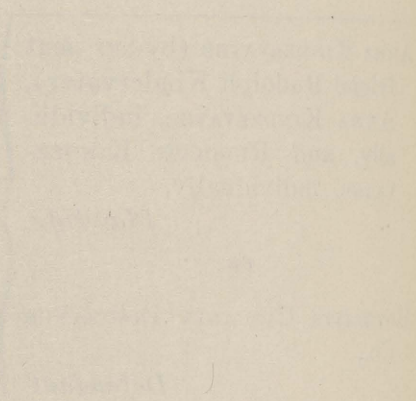
NELSON K. MINTZ,
Attorney for Defendant.

DECLARATION OF ATTORNEYS

FILE NO. 12-100

THE UNITED STATES OF AMERICA

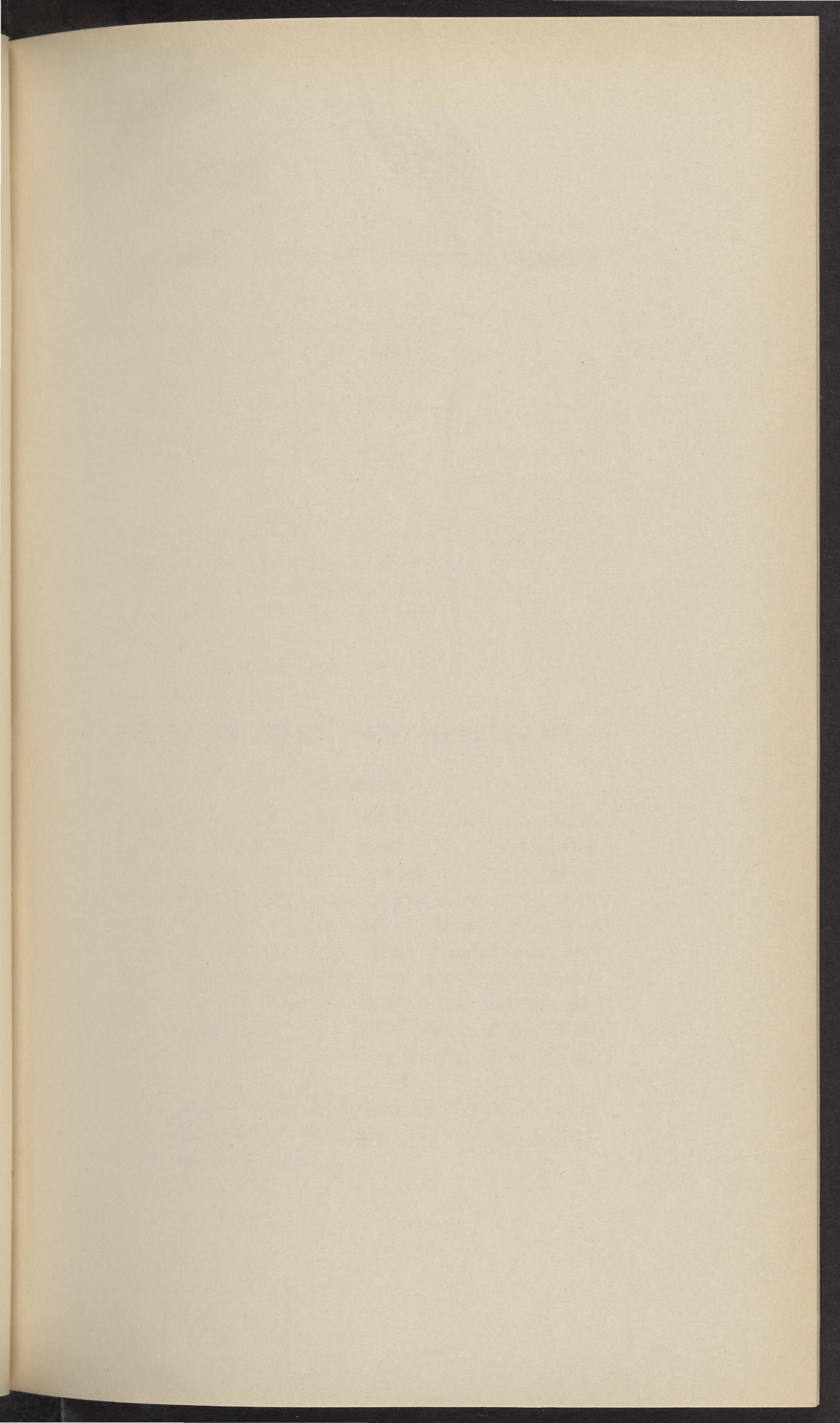
vs.

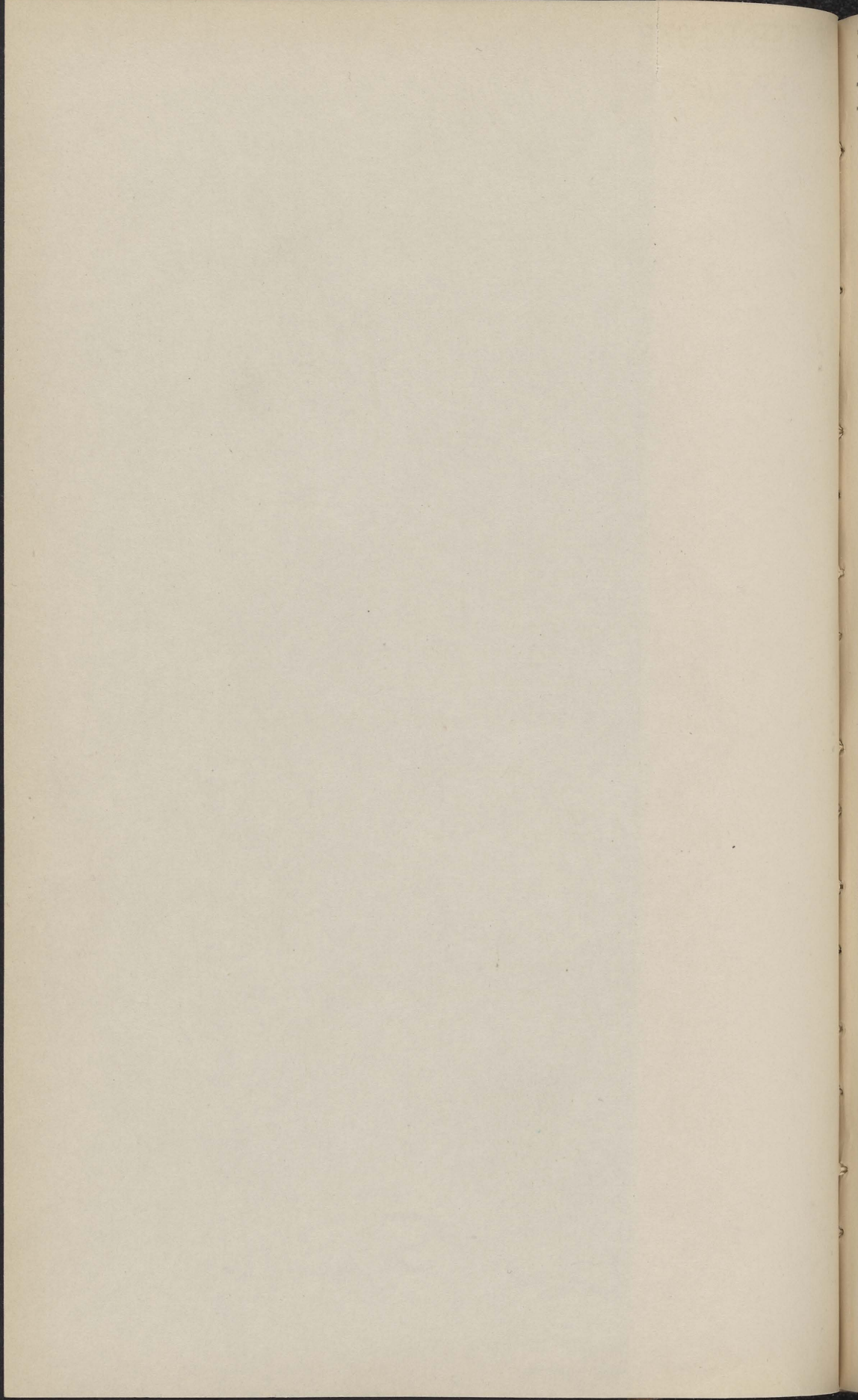


That the undersigned are the attorneys for the parties herein named, and that they are duly qualified to act as such attorneys.

CHAS. W. HULL
Attorney for Plaintiff

EDWIN R. WATKINS
Attorney for Defendant





12 FEB.T.1938

13 FEB.T.1938

New Jersey Court of Errors and Appeals

ANNA KINDERVATER (by her next
friend Rudolph Kindervater),
ANNA KINDERVATER, individ-
ually, and RUDOLPH KINDER-
VATER, individually,
Plaintiffs-Respondents,

vs.

MOTORISTS CASUALTY INSURANCE
Co. (also known as the Motor
Club Insurance Company) and
now known as the Atlantic
Casualty Insurance Company,
Defendant-Appellant.

Action at Law.
On Appeal from
New Jersey
Supreme Court,
Union County.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This is an appeal by the defendant-appellant, Motorists Casualty Insurance Co., (hereinafter referred to as either "defendant" or "Insurance Company"), from a judgment entered September 13, 1937, in the New Jersey Supreme Court, in favor of Miss Anna Kindervater and Mrs. Anna Kindervater, her mother, (hereinafter referred to as plaintiffs), against the defendant-appellant, in a total sum of \$7,189.64 plus costs of \$107.78, making a total of \$7,297.92 (Case, p. 52).

The matter was submitted to the trial court on a stipulation of facts for trial without a jury (Case, pp. 18-41 incl.).

Facts.

The stipulation of facts contains the following salient statements:

On or about September 17, 1930, the defendant Insurance Company issued its policy with limits of \$5,000 for one person, \$10,000 for one accident and \$1,000 for property damage, one accident, to William Simoni, (hereinafter referred to as Assured) covering a 1929 Chevrolet Coupe. Included in the provisions of the policy under Provision C is the following:

“Notice of Accidents and Settlements. The Assured shall give immediate written notice of any accident covered by this policy, and like notice of any claim and/or suit resulting therefrom, and such notice together with every process must be forwarded to the Home Office of the Company or to its authorized representative. The Company reserves the right to settle any claim or suit. Whenever requested by the Company the Assured shall aid in effecting settlements, securing information and evidence, the attendance of witnesses, and in prosecuting appeals. The Assured shall at all times render to the Company all cooperation within his power. Except as herein elsewhere provided for, *the Assured shall not voluntarily assume any liability*, settle any claim or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceedings without the consent of the Company previously given in writing.” (Italics ours.)

On July 11, 1931, and while the policy was in full force and effect, the plaintiffs, Mrs. Anna Kindervater and her daughter, Miss Anna Kindervater, were passengers in the automobile driven by the Assured, Simoni, being invitees in the said motor vehicle, and, while riding therein,

the automobile was involved in a three car accident at or near the intersection of Victory Bridge and Scott Avenue, South Amboy, New Jersey, colliding with two other motor vehicles, one being owned and operated by David Doyle and the other owned by George Brodsky (who was not in the automobile) and operated by Moe Brodsky, his father. As a result of the accident the two Kindervater women were injured.

On July 27, 1931, which was approximately two weeks after the accident, while at the home of the Brodskys and at the instigation of a member of the family other than George Brodsky who was not at home, the Assured executed the following statement in writing:

“William Simoni do admit colliding, damaging and injuring the occupants in automobile operated by Moe Brodsky on the highway to the Victory Bridge named Scott Avenue, namely an Oldsmobile coach and my car, a Chevrolet coupe. Accident occurring on July 11, 1931. I admit liability in the above mentioned accident.

(signed) William Simoni,
152 Magnolia Avenue,
Elizabeth, N. J.,
Elizabeth 3-6526.”

Defendant Insurance Company, upon ascertaining the existence and execution of above statement in writing by Simoni and considering it to be a breach of the policy provisions against a voluntary assumption of liability by the Assured, immediately pursued a course of conduct consistent with a disclaimer of all liability on the policy of insurance and subsequently did defend Simoni in the damage suits, but only after Simoni had executed a non-waiver agreement whereby the Insurance Company did not

waive any of its rights to stand upon its disclaimer.

A suit was begun on December 7, 1931, in the Union County Court of Common Pleas on behalf of Miss Anna Kindervater by her next friend, Rudolph Kindervater, Mrs. Anna Kindervater, individually, and Rudolph Kindervater, individually, against both the Assured, William Simoni, and David Doyle. Miss Kindervater, by her next friend, recovered a judgment against Simoni in the amount of \$7,500.00. Mrs. Anna Kindervater recovered a judgment for \$500.00 against Simoni. Both of these judgments were for personal injuries. Rudolph Kindervater recovered a judgment in the amount of \$800.00 for medical expenses for his wife and daughter, as well as for damages arising out of loss of earnings of Miss Kindervater and loss of consortium of Mrs. Kindervater and also for household help pending Mrs. Kindervater's illness. All judgments were rendered on February 3, 1933. The defendant Insurance Company refused to pay the judgments, standing on its disclaimer on the ground that there had been a policy breach.

On April 19, 1932, George Brodsky brought suit against William Simoni for property damage to his automobile, which was driven by his father, Moe Brodsky, and on April 22, 1932, recovered a judgment against Simoni in the amount of \$400.00. This defendant Insurance Company likewise refused to pay that judgment, electing to stand on its disclaimer because of the breach by reason of the alleged assumption of liability.

On August 22, 1932, suit was brought by George Brodsky directly against this defendant insurer, and on May 26, 1933, a judgment was rendered against the defendant Insurance Company and in favor of George Brodsky, from

which judgment this defendant Insurance Company prosecuted an appeal to the New Jersey Supreme Court, and on January 26, 1934, the Supreme Court reversed the trial court and held that there had been a breach of the policy provisions against the assumption of liability and no recovery could be had by George Brodsky on the policy of insurance (112 N. J. L. 211). This decision of the Supreme Court was affirmed by the Court of Errors and Appeals, without opinion, in 114 N. J. L. 154.

On March 7, 1933, the present plaintiffs commenced an action against this defendant Insurance Company on the policy of insurance for the judgments they had recovered in the Union County Common Pleas Court and on February 25, 1935, the case was tried. At the end of the plaintiffs' case, as appears by the records of the court, a motion was made by counsel for the defendant Insurance Company for a non-suit on the ground that the execution had been returned unsatisfied at the request of the attorney for the plaintiffs and same was not in compliance with Pamphlet Laws 1924, which required the issuance and return of a bona fide execution, unsatisfied. The trial court considered the point well taken and granted a non-suit on the ground that the plaintiffs had not made out a prima facie case against the insurance carrier.

From that adverse ruling, plaintiffs prosecuted an appeal to the Court of Errors and Appeals and this Honorable Court on October 2, 1936 reversed the trial court and awarded a venire de novo on the ground that the policy provisions were so broad that they did not require the issuance of any execution whatsoever and that a cause of action vested in favor of the injured

parties on the policies as soon as a judgment had been recovered.

Both the Brodsky decision and the Kindervater decision will be referred to in detail during the course of this brief.

This defendant denied, and denies, any and all liability on the policy, on the ground that there has been a definite breach of the policy in the assumption of liability by its assured, William Simoni, and this defendant further contended in the trial court that even if it is liable on the policy it is not liable to the full extent of the judgments, of course, because it is a \$5,000/\$10,000 policy and secondly, the policy of insurance did not cover indemnification for the judgment as recovered by Rudolph Kindervater, individually, for loss of services, loss of consortium, etc.

The trial court agreed with the contention of the defendant that it did not cover the judgment recovered by Rudolph Kindervater, individually, for loss of services, loss of consortium, etc., and rendered a judgment of no cause for action in favor of this defendant and against the plaintiff Rudolph Kindervater, on which said plaintiff has taken a cross-appeal herein. However, so far as Mrs. Kindervater and her daughter Miss Kindervater, the court found in favor of these plaintiffs and against this defendant.

LAW.**I.**

This case is governed by the case of George Brodsky v. Motorists Casualty Insurance Company (1933) 112 N. J. L. 211, affirmed (E. & A., 1934) 114 N. J. L. 154, which case is on all fours with the facts herein involved.

By coincidence, in this matter we have a reported case by this Honorable Court which is not only a precedent for a determination herein, but is one involving the same policy of insurance, the same accident, and the same question. The only factual difference is that the plaintiff in the reported case was George Brodsky, who was the owner of the automobile which Moe Brodsky operated and which automobile collided with the car operated by William Simoni, in which the present plaintiffs were passengers (Case, p. 19). As shown by the stipulation of facts, George Brodsky, on or about April 19, 1932 brought suit in the District Court against William Simoni for his property damage and recovered a judgment for \$400.00. On the failure of Simoni and the Insurance Company to pay this judgment, he brought suit against this Insurance Company on the identical policy involved herein. In the District Court a judgment was rendered against this defendant in favor of George Brodsky and an appeal was prosecuted by this defendant to the Supreme Court from that adverse decision. The Supreme Court on January 26, 1934 handed down a decision reversing the trial court and entered judgment in favor of this defendant. The decision is reported in 112 N. J. L. 211. This Honorable Court subsequently affirmed the Supreme Court on the opinion of that court.

This decision is reported in 114 N. J. L. 154 (Case, pp. 22, 23).

The Supreme Court, through Mr. Justice Parker, held that the execution of this paper constituted a breach of Provision C and that this defendant Insurance Company could set up this defense against George Brodsky, claiming under the policy issued to Simoni. The opinion in part reads as follows:

“The point now considered is not within any provision alluded to in the excepting clause above, and is within the general clause. It is, that Simoni had ‘voluntarily assumed liability’ for the accident * * *.

“That the execution of this paper was a breach of Provision C, seems too plain for argument * * *.

“The insurer defendant (undoubtedly the Court meant defended) Simoni under a non-waiver agreement, but it is not to be estopped to assert its non-liability to Simoni, and derivatively as to the respondent-plaintiff herein, *Suydam v. Public Indemnity Co.*, 10 N. J. Mis. R. 868; 161 Atl. Rep. 499.”

It may, therefore, be dogmatically stated that the statement in writing executed by Simoni constituted an assumption of liability and therefore we can now turn to the next proposition, namely, its effect in the present situation.

Of course, the suit by George Brodsky and the present suit by the Kindervaters are all on the same policy of insurance and both Brodsky and the Kindervaters are suing in the same position, namely, derivatively as injured parties both under the statute and under the terms of the policy itself.

This defendant contends that this assumption in writing constituted, as stated by Mr. Justice

Parker, a breach of Provision C of the policy on which the instant suit is brought, and this breach may be set up as a defense to the instant action.

It may be contended by plaintiffs that while the execution of this document constituted a breach of the policy so as to be a valid defense against liability thereunder so far as George Brodsky was concerned, still it had no effect whatsoever as to the present plaintiffs, the Kindervaters, because they did not partake in its procurement and had nothing whatsoever to do with this statement. Not so—it is wholly immaterial.

And it may be argued that the statement does not constitute an assumption of liability so far as the Kindervaters are concerned. To this defendant replies by stating, that in the first place such is not a necessary test as long as there has been a breach of the policy as to someone, for once the policy has been breached it is at an end, as the rights of the Kindervaters flow from the rights of Simoni; and secondly, the statement is an assumption of liability to the Brodskys as well as to the Kindervaters. One follows from the other. It must be remembered that the Kindervaters were passengers in the Simoni automobile which collided with the Brodsky automobile. The statement “admits liability *in the above mentioned accident.*” The Kindervaters were invitees in the Simoni car and by no stretch of any legal doctrine can the statement be made that if Simoni was at fault as to the occupants of the Brodsky automobile, still that did not mean that he was at fault to the occupants in his own automobile. If there was negligence as to the Brodsky car it follows a fortiori that there was negligence to the passengers in Simoni’s own car. It is impossible to admit

liability to the Brodsky car and not have this operate as an admission of the liability to the passengers in his own car. The duties owed in both situations were identical. The liability of Simoni to the Brodskys and to the Kindervaters depended solely on the showing of the slightest bit of negligence on the part of Simoni without any contributory negligence on the part of either the Brodskys or the Kindervaters. So, therefore, the *admission of liability in the accident* was also an admission to the Kindervaters.

To offset the contention of the Kindervaters, namely, their innocence so far as the procurement of the statement assuming liability is concerned, we merely call this Court's attention to the fact that the same argument was advanced in the brief submitted to the New Jersey Supreme Court by George Brodsky in his case against this defendant, which contention was answered by the defendant. In his brief, counsel for George Brodsky stated:

“The next point raised by the defendant-respondent concerns the alleged assumption of liability by the defendant, Simoni, as a result of which the defendant-respondent disclaimed liability on the policy. In considering this defense it must be borne in mind that the plaintiff, the judgment creditor in the first suit in the Elizabeth District Court was George Brodsky. George Brodsky was the son of Moe Brodsky. By Exhibit D-1, an affidavit of William Simoni, and Exhibit D-1a, an agreement to defend without prejudice, the defendant-respondent attempts to show that there was a meeting between the defendant Simoni and Mr. Moe Brodsky, the father of George Brodsky, and that at such meeting the defendant Simoni signed a statement to Moe Brodsky admitting liability to the accident. In the first place Moe Brodsky was not a party to the

suit and there is nothing to show that he, Moe Brodsky, was acting with the consent or authority of his son, George, or that George knew that such a statement had been obtained as is alleged from Simoni. It is not alleged by the defendant-respondent that the plaintiff, George Brodsky ever spoke to or knew or ever had any dealings with the assured, Simoni, nor that the plaintiff, George Brodsky ever received from Simoni any admission or assumption of liability in the matter whatsoever. Moreover it appears quite clearly that the alleged statement of Simoni was defendant's own exhibit in the Elizabeth District Court and was put into evidence as part of the defendant's case over the objection of counsel for the plaintiff in that suit. Certainly so far as George Brodsky in the suit between George Brodsky and Simoni in the Elizabeth District Court is concerned and the judgment obtained by him, the said George Brodsky did not obtain his verdict by reason of any assumption of liability on the part of Simoni, but obtained a judgment against the said Simoni in spite of the effort of the defendant Simoni, represented by counsel for the insurance company, putting into evidence an alleged assumption of liability by the assured Simoni. The case was barren of any evidence to indicate that George Brodsky, plaintiff in the suit in Elizabeth and in this suit, had ever obtained an assumption of liability from the defendant, Simoni, who were the parties to the suit in Elizabeth, George Brodsky was the beneficiary of an assumption of liability on the part of the said Simoni."

It will thus be seen that the argument of George Brodsky was that even though this was an assumption of liability, George Brodsky has nothing whatsoever to do with its procurement, it having been procured by some other member of his family and in fact there is no showing that

he even knew about it. Moreover, the argument was that George Brodsky did not even use the statement at the trial in his behalf and that he procured a judgment without resorting to this statement assuming liability.

This argument was unavailing because the Supreme Court held that this assumption of liability, even though the records show that George Brodsky had nothing whatsoever to do with its procurement, constituted a valid defense to the defendant Insurance Company to the suit by George Brodsky.

And that is the precise situation here; even though the Kindervaters knew nothing about the statement, the statement was not used at the trial and the judgments were obtained without directly using said assumption of liability itself. And this is not a mere technical advantage. There is logic and substantial reason for same. The execution of the written assumption of liability for the accident by the assured Simoni was bound to influence his testimony in favor of all of the plaintiffs and, as he supposed at the time, against the insurance company, regardless of the facts, because the assured knew that the paper might and could have been used to discredit him on cross examination at the times when he testified at the original trials of the plaintiffs against him if he had attempted to exculpate himself for liability for the occurrence of the accident.

Under the Brodsky decision the execution of the statement constituted a breach of the policy and it is a defense to an action on that policy for after all the rights of the injured parties are no greater than the rights of the insured himself. *Hutt v. Travelers Insurance Co.*, 110 N. J. L. 57; *New Amsterdam Casualty Co. v. Mandel*, 115 N. J. Eq. 198, affirmed (E. & A.) 116 N. J.

Eq. 48; *Bradford v. Commonwealth Casualty Co.*, 10 N. J. Mis. R. 301; *Brodsky v. Motorists Casualty Insurance Company*, *supra*.

Moreover, it is not at all necessary (although it has been shown that it was) that the giving of the statement or the assumption of the liability be prejudicial to the interest of the insurance company before it can resort to the use of the same as a defense against payment under the policy. A case precisely on all fours and going into this very question of prejudice is that of *American Automobile Insurance Co. v. Fidelity and Casualty Co. of New York, et al.*, (Court of Appeals of Maryland, 1930), 152 Atl. 523. In that case the insured of the American Automobile Insurance Company executed a statement in writing which admitted his fault in causing the accident. The insurance company disclaimed liability on the ground that the statement constituted a violation of the policy provision which read exactly as does the policy provision in the instant case, namely, that the "assured shall not voluntarily assume any liability." Subsequently suit was brought on the policy of insurance after return of execution unsatisfied and to the defense of the insurance company it was set up that the statements in order to be effectual as a bar against payment by the insurer, must be prejudicial to the interest of the insurance company. The Court refused to accept this contention and held the parties to the contract as written and stated that the breach excused the payment by the insurance company. The Court during the course of its opinion said:

"There can be no doubt that the violation of that condition contained in the policy is a breach of contract. It is contended by the appellees that in addition to the breach, in order to relieve the appellant from liability

it must appear that it was prejudiced by the breach. While this identical question does not seem to have been the subject of decision by this court, and neither have we been able to find that it has been specifically passed upon in other jurisdictions, there are previous determinations of this court which, by analogy, are decisive of that question.”

The Court then goes on during the course of its opinion, to cite from an opinion rendered by Judge Cardozo, then of New York Court of Appeals, in the case of *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, a case involving the breach of a contention in the policy requiring cooperation on the part of insured in defending or settling a claim. The Court quotes as follows:

“The plaintiff makes the point that the default should be condoned, since there is no evidence that cooperation however willing would have defeated the claim for damages or diminished its extent. For all that appears, the insurer would be no better off if the assured had kept its covenant, and made disclosure full and free. The argument misconceives the effect of a refusal. Cooperation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent.” (Italics ours.)

In concluding the Court in *American Automobile Insurance Company* case, holds:

“It is certain that by signing the statement he did, Joyner assumed liability for damages arising out of the accident to Dr.

Riland's car; which was a clear violation of the plain condition of his contract and which must be held to relieve his insurer from liability, irrespective of whether or not the appellant was prejudiced by such assumption of liability on the part of Joyner. By his contract he agreed not to voluntarily assume any liability and this was a condition upon which the liability of the appellant, according to the terms of the contract, depended."
(Italics ours.)

This rule is also set forth in 71 A. L. R. 1477 as follows:

"The assured's voluntary assumption of liability for an accident, within the meaning of a clause of this character, may be set up by insurer as defense to an action brought against it by the injured person. * * *"

It is accordingly submitted that the moment Simoni executed this statement assuming liability, he breached Provision C of the policy of insurance, relieving this insurer from all obligations under the policy and whether the Kindervaters had anything whatsoever to do with the statement or whether it was used at the trial is totally immaterial and need not be inquired into.

Reference should be made to the opinion of this Honorable Court in the instant case in *Kindervater, et al. v. Motorists Casualty Insurance Co.*, (1936) 117 L. 131, previously up on appeal on the question of execution. As already stated, at the end of the propriety of return of plaintiffs' case in the first trial counsel for this defendant Insurance Company moved for a nonsuit on the ground that there had been no proper issuance of the execution in that the return thereof was requested unsatisfied at the request of the attorneys for the plaintiffs, wherein the statute and policy call for a return of execution

unsatisfied because of the insolvency or bankruptcy of the insured and without such a condition no suit against the insurer could lie. The trial judge ordered the non-suit for that reason and, of course, no defense was put in by this defendant at that time. During the course of respondent's brief in that appeal taken by the Kindervaters, it was argued that inasmuch as the case was on all fours with *Brodsky v. Motorists Casualty Insurance Company, supra*, even if the trial court was in error in granting a non-suit on the ground of improper issuance of execution, still the Court of Errors and Appeals should not reverse because eventually the question of assumption of liability would be raised against the plaintiffs and it would be a bar to the action. The purpose of submitting that proposition to this Honorable Court was to advance the argument that finality of litigation being desired it would not avail to reverse the lower court even assuming that there had been error. Appellant was trying to take a short cut but without success because this Honorable Court did not have before it on the record as yet this assumption of liability. And so, therefore, this Honorable Court was correct when in its opinion it held that the Brodsky decision could not be advanced as a bar to the reversal of the Supreme Court. Chancellor Campbell there said:

“Finally respondent urges that what appears to be tantamount to the proposition that the contract of interest is void and unenforceable by any and all parties because of the finding of the Supreme Court in *Brodsky v. Motorists Casualty Insurance Co.*, 112 N. J. L. 211, affirmed by this court, 114 Id. 154. But this is not so.”

Appellant calls the Court's attention to the arguments advanced by it in its original brief in this court so that this Honorable Court will not misconstrue the statement. After all, that was the only theory upon which it could be called to the attention of this Court, because as already stated, the appeal went up only on the trial court's granting of the motion for a non-suit after the plaintiff's case had been in. It is true that at the beginning of the case counsel moved for a direction on the theory of *res adjudicata*, advancing the *Brodsky Case* as the basis for the argument, but the trial court, because there was nothing on the record at that point in the trial, and the parties were different and this is the construction given by Judge Cleary (Case, p. 45), held that it could not operate as *res adjudicata*.

It is therefore, respectfully submitted that the assured, William Simoni, assumed liability for the accident in writing, violating Provision C of the policy of insurance and such a breach may be set up by this defendant Insurance Company as a valid defense to an action by any person claiming under the policy.

How analogous is the present situation to the Brodsky situation. Both George Brodsky and the present plaintiffs must predicate their rights against this defendant on the liability of this defendant to its assured, William Simoni. Cases are legion which hold that defenses which this insurance carrier has against its assured are available against third persons who were injured and were judgment creditors of the assured, and, as already stated, the claim of George Brodsky and the present plaintiffs both arise out of the very same accident. The assured Simoni owed the same degree of care to both George Brodsky and the present plaintiffs, namely, a duty to

exercise due care under the circumstances. Contributory negligence on the part of George Brodsky or the Kindervaters would have precluded recovery against Simoni. Likewise, the showing of the slightest bit of negligence on the part of Simoni toward either George Brodsky or the Kindervaters, in the absence of contributory negligence, was enough to warrant a judgment against Simoni. It can, therefore, be dogmatically stated that by no stretch of the imagination can it be said that Simoni could be held liable to George Brodsky without being held liable to the Kindervaters and vice versa, the question of contributory negligence having been disposed of in favor of George Brodsky or the Kindervaters. No more analogous situation can be found, and it is, therefore, respectfully submitted that this case of *George Brodsky v. Motorists Casualty Insurance Co.*, is on all fours with the facts presented in this appeal and is a direct precedent for a reversal of the trial court herein and in conformity with the doctrine of *stare decises*.

Another allied case was presented to Circuit Court Judge William A. Smith at the Essex Circuit on practically the same stipulated set of facts as here. That was the case of *Rose Brodsky and Moe Brodsky, plaintiffs v. Motorists Casualty Insurance Co.*, which involved a suit for personal injuries of Rose Brodsky, who was a passenger in the car owned by George Brodsky and operated by her husband, Moe Brodsky. The suit against this defendant also arose out of the same accident involved herein with Simoni and suit was on this very same policy of insurance. This defendant Insurance Company refused to pay the judgment which was recovered in the trial court by Rose Brodsky and Moe Brodsky

against William Simoni and a suit on the policy ensued, as is the fact in this case.

Circuit Court Judge William A. Smith rendered the following memorandum in dismissing the suit against this defendant Insurance Company:

“The above issue was submitted to me for trial without a jury on a stipulation of facts agreed to by the parties. I find the facts to be as contained in the stipulation, and my conclusion is that William Simone breached the provision of his contract of insurance with the defendant known as Provision C by admitting in writing liability for incurring the accident which caused the damages here sought to be recovered. It is my conclusion that the decision of the New Jersey Supreme Court in the case of *George Brodsky v. Motorists Casualty Insurance Company*, 112 N. J. L. 211, affirmed by the New Jersey Court of Errors and Appeals in 114 N. J. L. 154, is controlling upon the issue here submitted, although of course it is not *res adjudicata*.

“The breach on the part of Simone excuses the defendant from answering to the plaintiffs in this action.

“I therefore find a verdict in favor of the defendant and against the plaintiffs upon the issue raised in this action.”

This decision was rendered on July 19, 1937 and is unreported, and plaintiff therein has also appealed to this Court.

This defendant submits that the decision of Judge Smith was the correct law applicable herein and should have been the result of the Kindervater suit as well, because Rose Brodsky was in the same position as the Kindervaters herein. There is no dispute that neither the Kindervaters nor Rose Brodsky had anything to do with the procurement of the statement assum-

ing liability. Both Rose Brodsky and the Kindervaters were passengers in the cars involved in the accident. Even if there is any question of the culpability of Moe Brodsky in procuring the statement, that is, of course, not binding on Rose Brodsky because there definitely was no agency and no question along that line was raised. Judge Smith rightly concludes that the decision of the Supreme Court in *George Brodsky v. Motorists Casualty Insurance Company*, affirmed by this Honorable Court, is controlling upon the issues involved in the Rose Brodsky suit, even though not *res adjudicata*, and concludes that the breach on the part of Simoni excuses this defendant from answering to Rose Brodsky.

Defendant, therefore, respectfully submits that the trial court was in error in holding that the policy of insurance had not been breached by the assured Simoni so far as the Kindervaters were concerned, because, as stated by Judge Smith, the assured had breached the contract of insurance with the defendant known as Provision C by admitting in writing liability for incurring the accident involved herein, which breach excused this defendant from answering to anybody recovering a judgment against the assured.

II.

Further comments and exceptions to the Trial Court's memorandum.

Defendant as ground 1 of its grounds of appeal states that the Supreme Court was in error in holding that the question before the Court for determination was "can the admission of liability by the assured to the Brodskys, which

breached the policy as to them, be also considered a breach of the policy as to these plaintiffs" (Case, p. 45).

It is submitted that that is not the question involved herein. The only question that must be determined is whether there has been a breach of the policy so far as only the assured and this Insurance Company are concerned. The policy of insurance is a contract whereby one for a stipulated consideration undertakes to indemnify the other against damage or loss on a certain subject by certain perils or causes of loss for a definite period. *Richards on the Law of Insurance, 4th Ed.* (by Long, 1932) p. 2. So defendant, Motorists Casualty Insurance Company, contracted with assured, William Simoni, to the end that for a premium the Company undertook to insure the said Simoni against loss by reason of liability imposed by law upon the assured for damages due to his negligence. The contract by this Company, except perhaps in cases involving the financial responsibility law and under other statutes where the public is made an interested party, is purely with Simoni and the rights of these plaintiffs and other injured parties are given to them solely by virtue of a statute. To determine whether there has been a breach of the contract of insurance, no one will advance the argument that we must look toward the actions of parties outside the contract. The sole question to determine is whether the contracting parties, or one of them, have committed a breach of the policy, for, as recognized by the trial court, the rights of the injured parties and the plaintiffs herein are dependent upon the rights of the assured against the Insurance Company (Case, p. 46). Under this policy, if the assured could not hold the Insur-

ance Company, the third parties had no cause of action.

Furthermore, the contract is an entire one and a general policy of insurance against liability imposed by law on Simoni. It is not a contract to pay the judgment of individual plaintiffs who may have procured judgments against the assured.

Accordingly, it is submitted that the only question which the trial court had before it to decide was whether Simoni had breached the contract. The policy of insurance is not a severable contract as to different risks therein contained. There might be some soundness to the trial court's statement if all of the parties, namely, the Brodskys and the Kindervaters, had claims against Simoni arising out of different accidents at different times, because in such a case even though the policy was for the conventional \$5,000/\$10,000, still the Company would have had to pay up to any amount so long as there was more than one accident. *But it must be remembered that all the claims involved herein arose out of a common set of facts and out of a common accident.* Therefore, the only premise which the trial court should have considered was whether Simoni had breached the contract and thus excuse performance by this Insurance Company. It is hard to conceive how, *in reference to one accident*, Simoni could have breached the contract as to one party and not as to another party. In policies of liability insurance the negligence of one party, namely, an assured, is covered.

Mr. Justice Parker in the *George Brodsky Case* and Circuit Court Judge William A. Smith in the *Rose Brodsky Case* had no difficulty in deciding that there was a breach of the policy, and

because of this breach by *Simoni*, the actions on the policy in those cases fell.

Judge Cleary, it is submitted, falls into error when he talks generally about the Brodsky claim as distinguished from the Kindervater claim. There are four distinct claims herein, namely, one by George Brodsky, one by Rose Brodsky, one by Moe Brodsky and another by the Kindervaters. This is important because in the reported case of *George Brodsky v. Motorists Casualty Insurance Company*, submitted to be precedent herein, George Brodsky had nothing whatsoever to do with obtaining the statement and yet it was held to defeat his recovery. Furthermore, the statement assumed "liability in the above mentioned accident," (not to the Brodskys or one of them) and the Kindervaters were involved in that accident. Hence it clearly was an admission of liability as to them and they cannot recover herein.

* * * *

Point 2 of the grounds of appeal states that the Supreme Court was in error in holding that Provision C of the policy of insurance was not without ambiguity and that the effect of a breach thereof was open to 2 constructions. Such statement is found in Judge Cleary's memorandum (Case, p. 47).

Mr. Justice Parker in his opinion in the case of *George Brodsky v. Motorists Casualty Insurance Co.*, *supra*, had no difficulty in construing Provision C of the policy of insurance. He did not find any ambiguity therein. In his opinion reported in 112 N. J. L. 211 he states "*that the execution of this paper was a breach of Provision C, seems too plain for argument.*" He excused performance on the part of this Insurance Company because of the breach of the

paper assuming liability, which in Mr. Justice Parker's opinion, was a breach of Provision C of the policy of insurance. It is, therefore, respectfully submitted that the trial court was bound by this Honorable Court's construction of that provision and the attention of this Court must be called to the fact that it affirmed the Supreme Court on Mr. Justice Parker's opinion.

It is, therefore, respectfully submitted that the effect of a breach of Provision C is clear. It excuses performance on the part of this Insurance Company, and there is no need for a discussion of the presumption against this defendant so far as an ambiguous clause is concerned as is found in Judge Cleary's opinion (Case, pp. 47-48).

* * * *

Point 3 of the grounds of appeal states that the Supreme Court was in error in holding that Provision C clearly provided that the assured shall not voluntarily assume any liability, *except at his own cost*. Such a statement is found in Judge Cleary's memorandum (Case, p. 48).

An examination of the policy discloses that it provides under Provision C that the assured shall not voluntarily assume *any* liability, settle any claim or incur any expense, except at his own cost. It is obvious that the clause "except at his own cost" must refer to the settling of any claim or incurring any expense, because those are the only 2 clauses which entail financial undertakings. The assured may assume liability for any number of accidents and yet no claims may be made against the insurance carrier and no financial loss may be sustained by either the assured or the insurance company. But with a settlement of any claim or incurring of any expense, a financial outlay is, of course,

necessary. It is, therefore, respectfully submitted that the trial court gave a strained construction to this clause "except at his own cost."

And even if the clause did read as contended by the learned trial court, still it is submitted that it was bound by the decision of this Honorable Court in *Brodsky v. Motorists Casualty Insurance Co.*, *supra*, which held that a breach of Provision C avoided the policy, wherein it affirmed a judgment for this defendant on the opinion rendered by Mr. Justice Parker, with the result that the trial court should have found in favor of this insurance carrier and not in favor of the plaintiffs herein.

* * * *

Point 4 of the grounds of appeal states that the Supreme Court was in error in holding that the penalty for a voluntary assumption of liability under Provision C was not unequivocally a forfeiture of the policy in toto, but a forfeiture by the assured of all his rights against the insurer under the policy as to that liability for which he has assumed responsibility. Such a statement is found in Judge Cleary's memorandum (Case, p. 48).

Defendant has already discussed that the test herein should have been whether there was a breach of the policy by Simoni toward this defendant Insurance Company in any respect whatsoever. The policy restricts assured from assuming *any* liability (Case, p. 29); and the assured violated it by assuming liability in this accident. This is an entire contract and not a severable contract. It has already been shown that an admission of liability toward the Brodskys necessarily involved an admission of liability to the Kindervaters.

Again Mr. Justice Parker in the *George Brodsky Case* held that this assumption of liability by Simoni avoided the policy in a suit by George Brodsky against the Company and it must be kept in mind that throughout the innocence of George Brodsky in obtaining this statement was emphasized. This decision of Mr. Justice Parker is clearly precedent for the proposition that the assumption of liability also worked a forfeiture so far as the Kindervaters were concerned, because George Brodsky was as innocent as the Kindervaters so far as the procurement of the statement is concerned, and the restriction was against assuming *any* liability.

Circuit Court Judge William A. Smith stated in his memorandum hereinabove referred to "*that the breach on the part of Simoni excuses the defendant from answering to the plaintiffs in this action.*" He followed Mr. Justice Parker's opinion and rightfully considered it as precedent herein.

* * * *

Point 5 of the grounds of appeal states that the Supreme Court was in error in holding that the insurer may escape liability, but not necessarily by a forfeiture of the policy, but the policy may well remain in full force and effect as to those losses sustained by the assured where the conditions of the policy have been met, while a recovery may be defeated as to a particular loss in connection with which the assured was remiss in the performance of his obligations under the contract. Such a statement is found in Judge Cleary's memorandum (Case, p. 49).

This defendant has already gone into a discussion of this ground of appeal, and is desirous to add at this time that it is not necessary to have an explicit forfeiture clause in a

policy to avoid liability as inferred by Judge Cleary. Responsibility on the part of this insurance carrier may well be avoided by the breach of a promissory warranty as is obviously the character of Provision C, the statement that the assured shall not assume *any* liability. The effect of the breach of such a warranty is found in the case of *Neilson v. American Mutual etc., Co.*, (E. & A., 1933), 111 N. J. L. 345, 347, where Judge Hetfield said:

“* * * Insurance contracts, as a rule, contain both affirmative and promissory warranties. The first class relates to matters existing at or before the issuance of the policy, and has the effect of a condition precedent; while a promissory warranty is one where the insured stipulates that something shall be done or omitted after the policy takes effect, and during its continuance, and has the effect of a condition subsequent. The provisions now under consideration, must be construed as promissory warranties, on the part of the insured, and in the nature of conditions subsequent, a compliance with which is essential to the right of recovery under the contract. ‘The terms of the policy constitute the measure of the insurer’s liability, and there can be no recovery thereon by insured where he has violated or failed to perform its conditions, or warranties are not literally true or fulfilled, in the absence of an estoppel or waiver on the part of the company. *A breach of warranty will avoid the policy, although there is no provision to that effect in the policy.*’ 32 Corp. Jur. 1291.” (Italics ours.)

It is, therefore, respectfully submitted that a breach of this promissory warranty against the assumption of *any* liability by the assured was sufficient to excuse this Insurance Carrier from

performing its obligation and paying the judgments herein.

* * * *

Point 6 of the grounds of appeal states that the Supreme Court was in error in holding that the statements assuming liability by the assured to third persons are not competent to establish the defense as against these plaintiffs. Such a statement is found in Judge Cleary's memorandum (Case, p. 49). How else can this breach be proved? After all, this defense raised by this Insurance Carrier is that the assured did something to excuse this defendant from complying with its contract. The question is, *what did this assured do* and what more direct evidence is there than the statement itself? Here defendant is introducing the very "breach," if such a wording can be attributed to it. It is, therefore, respectfully submitted that the trial court apparently confused the situation where a statement is made by the assured which is not in itself the subject matter of the breach and where a statement constituting the very breach is sought to be introduced. Agreeing with the trial court's statement would mean that the very clause involved might just as well have been left out because it could never be used. Defendant cannot possibly conceive what other avenue of proof is available in such a situation and it respectfully contends that the trial court completely erred in making this statement.

* * * *

Points 7 and 8 of the grounds of appeal have already been gone into thoroughly.

Conclusion.

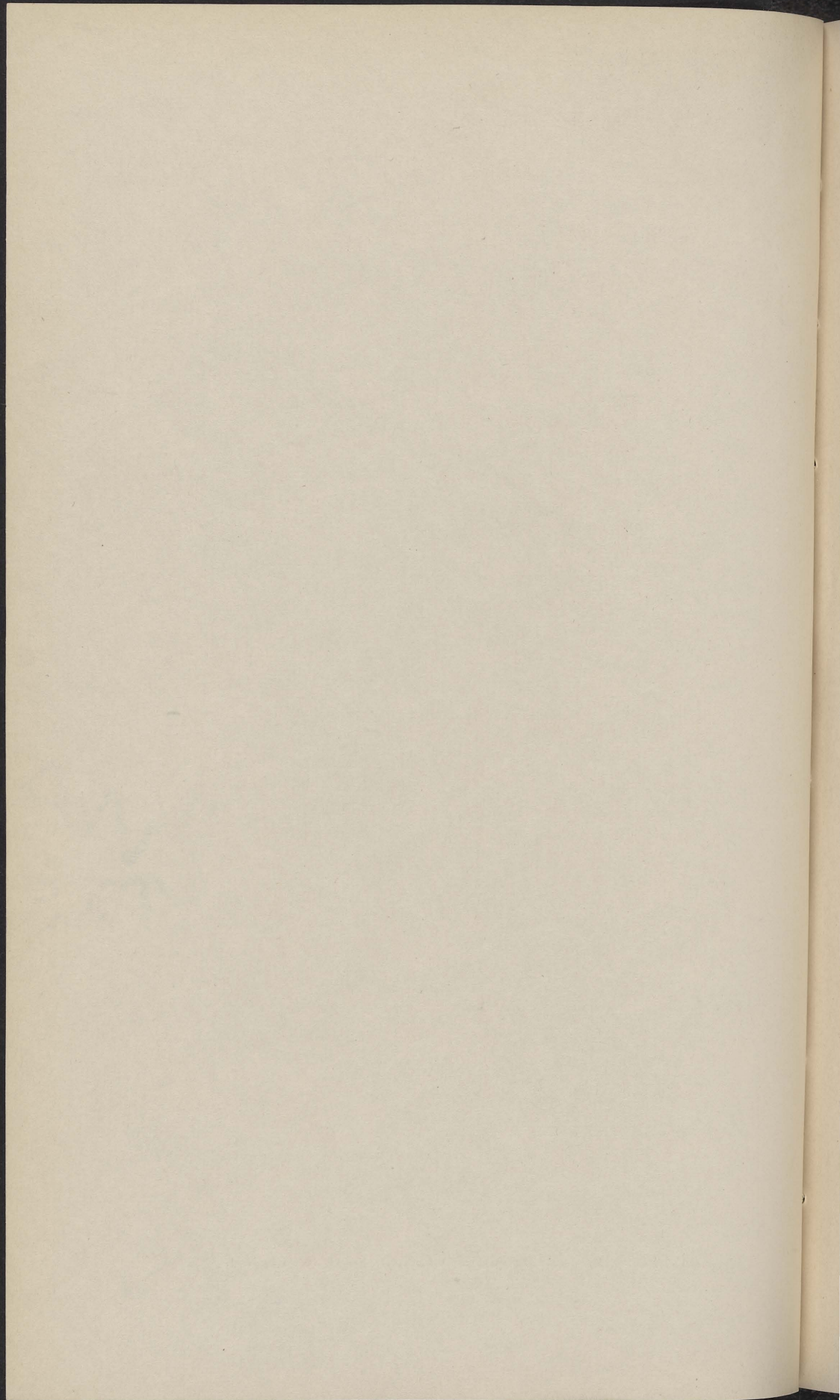
In conclusion, this defendant respectfully submits to this Honorable Court that the opinion of Mr. Justice Parker in the case of *George Brodsky v. Motorists Casualty Insurance Co., supra*, on which this Honorable Court affirmed its finding, is a complete answer in support of this defendant's attack on the trial court's memorandum and findings. That opinion by Mr. Justice Parker was direct precedent which Judge Cleary should have followed and which should have been the guiding case in his decision, justifying a judgment for the defendant herein. It was the precedent for the decision by Circuit Court Judge William A. Smith in the suit brought by George Brodsky, who also had nothing whatsoever to do with the procurement of the statement assuming liability, a most similar and comparable situation.

Defendant, therefore, respectfully submits that the trial court was in error and that a verdict of no cause for action in favor of this defendant and against the plaintiffs, Mrs. Anna Kindervater and Miss Anna Kindervater, should have been entered herein.

Respectfully submitted,

HARRY GREEN,
Attorney for and of Counsel with
Defendant-Appellant.

Arthur W. Cross, Inc., Law Printers, 55-57 Lafayette Street, Newark, N. J.
(21160)



12 FEB.T.1938

13 FEB.T.1938

New Jersey Court of Errors and Appeals

ANNA KINDERVATER (by her next friend Rudolph Kindervater), ANNA KINDERVATER, individually, and RUDOLPH KINDERVATER, individually,
Plaintiffs-Respondents,

vs.

MOTORISTS CASUALTY INSURANCE CO. (also known as the Motor Club Insurance Company) and now known as the Atlantic Casualty Insurance Company,
Defendant-Appellant.

Action at Law.
On Appeal from
New Jersey
Supreme Court,
Union County

BRIEF OF PLAINTIFFS-RESPONDENTS.

STATEMENT.

This brief is divided into two parts, the first contains an ANSWER directed to the brief of the defendant-appellant, while the second (beginning at page 33 infra) in conformity with Rule 36 of this Honorable Court, is devoted to a BRIEF by the plaintiff-appellant, Rudolph Kindervater, individually, in connection with his CROSS-APPEAL, filed in this cause, appealing from that portion of the judgment of the Supreme Court, Union County, which denied recovery to him individually.

FACTS.

The facts in this case are those which were stipulated and submitted to the Trial Court on a stipulation of facts for trial without a Jury (Case, pages 18-24 inclusive).

The facts contained in said stipulation are substantially embodied in the Postea and Findings of Fact filed by the Trial Court in this cause on September 13, 1937 (Case, pages 42-44 inclusive).

The appellant-defendant in its statement of Facts, last paragraph, page 5, in citing this Honorable Court's ruling in *Kindervater vs. Motorists Casualty Insurance Co.* 117 N. J. L. 131, (where the instant Respondents successfully appealed and obtained a reversal of a non-suit in the first trial) failed to state the following portion of this Honorable Court's opinion in awarding a new trial:

"Finally respondent urges that what appears to be tantamount to the proposition that the contract of insurance is void and unenforceable by any and all parties because of the finding of the Supreme Court in *Brodsky* against it, 112 N. J. L. 211, affirmed by this Court, 114 Id. 154. But this is not so".

PART ONE

I

THIS HONORABLE COURT BY ITS RULING IN KINDERVATER VS. MOTORISTS CASUALTY INSURANCE CO. (E. & A. 1936) 117 N. J. L. 131, HAS ALREADY DETERMINED THAT THE PLAINTIFFS - RESPONDENTS WERE NOT BARRED FROM RECOVERY AGAINST THE INSURANCE COMPANY, ON THE POLICY.

The facts and questions of law appearing now in the instant case are identical with those decided by this Honorable Court in said case of *Kindervater vs. Motorists Casualty Insurance Co.*, *Supra*.

There is no desire upon the part of the Plaintiffs-respondents to burden this Honorable Court with references to the State of the Case and Briefs filed in the previous appeal, but in view of our contention that the decision of this Honorable Court in the previous appeal is *Res Adjudicata* of the issues in the instant case, it is respectfully requested that this Honorable Court review said State of Case and Briefs filed in the previous appeal, supra. This indulgence is sought by reason of this Honorable Court's ruling in *Camden, Atlantic & Ventor Land Co. vs. Ventor City, et al., Same vs. West Jersey & S. R. Co. et al.* (E. & A. 1929), 106 N. J. L. 125, wherein it was said at page 131,

“It may be well to add in conclusion that the state of facts agreed upon between counsel and submitted to the trial judge in the former case for his decision, which stipulation became a part of the record of that cause, and the facts agreed upon between counsel in the second trial, and submitted to the trial judge for his decision, disclose that the issues at the first trial were the same as those presented at the second trial, and even without the aid of the postea, both records present the issue, which were required to be passed upon by the trial judge in giving judgment.

It certainly must be within the knowledge of both bench and bar that often times in the trial of causes where the plea of *res adjudicata* has been interposed, the testimony taken at the former trial, and the charge of the court, have been admitted in evidence in order to ascertain whether or not the same issue or issues was or were presented at the former trial.”

For the purpose of convenience the plaintiffs-respondents herein will be designated as the Kindervaters and the defendant-appellant, as the Insurance Company.

A brief résumé of the litigation between the parties in question will show the following:

1. In March 1933 the Kindervaters instituted an action against the Insurance Company on a policy of Insurance, having previously recovered judgments against the Insurance Company's assured.

2. The Insurance Company by its answer denied the claims of the Kindervaters, alleging that,

- (a) There was an improper issuance of execution against the assured.
- (b) That the assured voluntarily and in writing assumed liability for said accident.
- (c) The assured failed to cooperate.
- (d) Judgments recovered by the plaintiffs were not comprehended within the terms of the policy of insurance.

3. The matter came up for trial in the Supreme Court, Union County on February 25, 1935, Honorable Newton H. Porter presiding. The Insurance Company moved to file a supplemental answer which contained an allegation that the Kindervaters are barred from recovery because of a decision rendered by the New Jersey Supreme Court in the matter of *Brodsky vs. Motorists Casualty Insurance Co.*, reported in 112 N. J. L. 211, affirmed by this Honorable Court in 114 N. J. L. 154 (January 10, 1935).

This decision having been rendered between the time suit was instituted by the Kindervaters and the actual trial date before the Honorable Newton H. Porter. The Trial Court denied said motion. (State of Case, pages 16-19) in *Kindervater vs. Motorists Casualty Insurance Co.* (E. & A. 1936), 117 N. J. L. 131, (Appeal No. 60, May Term 1936).

4. At the conclusion of the plaintiffs case the Insurance Company moved for a non-suit on the ground of improper issuance of execution and that the plaintiffs had not made out a *prima facie* case. The Trial Court granted this motion.

5. Subsequently the Kindervaters appealed to this Honorable Court and the Insurance Company filed a brief, claiming that the judgment of non-suit was proper, that the Kindervater claims were on all fours with the Brodsky case, and urged as a finality of litigation that the judgment of non-suit should be sustained because of the holding in the *aforesaid case of Brodsky vs. Motorists Casualty Insurance Co., supra.*

6. This Honorable Court having had presented to it all of the foregoing facts together with the argument that the Brodsky decision is controlling and that there should be a finality of litigation, and observing the decision by this Honorable Court in *Brodsky vs. Motorists Casualty Insurance Co.*, reversed the Trial Court, deciding among other things, the following:

“Finally respondent urges that what appears to be tantamount to the proposition that the contract of insurance is void and unenforceable by any and all parties because of the

finding of the Supreme Court in Brodsky against it, 112 N. J. L. 211, affirmed by this Court, 114 Id. 154. *But this is not so*". (Italics ours).

It is obvious that the reason for the awarding of a *venire de novo* by this Honorable Court was because the other defenses contained in the answer of the Insurance Company such as lack of cooperation, had not been disposed of at the Trial before Honorable Newton H. Porter, when the non-suit was granted.

Now, by virtue of the Stipulated Facts presented in the instant case, the defense of lack of cooperation has been waived and the only point in issue is the effect of the memorandum executed by the assured to the Brodskys, which proposition is exactly the same in point and language as that advanced by the Insurance Company in support of its plea for leave to file a supplemental answer on the date of trial before Honorable Newton H. Porter, and also in support of its contention before this Honorable Court on the previous appeal that the decision in the Brodsky case was controlling, that there should be a finality of litigation, that the policy was void and unenforceable as to any and all parties, and was a bar to any recovery by the Kindervaters.

This Honorable Court's attention is respectfully directed to the last paragraph on page 15 and the further argument on pages 16-17 of the Insurance Company's brief in the instant case, wherein they say that "Appellant (Insurance Company) was trying to take a short cut but without success because this Honorable Court did not have before it on the record, as yet, this assumption of liability".

This is not so, as the record in the previous appeal discloses that the "assumption of liability" was before this Honorable Court in at least the following instances:

1. In Paragraph 3 of the Second Separate defense to all counts of the Answer filed by the Insurance Company, on page 12 of the State of the Case in the previous appeal (the same answer appearing in the instant State of Case on page 11). The Insurance Company's answer alleged, "Said William Simoni voluntarily and in writing assumed liability for said accident". Case, page 13-14, lines 32-34.
2. In the transcript of testimony of the State of the Case in the previous appeal (May Term 1936, No. 60) pages 16-17-18 and 19, it appears that a motion was made by the Insurance Company (Mr. Green) to file a supplemental answer containing an allegation that the Brodsky case was controlling and that the decision in the Brodsky case has established the law of the case in so far as the policy of insurance was concerned, and having denied recovery thereon to the Brodskys and the Kindervaters' rights flowing from the same source, therefore the Kindervaters are not entitled to recovery on the policy of insurance. This motion was denied by the Trial Court, to which the Insurance Company, excepted.
3. In the brief of defendant-respondent (Insurance Company) in the previous appeal, pages 8, 9, 10 and 11, (May Term 1936 No. 60) and in their additional brief entitled, "Answer to Supplemental Brief" in the same appeal.

There can be no doubt therefore, that this Honorable Court had before it in the previous appeal, "the assumption of liability" fully and adequately, for it considered that very point and definitely answered the contention of the Insurance Company on that score by holding that the contract of insurance was *not void and unenforceable by any and all parties because of the ruling in the Brodsky case.*

We therefore respectfully submit the same answer should be given now as was given then by this Honorable Court.

II

THE INSTANT CASE IS NOT GOVERNED OR CONTROLLED BY THE BRODSKY RULING. THE RESPECTIVE DECISIONS IN BRODSKY VS. MOTORIST CASUALTY INSURANCE CO. (1933) 112 N. J. L. 211, AFFIRMED (E. & A. 1935) 114 N. J. L. 154, AND KINDERVATER VS. MOTORIST CASUALTY INSURANCE CO. (E. & A. 1936) 117 N. J. L. 131, ARE JUSTIFIED AND ARE READILY AND DEFINITELY DISTINGUISHABLE.

It is respectfully submitted that the ruling in the Brodsky case is not applicable to the Kindervaters. The decisions in both of these cases are justifiable. They rest on separate and distinct grounds which are definitely distinguishable.

The Brodsky decisions are predicated on all or either of the following theories:

1. That Moe Brodsky, the operator of the automobile, and Anna, the daughter of Moe Brodsky (the person who procured the assumption

of liability statement from the assured to the Brodskys) were acting as agents or representatives of George Brodsky and the mother, Rose Brodsky.

2. That since the Brodskys, both George and the mother, procured the statement of assumption of liability through their agent or representative, the daughter, they were barred from any recovery.
3. That by reason of the conduct of the assured in executing the assumption of liability statement to the Brodskys, there was a violation by him of that provision in the policy which prohibited any assumption of liability *except at his own cost*. Having breached that provision (for the benefit of the Brodskys), the penalty therefor being that neither he, nor the Brodskys through him, could recover from the Insurance Company but that *that* assumption was at *his* (the assureds') own cost.

It is respectfully submitted that a careful reading of the assumption of liability statement will reflect the view that it was directed by the assured to the automobile operated by Moe Brodsky and the occupants therein and no other persons.

The Insurance Company in its brief in the instant case on page 10, second paragraph, endeavors to establish that the Brodsky case is analogous to the Kindervaters, reciting at length the contention raised by Counsel for George Brodsky in his case against this Insurance Company, but fails to advise this Honorable Court of the position taken by it (Insurance Company) in opposition thereto. We respectfully direct this Honorable Court's attention

to the brief filed by the Insurance Company in opposition to the appeal on behalf of George Brodsky in the Brodsky case, wherein the Insurance Company on page 24, Point 3 of its brief, (Appeal No. 61, Oct. Term 1934) maintained that Moe Brodsky was the agent of George Brodsky and that *that* legal presumption was not controverted.

In support of such position the Insurance Company there said:

“Plaintiff (Brodsky) makes much of the fact that statement executed by William Simoni and referred to in the defendant’s exhibits was obtained by Moe Brodsky and not George Brodsky. Moe was the operator of George Brodsky’s automobile at the time of the accident. This Court in *TISCHLER V. STEINHOLTZ*, 99 N. J. L. 149 at 152 held:

“Such proof of defendant’s ownership of automobile driven on the public highway raises a presumption of fact that such automobile was in the possession of the defendant, if not personally, then through his servant, the driver, and that such driver was acting within the scope of his employment * * *

The legal presumption therefore is that Moe Brodsky was agent and servant for George Brodsky, and even assuming that George Brodsky was not present when the statement was obtained, still he benefited thereby as a very reading of the statement will show. It is quite interesting to know that George Brodsky was not produced to deny the authority of Moe Brodsky to bind him by obtaining the statement.”

Since the Insurance Company in the Brodsky case contended (and rightly so) that Moe Brodsky was the agent of George Brodsky and that George Brodsky was bound by the conduct of Moe Brodsky, and that George Brodsky was not produced to deny such relationship and agency, it is understandable that the Supreme Court adopted such views with respect to the relationship and agency of the Brodskys, one to another, employing the following language in deciding the Brodsky case, "That the automobile operated by Moe Brodsky was that of respondent (George Brodsky) * * * is not questioned".

Now let us examine the conduct of Anna Brodsky, the daughter of Rose and Moe Brodsky, and the sister of George Brodsky. (Case, page 19, Stipulation of Facts, paragraph 3). It is undisputable that Anna Brodsky, the daughter, requested the assured to step into another room in order that she might have him sign a statement for *her* Insurance Company. Whose Insurance Company did she refer to? Certainly it was not *her* Insurance Company for admittedly she was not an occupant in the car, and was not the owner or operator thereof. There can be no doubt that she solicited this statement from the assured on behalf of her brother, George and her mother, Rose, and certainly *not* for the Kindervaters who admittedly were strangers to the Brodskys.

The Insurance Company in its brief in this instant case at the bottom of page 8, last paragraph, and at the top of page 9, says:

"This defendant contends that this assumption in writing constituted, as stated by Mr. Justice Parker, a breach of provision C of the policy on which the instant suit is

brought, and this breach may be set up as a defense to the instant action”.

While it is true that the Supreme Court, through Mr. Justice Parker, decided that the assured's statement was a breach of Provision C of the policy so far as the claim of Brodsky is concerned, it is obvious that Justice Parker did not say and certainly could not mean that it was a defense to the Kindervaters' action, because, the claim of the Kindervaters against the Insurance Company did not appear anywhere in the records, *and as a matter of fact had not yet been tried.*

Subsequent to the ruling in the Brodsky case by the Supreme Court and its affirmance thereof by this Honorable Court, the appeal of the Kindervaters was presented to this Honorable Court and this Honorable Court having had presented to it all the facts involved, both in the Kindervater and the Brodsky matters and having before it the final decision in the Brodsky case, ruled unanimously, with Mr. Justice Parker concurring, *that the contract of Insurance was not void and unenforceable by any and all parties because of the decision in the Brodsky case.*

The Insurance Company in its brief in the instant case on page 18, last paragraph, and page 19, refers to the decision of Circuit Court Judge William A. Smith in a case by Rose Brodsky against the Insurance Company. It is respectfully submitted that what was said in relation to the case of George Brodsky can also be said with relation to the case of his mother, Rose Brodsky, and that both Brodsky decisions are justified.

It is significant to note that Judge Smith in his decision specifically limits the application of the

breach of the policy and denial of recovery by reason of such breach to the plaintiffs in the Rose Brodsky case and does not in any way by inference or otherwise, refer to or pass upon the facts and conditions prevailing in the Kindervater case.

It is therefore respectfully submitted that the decisions in the Brodsky cases are justifiable but in no way controlling or applicable to the Kindervater case.

On the other hand the Kindervater decision rests on the theory:

1. That the Kindervaters were total strangers to the Brodskys, had no knowledge of the statement, did not participate or acquiesce in the procurement thereof or receive any benefits therefrom. The existence of said statement was unknown to the Kindervaters until they were apprised thereof by the answer of the Insurance Company.
2. The statement was not in evidence or even offered in evidence in the damage suit of the Kindervaters against the assured, and consequently the Insurance Company was not prejudiced thereby.
3. The statement executed by the assured is directed to the Brodskys and by its language limits the assumption of liability to the automobile operated by Moe Brodsky and the occupants thereof.
4. That the assured complied fully with all of the terms, covenants and conditions of the policy of insurance in so far as they related to the claims of the Kindervaters.

5. That there was no forfeiture of the policy of Insurance because of the assured's execution of the statement of liability to the Brodskys, it simply being a breach of Provision C and the penalty for such breach as specifically provided for was that where the assured assumes any liability, such assumption of liability shall be at *his own cost and expense*.
6. The assured was not the agent or representative of the Kindervaters. The Kindervaters had a right of action to recover under the terms of the policy, and statements by the assured to third persons, such as the Brodskys, did not bind the Kindervaters and were not competent to establish the defense by the Insurance Company.

It is respectfully submitted that in order for the statement, which was procured from the assured by the Brodskys on the representation by the sister of George Brodsky in the presence of her father, Moe Brodsky, that she wanted to send a statement to her Insurance Company, to be binding on and a bar to the Kindervaters' recovery, it must be established that this statement was obtained by or for the benefit of the Kindervaters or with their knowledge and acquiescence. Of course, this is not so, and the Insurance Company admits by stipulation that the Kindervaters did not have knowledge of such a statement at any time and that the plaintiffs were absolute strangers to the Brodskys, (Case page 19, Stipulation of Facts, paragraph 4).

It is respectfully contended that the assumption of liability statement has no place in this case and is not any more binding on the Kindervaters than it would have been for example, on any municipality

or person who would have been damaged or injured if the assured's car had proceeded on the sidewalk and damaged a water hydrant or injured a person walking on the sidewalk. The mere procurement of the statement by the Brodskys, by the means which they did, could not bind such municipality whose water hydrant was damaged or such person on the sidewalk who was injured, unless such municipality or such person was in some way a party to the procurement of said statement or had accepted the benefits therefrom.

Let us take another ^Usuppositio^As case and assume that there is an accident wherein two persons are injured due to an assured's negligence. Each of the injured persons filed a *separate* suit against the assured. The assured upon receipt of the summons and complaint in each suit forwards only one summons and complaint to the Insurance Company and through carelessness or by intent, does not forward the other summons and complaint to his Insurance Company.

It must be conceded that the Insurance Carrier would not be liable in the event of a judgment of the injured party whose summons and complaint the assured with-held from the Insurance carrier. On the other hand there can be no doubt that the Insurance Carrier would be liable to *such* injured person whose summons and complaint it had received, in the event of a judgment against the assured.

In the first instance referred to in the previous paragraph there was a violation by the assured of certain terms and provisions of the contract of insurance because the assured failed, by intent or otherwise, to forward the summons and complaint to the Insurance Carrier. In the second instance

there would be absolute liability against the Insurance Carrier because there had been full compliance with the terms and provisions of the contract of insurance, by the assured. So the Kindervaters are in the same category as the injured party in the second instance above mentioned.

In the instant case there was full compliance with the terms and provisions of the policy of insurance by the assured, Simoni, with respect to the Kindervaters, while there was a violation of Provision C of the policy of insurance by the assured with respect to the claim of the Brodskys.

It is significant to note in paragraph 3 of the Stipulated Facts that the daughter of Moe Brodsky who also was a sister of George Brodsky and also the daughter of Rose Brodsky, said to Simoni in the presence of her father, Moe Brodsky, "That he, Simoni, should come into the other room and sign a statement about the accident, so that she could send it to her Insurance Company". Whose Insurance Company did she mean? Undoubtedly her brothers', George Brodsky. In whose interest was she speaking, unquestionably that of her brother and her mother. She certainly wasn't talking about herself because she wasn't the owner or the operator of the car and as a matter of fact, was not an occupant thereof, and consequently suffered no injury. There can be no dispute that she wasn't talking in behalf of the Kindervaters because admittedly they were absolute strangers to the Brodskys and had no knowledge of what was going on.

In *DZIADOSC ET AL. V. AMERICAN CASUALTY Co.* (E. & A. 1935) 114 N. J. L. 137, the plaintiffs obtained judgments against one, Charles Keir for negligence in the operation of his automo-

bile. The defendant was the Insurance Carrier for Keir. In the answer filed by said Insurance Carrier, it alleged that the policy contained a provision that the policy did not cover the assured against loss of any kind resulting from the operation of any automobile insured therein if rented or leased to others, or used to carry passengers for a consideration, actual or implied, and that Keir violated and breached the aforesaid provision. At the trial the Insurance Carrier called as a witness its claim manager to testify over objection and exception that Keir, in a written statement made to him for the Insurance Carrier, had stated:

“That he had several passengers in the car, that he was taking them home and that they paid him \$1.00 each per week for gas and oil”.

The Court, Justice Donges speaking, said at page 141:

“The defendant must establish its defense by competent evidence. The plaintiffs had a right of action to recover under the terms of the policy and statements of the assured to third persons were not competent to prove the fact sought to be set up in defense, as against the plaintiffs any more than a like statement was binding on the plaintiff in the Center Garage Co. case.

The assured, Keir, was not the representative or agent of the plaintiffs and they do not sue in his right, strictly speaking, but are given an independent right to sue, dependent, of course, upon the validity of the policy”.

And similiarly in the instant case, since the assured, Simoni, was not the agent of the Kindervaters, any statement made by him to the Brodskys or third parties could not be binding on the Kindervaters.

It is admitted that the assured, Simoni, was remiss in the performance of his obligation under the policy of insurance with respect to the Brodskys because in that situation he breached the provisions of Section C of the policy when he voluntarily assumed in writing liability for the Brodskys' damages. The assured, however, was not remiss with respect to his obligations of the contract of insurance in so far as the Kindervaters are concerned, because according to the Stipulated Facts there was no lack of cooperation on his part, and it is respectfully submitted that there was no voluntary or other assumption of liability by the assured to the Kindervaters.

The situation being that the assured was not remiss in the performance of his obligations to the Insurance Company under the terms and provisions of the contract of insurance in so far as the Kindervaters were concerned, therefore, the Insurance Company cannot escape liability to the Kindervaters.

It has been held by the highest Court of the State of Missouri in the case of *Finkel vs. Western Auto Insurance Co.* (1930) 26 S. W. (2nd) 843, 224 Mo. App. 285, where the plaintiff recovered a judgment against the defendants' assured, and the claim of the defendant was that the assured breached the provision relative to lack of cooperation when he failed to put in an appearance at the trial, that it was a question of fact for the jury to determine and in affirming a judgment for the plaintiff, said at page 847 of 26 S. W. (2nd).

“Nor is there any doubt about the contention of counsel for plaintiff that courts abhor forfeitures, and refuse to read such a drastic provision into a policy of insurance when the parties themselves have not unmistakably inserted it therein. In such an instance as this, however, we do not understand that any forfeiture of the policy is involved. *If the insurer is fortunate enough to escape liability, it is not necessarily by a forfeiture of the policy, for the policy may well remain in full force and effect as to those losses sustained by the assured where the conditions of the policy have been met, while a recovery may be defeated as to a particular loss in connection with which the assured was remiss in the performance of his obligations under the contract.* (Italics ours).

By this we mean that the condition of the policy requiring co-operation by the assured is in the nature of a condition precedent to liability on the company's part for the loss growing out of a claim with the disposition of which the assured's assistance is demanded; and we see no reason why we should hold that a breach of such condition in a given instance should have the effect of nullifying and vitiating the contract for all time and purposes. In other words, the failure of the assured to aid in securing information and evidence when requested by the company will not terminate the company's entire liability as a matter of law, the policy not expressly making such failure a cause of forfeiture, but, in an action by the assured for indemnity to cover a particular loss sustained, his failure will be evidence for the

company on the vital question of whether he was guilty of such a breach of his contract as to serve to defeat his action, and to relieve the company from liability therein. *Ward v. Maryland Casualty Co.* 71 N. H. 262, 51 A. 900, 93 Am. St. Rep. 514”.

In *Michler vs. New Amsterdam Casualty Co. Inc.*, 104 N. J. L. 30, affirmed (E. & A. 1928) 663, the plaintiff was insured against loss of property by burglary or robbery. He was bound and gagged and robbed by thieves who took cash from his person and cash register. In a suit upon the policy to recover his loss the defendant, Insurance Company, set up a defense that the plaintiff had not kept books and accounts so that a loss under the policy could be accurately determined as required by the provision of such policy. The Court, Mr. Justice Kalish, speaking said at pages 32 and 33:

“Forfeiture clauses in insurance policies are not favored in law. *Hampton v. Hartford Fire Insurance Co.* 65 N. J. L. 265. * * *

“It is true that clause (d) of the policy provides: ‘Unless books and accounts are kept by the assured and the loss can be accurately determined therefrom by the company,’ the company shall not be liable for such loss.

A fair reading of this provision, bearing in mind that forfeitures are not favored in law, and that where there is an ambiguity found in a contract of this nature, such a provision should be most strongly construed against the insurer, and *should be construed in a sense so as not to work an injustice to an assured*, leads us to the view that the plain meaning of the provision is, that when it

becomes necessary to accurately determine a loss by robbery and it appears that the keeping of books and accounts is material and necessary in order to attain that end, then in such a case the failure to have complied with provision (d) operates to defeat any liability for loss on part of the company.

(Italics ours)

There is nothing before us in the case *sub judice* that tends to show that the keeping of books and accounts by the assured was material or would have been in the least helpful and necessary to accurately determine the loss of the assured, sustained by him as a result of the robbery". * * * * *

An inspection of the policy of insurance in the above cited case will disclose that the provisions of the policy of insurance there were more stringent than those in the policy of insurance in the instant case, because in the policy in the Michler case there was a provision, that the Insurance Company would *not be liable* unless books and accounts were kept by the assured. The policy in the instant case does not provide that the company shall not be liable in case of a breach of Provision C but only provides a penalty against the assured when and if he voluntarily assumes any liability. Said penalty is that such assumption of liability shall be at his (assured's) own cost and expense.

It is respectfully submitted that the Michler case is also helpful on another point which is analogous to the Kindervaters' position. The rights of the Insurance Company in the instant case were not prejudiced or affected in any way whatsoever by the execution of the statement by the assured to the Brodskys, for it is admitted by the Stipulation of

Facts that "the said statement was never received or used by the Kindervaters. Its existence being unknown to the Kindervaters until apprised thereof by the answer of the Motorists Casualty Insurance Co., in this suit on the policy of insurance." (Case, page 20, lines 7 to 13.)

In the Michler case, although there was a failure to comply with the policy when the plaintiff failed to keep books and accounts, the Court clearly said that the failure to comply with the policy was not material and affirmed the judgment in favor of the plaintiff.

It is respectfully submitted that the statement signed by Simoni, comes within the provisions of paragraph C of the policy of Insurance, releasing the Insurance Company from the obligation to satisfy the Brodsky judgments, because he, Simoni, voluntarily and in writing assumed responsibility for the damage to the Brodskys. He did not assume liability for the damage and injuries suffered by the Kindervaters and consequently the defense of the Insurance Company as to them, should fail.

This Honorable Court's attention is respectfully directed to paragraph C of the policy of insurance, (Case, page 29, line 21).

"Except as herein elsewhere provided for, the assured shall not voluntarily assume any liability, settle any claim or incur any expense, *except at his own cost* or interfere in any negotiations for settlement or legal proceedings without the consent of the Company previously given in writing". (Italics ours)

With respect to this provision there is nothing

further that we can add to the very clear and definite reasoning of the Trial Court, Case 48, line 20, wherein the Court said:

“The provision clearly provides that the assured shall not voluntarily assume any liability, except at his own cost. The penalty, then, for a voluntarily assumption of liability—and it is significant that Provision C is the only one for which an express penalty is provided—is not unequivocally a forfeiture of the policy in toto, but a forfeiture by the assured of all his rights against the insurer under the policy as to that liability for which he has assumed responsibility. This construction is not only fair and eminently reasonable, and the the one undoubtedly in the mind of the parties at the time of contracting, but the provision more readily lends itself to this construction, favorable to the Assured. The assured was undoubtedly remiss in the performance of his obligations under the policy with respect to the Brodsky claim, and consequently, as the result of the Brodsky case indicates, his rights against the defendant company with respect thereto were forfeited. But the policy does not clearly provide that such non-compliance with its terms shall work a forfeiture effective as to the claims of all injured persons. The assured was not remiss in his obligations to the insurer so far as these plaintiffs are concerned. The insurer may escape liability, as it did in the Brodsky case, but not necessarily by a forfeiture of the policy, for the policy may well remain, and I find it did so remain, in full force and effect as to those losses sustained by the Assured where the conditions of the policy have been met, while recovery

may be defeated as to a particular loss in connection with which the Assured was remiss in the performance of his obligations under the contract. The Assured was not the agent or representative of the plaintiffs. Plaintiffs had a right of action to recover under the terms of the policy, and statements of the Assured to third persons are not competent to establish the defense as against these plaintiffs."

The Trial Court in the instant case has held that the language of Provision C is clear and unequivocal. However, assuming that there might be the slightest ambiguity, such should be construed most strongly against the insurer: *WEISS V. UNION INDEMNITY CO.* (E. & A. 1931) 107 N. J. L. 348, *KISSINGER V. NORTH AMERICAN UNION LIFE* (E. & A. 1932) 108 N. J. LAW 405.

It is a general rule of law that the insurance policy is construed strictly against the insurer. *VAILSBURG MOTOR CORPORATION V. FIDELITY & CASUALTY CO.* (E. & A. 1933) 110 N. J. LAW 209.

If it can be said that this clause is susceptible of two constructions, the policy or the clause must be construed most strongly against the insurer. *LOWER V. METROPOLITAN LIFE* (E. & A. 1933), 111 N. J. LAW 426, and cases cited.

It is a secondary rule of construction of contracts of this class that, where the language is susceptible of two constructions, that more favorable to the assured will be adopted. *FLEMING V. CONNECTICUT GENERAL INSURANCE CO.* (E. & A. 1935), 116 N. J. LAW 6.

The language is to be given a liberal interpretation in favor of the assured. It was said in *HAMP-
TON V. HARTFORD FIRE INS. CO.* (E. & A.
1900) 65 N. J. LAW 265, 267,

“Forfeitures of this class are not favored in the law. The rule as to them in our state is settled. Our Courts say: ‘It has become a settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed to uphold the contract; and conditions contained in them which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy.’ *CARSON V. JERSEY CITY INSURANCE CO.*, 14 *VROOM* 300; *SNYDER V. INSURANCE CO.*, 30 *Id.* 544.

The Court will never seek for a construction of a forfeiture clause in a policy which will sustain it, if one which will defeat it is reasonably deducible from the terms or words used to express it”.

Since the contract of Insurance in the instant case does not provide for any forfeiture in the event of any violation of its terms and in the absence of such forfeiture clause, it would lead to a dangerous situation to permit the Insurance Carrier to be relieved of payment of a judgment which was honestly and legitimately obtained by an innocently injured party or parties, simply because the assured had assumed liability for one of three or four injured persons claims, particularly where the assumed claim involved only a few dollars while the other judgment or judgments involved thousands of dollars. Apropos to this situation we have the re-

marks of this Court in the Michler case at page 33 of 104 N. J. L.

“Bearing in mind that forfeitures are not favored in law and that where there is an ambiguity found in a contract of this nature such a provision should be most strongly construed against the assured, and *should be construed in a sense so as not to work an injustice to an assured,*” (Italics ours).

It is respectfully submitted that if a forfeiture were to prevail it would throw the door wide open to collusion or possible collusion between the assured and his Insurance Carrier whereby the assured might for a consideration assume responsibility for a very small claim of a few dollars, and in that way protect his Insurance Carrier from being obligated to pay a greater claim or claims.

The Kindervaters have no interest in the Brodskys and never had, and whatever reference is made in this brief to the Brodskys or to the brief filed by the Insurance Company in the Brodsky case, is done only with the thought of pointing out to this Court the position assumed by the Insurance Company at stated periods.

To summarize, may we repeat the language of the Trial Court in saying that “the burden is upon the defendant, Insurance Company, to prove a violation by the assured of a condition of the policy which cancels its mutual obligations for all purposes, and particularly so far as these plaintiffs (Kindervaters) are concerned. That, the defendant (Insurance Company) has failed to do.”

I I I

CASES CITED BY INSURANCE COMPANY
DISTINGUISHED.

The Insurance Company in its brief in the instant case makes reference to several cases in other jurisdictions, and particularly to one case decided by this Honorable Court, which cases it claims are controlling and applicable to the Kindervaters. Such contention is disputed and an analysis of the cases referred to will establish that they are not controlling or applicable to the Kindervaters, because the basic points and facts are different.

In the case of *American Automobile Insurance Co. vs. Fidelity & Casualty Co. of New York*, Court of Appeals of Maryland, 1930, 152 Atl. 523, 159 Md. 631, referred to in the Insurance Company's brief on page 13, the facts are as follows :

There, one, Dr. Riland, was the owner of an automobile which was parked in front of his residence. He had a policy of insurance with the Fidelity & Casualty Co. of New York. One, Joyner, was the owner of an automobile which was insured by the American Automobile Insurance Co.

On the night in question, the parked car of Dr. Riland was run into and damaged by the automobile of Joyner while being operated by him. Joyner was personally injured and taken to the hospital and Dr. Riland's car was damaged. Dr. Riland notified his Insurance Carrier of the accident, and one, William Fink, its claim adjuster, was sent to the hospital to interview Joyner. He interviewed Joyner and obtained from Joyner a written statement wherein Joyner apparently assumed liability for the accident.

No other parties were injured or had any claims. The Fidelity & Casualty Co. of New York had the damaged car of Dr. Riland removed from the street and repaired. The American Automobile Insurance Co. was notified by Joyner of the accident. Thereafter the American Automobile Insurance Co. disclaimed liability on the policy. Subsequently the Fidelity & Casualty Co. of New York, who had paid its assured, Dr. Riland, the damage sustained by him, sued Joyner and recovered a judgment against him. A Writ of Execution was issued and returned unsatisfied. Whereupon the Fidelity & Casualty Co. instituted suit against the American Automobile Insurance Co. on the policy and the Maryland Court held, that the plaintiff could not recover from the defendant Insurance Company because of the assumption of liability statement executed by Joyner.

It can be readily seen that the position of the Fidelity & Casualty Co. is identical with that of the Brodskys. In both cases agents or representatives procured statements of assumption of liability from the assured, and because of such conduct, were barred from recovery. It must be borne in mind that in the Maryland case the Court did not have before it any claimants such as the Kindervaters.

A careful reading of the cases referred to in the cited case in the Maryland Court will show that the policies of insurance referred to in such cases specifically provided for a forfeiture of the benefits of the policy in the event of any breach.

It may be also observed that the Maryland Courts have repudiated the principle of the law that Insurance contracts are to be construed most strongly against the insurer, for it was said by the Maryland Court, at page 526 of 152 Atl:

“It was said by Judge McSherry in *Aric. Ins. Co. vs. Hamilton*, 82 Md. 88, 33 A. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457, that, ‘in *Kelly’s Case*, 32 Md. 421, 3 Am. Rep. 149, and in *Weaver’s Case*, 70 Md. 539, 17 A. 401, 18 A. 1034, 5 L. R. A. 478, this court repudiated the principle of interpretation adopted in some cases—that insurance contracts are to be construed more strongly against the underwriter—and adopted the sounder view that the intention of the parties, as gathered from the whole instrument, must prevail”.

Our Courts, however, still maintain the view that contracts of insurance must be construed strictly against the insurer. *VAILSBURG MOTOR CORP. V. FIDELITY CASUALTY CO.* 110 N. J. L. 209, 164 Atl. 408.

In the case of *COLEMAN VS. NEW AMSTERDAM CASUALTY CO.* 247 N. Y. 271, 160 N. E. 367, referred to in the Insurance Company’s brief on page 14, the facts are that the defendant issued to a drug store company a policy of insurance indemnifying the drug company against loss as the result of a mistake in filling a prescription. The plaintiff, a customer of the drug company, sued the company for damages, claiming an error in the filling of a prescription. The drug company notified the insurance company. The Attorney for the Insurance Company made ready to defend the suit. He sent for the secretary of the assured, one Weiss, who had compounded the prescription. Weiss said there had been a mistake and refused to say more unless the insurer would undertake to pay any judgment recovered against him as well as any judgment recovered against his corporation, the assured. On the refusal of the Attorney to enlarge the liability, Weiss

announced he would neither sign an answer nor tell anything he new. Letters were written by the Insurance Company to the assured, requesting conferences on the merits of the plaintiff's claim. The letters were ignored by the assured. The Insurer therefore gave notice to the Drug Company that it disclaimed liability since the assured was unwilling to aid in the defense. There was a judgment for damages to the plaintiff by default. The assured was adjudged a bankrupt and execution was returned unsatisfied, and the plaintiff brought the action on the policy against the Insurance Company.

The Court in denying recovery to the plaintiff held at page 369 of 160 N. E.:

“Cooperation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. *The case is not one of the breach of a mere covenant where the consequences may vary with fluctuation of the damage. There has been a failure to fulfill a condition upon which obligation is dependant*”. (Italics ours).

It is respectfully submitted that the above decision is sound and, as we have previously stated, the conduct of the assured, Simoni, and the Brodskys resulted in a breach of one of the provisions of the policy of insurance in the instant case, the consequence of which permitted the Insurance Company to escape liability to the persons to whom there was an assumption of liability (Brodskys) and incidentally compelling the assured, Simoni, to bear *that* assumption of liability (in the words of the policy) “at his own cost and expense”.

The Coleman case turns on the point that because of a lack of cooperation of the assured there was a failure to fulfill a condition upon which the entire obligation (contract of insurance) was dependent, while the act of Simoni was not such as would void the entire policy of insurance but rather one which involved a fluctuation of damages, the penalty of which was as previously referred to.

In the case of *NEILSON V. AMERICAN MUTUAL LIABILITY INSURANCE CO.* (E. & A. 1933) 111 N. J. L. 345, Insurance Company's brief, page 27, the plaintiff, Neilson recovered a judgment against one, James C. Stiles because of the negligence of said Stiles in the operation of a certain auto truck owned and operated by him. Stiles' Insurance Carrier was the American Mutual Liability Insurance Co. Execution was issued against the defendant, Stiles and returned unsatisfied. Suit was instituted against the Insurance Carrier who refused to pay, claiming and proving that Stiles, their assured, was engaged at the time of the accident in transporting passengers for hire, in express violation of the terms of his policy of insurance. It was held by this Honorable Court at page 347:

“That by reason of the violation of its provisions *the policies were void and not in force at the time of the accident.* * * * The fact that Stiles, at the time of the accident, was transporting, for hire, employes of the Elizabeth Paving Company, was not controverted; and the contract of insurance provided, *in clear and unmistakable language against liability in such event*”. (Italics ours).

No fault can be found with this ruling as the validity of the entire policy depended upon the use to which the auto was subjected at the time of the

accident. We desire to point out that the clause relating to the use of the auto truck was part of the *Exclusion* clause of the policy of insurance, which provided that the policy *did not apply* to injury or damage incurred while the vehicle involved in the accident was being used in carrying passengers for compensation, and contained a declaration which formed a part of the policy to the effect that no motor vehicle or trailer would be rented to others or used to carry passengers for a consideration expressed or implied.

It must be borne in mind that in the Neilson case there was an absolute prohibition against the use of the vehicle insured for transportation of passengers for hire, and specifically provided that the policy of insurance would not cover if such a condition prevailed. In other words it said that the entire policy of insurance shall not apply if the vehicle was used for transporting passengers for hire. Since the policy of insurance in toto didn't cover, naturally, the plaintiff, Neilson, had no rights against the Insurance Carrier, there being no policy of insurance in force at the time the accident happened.

In the Kindervater case the policy does not say in clear and unmistakable language that the policy shall be void and unenforceable as to any and all parties or shall be a bar to any and all claims of injured persons because of the conduct of the assured in assuming liability for some injured persons claim. The penalty for such conduct of the assured in the instant policy of insurance is that the assured shall at his own cost and expense compensate the person or persons to whom he admitted or assumed such liability.

So in the instant case the policy of insurance was in full force and effect at the time the Kindervaters were injured, whereas in the Neilson case there was no policy in force at the time the loss occurred. Upon the occurrence of the accident the Kindervaters were vested with definite rights which could not be defeated by the statement or statements of the assured to the Brodskys or third persons, unless the Kindervaters consented to the making of such statement, accepted or ratified the same.

It is therefore respectfully submitted that the judgments of the Lower Court in favor of Miss Anna Kindervater (daughter) and Mrs. Anna Kindervater (wife) should be affirmed.

PART TWO

CROSS-APPEAL

BRIEF OF RUDOLPH KINDERVATER, INDIVIDUALLY, ON HIS CROSS-APPEAL.

STATEMENT

This is an appeal from that portion of the judgment rendered by the Trial Court in favor of the Insurance Company and against Rudolph Kindervater, individually, in an action instituted by Rudolph Kindervater, individually, together with other plaintiffs, in the New Jersey Supreme Court, Union County. See Postea — State of Case page 49, LL 30 etc.

FACTS.

On or about September 17, 1930, the Insurance Company issued its policy of insurance covering a certain automobile owned by William Simoni.

As will more fully appear from the Stipulation of Facts (See State of Case, page 18), Miss Anna Kindervater, daughter, and Mrs. Anna Kindervater, wife of Rudolph Kindervater, were injured by reason of the negligence of the assured Simoni. Judgments were recovered against the assured by Miss Anna Kindervater (infant daughter), Mrs. Anna Kindervater (wife) and Rudolph Kindervater, individually, the latter judgment being for medical expenses incurred by Rudolph Kindervater for his wife, household help, loss of consortium of his wife and medical expenses for the infant daughter and loss of earnings of the infant daughter.

Payment of these judgments was refused by the Insurance Company. In the suit against the Insurance Company on the policy of insurance, the Trial Court entered judgments in favor of the daughter, Miss Anna Kindervater and the wife, Mrs. Anna Kindervater, but denied recovery to Rudolph Kindervater, individually, on the ground that his judgment (medical expenses of the infant daughter and wife, loss of consortium of the wife, household help and loss of earnings of the daughter) is not clearly within the terms of the clause "bodily injury" and is not comprehended within the provisions of the policy of insurance or the statutes in effect at the time the policy was issued.

POINTS I AND II

THE JUDGMENT OF THE PLAINTIFF APPELLANT, RUDOLPH KINDERVATER, INDIVIDUALLY, WAS CLEARLY COMPREHENDED WITHIN THE PROVISIONS OF THE POLICY OF INSURANCE ISSUED BY THE DEFENDANT-APPELLANT TO ITS ASSURED, SIMONI.

The Trial Court in construing the provisions of the policy makes the observation that "the husband received no bodily injuries from the loss of his daughter's earnings, nor the loss of his wife's consortium nor is his wife or his daughter his property so that an injury to their persons is an injury to his property".

It is respectfully submitted that this interpretation of the provisions of the policy of insurance is not only at variance with but absolutely contrary to the decisions of the State of New Jersey and other States, where identical or similar terms and provisions in a policy or policies of insurance have been construed.

The Trial Court in its Postea, State of Case P. 50 LL 1 etc., cites the case of *Smith vs. Red Top Taxi-Cab Co.* 111 N. J. L. page 439, in support of its views. This case in effect holds that two independent suits may *not* be instituted by a plaintiff in a District Court or any Court, one for physical injuries and the other for medical expenses and loss of earnings, since they are *not* separate causes of action but are incidents of the main cause of action, the personal injury. There can be no disagreement with this decision as it only reaffirms the law with reference to cases of that kind.

In the instant case the question is not whether an adult plaintiff may divide up his cause of action but rather the right of a parent to recover from the insurance company for the medical expenses and loss of earnings of his dependent child and of a husband for medical expenses, loss of consortium and household expenses of his wife, *incident to injuries* sustained by such dependent child and wife, because of the negligence of the defendants assured.

With this point in mind it now resolves itself into a question of construction of the provisions of the policy which are pertinent to the issue, State of Case P. 25 LL 20 etc. By the terms of the Policy the Insurance Company agreed,

“TO INSURE the Assured against loss by reason of liability imposed by law upon the Assured for damages on account of

(a) Bodily injuries, including death, at any time resulting therefrom, to any person or persons,

Accidentally suffered or alleged to have been suffered while this policy is in force by reason of the ownership, maintenance or use, etc.”

A reasonable interpretation of the foregoing provisions leads to the conclusion that recovery may be had against the insurer by any parent or husband who sustained losses incident to (on account of) the bodily injuries of the wife or dependent child. Since there is a liability imposed by law upon the father for the medical care etc., of his infant child and likewise that of the husband for his wife, and since medical care is incident to the bodily injuries sustained by such dependent child and wife, and in view of the phraseology of the aforementioned pro-

vision whereby the insurer insures the assured "against loss by reason of liability imposed by law on account of bodily injuries," it follows that the insurer cannot escape paying a judgment or liability which was imposed by law upon the assured because of losses incident to the bodily injury.

If Miss Anna Kindervater had been of age and likewise if Mrs. Anna Kindervater, a widow, and they respectively had incurred the expenses which constitute the basis of Rudolph Kindervater's judgment individually, their right to claim reimbursement in their suit against the insurer would have been unquestioned. The expense of medical treatment, loss of earnings and household help would have been regarded as necessary incidents of the bodily injuries. The fact that payment of such treatment or losses incurred was made or assumed by the father and husband, in conformity with New Jersey Law, does not change its character as a necessary concomitant of the bodily injuries suffered by the daughter and wife.

In the New Jersey case of *KULA V. JERSEY MUTUAL CASUALTY INSURANCE CO.* 8 N. J. Misc. 929, Sup. Ct. 1930, the plaintiff's wife had received injuries in an automobile accident and suit was brought by the plaintiff and his wife, against the defendants assured. The wife for bodily injuries and the husband for loss of consortium of his wife, expenses, etc. A judgment was rendered in favor of the wife and husband. The tort-fessor was insured in accordance with the provisions of the Statute (P. L. 1926, c. 231, page 383) against loss from liability for damages on account of bodily injuries resulting from the operation of his taxicab. The defendant satisfied the judgment obtained by the wife but refused to satisfy the judgment ob-

tained by the husband, the plaintiff. The suit was by the husband to recover against the defendant on the policy of insurance. The Court in awarding a judgment for the husband said, at page 930 of 8 N. J. Misc.:

“The policy was written under the authority of the statute referred to and in pursuance therewith. That statute provides that no auto cabs shall be operated upon any street until the owner shall file with the commissioner of motor vehicles an insurance policy in the sum of \$5,000 “against loss from the liability imposed by law upon the auto cab owner for damages on account of bodily injury or death suffered by any person or persons as a result of an accident occurring by reason of the ownership, maintenance or use of such auto cab upon any public street,” etc. The controlling words seem to be “*damages on account of bodily injury or death suffered by any person or persons as a result of an accident*”. (Italics ours).

The defendant construes this statute to restrict recovery only to those persons actually suffering bodily injury or death by reason of the operation of an auto cab. It seems to me the legislative intent is much broader than that and allows recovery to any one who suffers damages “on account of bodily injuries,” whether to himself, his wife, or to his dependent child. The damage to the husband in the case at bar as assessed by the jury aforesaid is recoverable under the statute and policy of insurance issued thereunder”.

Apparently the Trial Court in the instant case in arriving at his conclusion, overlooked that portion of the policy which we respectfully submit are the controlling words, namely, * * * *by reason of liability imposed by law upon the assured for damages on account of bodily injuries * * * to any person or persons*".

Counsel for the Insurance Company may argue that the decision in the Kula case rests upon a certain statute, recited in P. L. 1926, c. 231, page 383, yet the language as set forth in said statute is identical with the terms and provisions contained in the instant policy of insurance. The terms of the policy are equally as broad or broader than the language in the statute and therefore the interpretation of the terms of the policy should be equally as broad and as favorable to the plaintiff-appellant.

The Trial Court in the instant case makes reference to an act of the Legislature recited in P. L. 1931, Chapter 194. A comparison of the pertinent part of that statute with the provisions in the policy of insurance in the instant case illustrates that the instant policy contains substantially the language of the statute and that the statute was enacted to overcome an omission in some policies of insurance. The statute uses the term "legally liable". The instant policy reads, "liability imposed by law".

In *AMERICAN MOTORISTS INSURANCE COMPANY V. KOPKA*, 186 A. 335, (Sup. Ct. N. H. 1936), 88 N. H. 182, the plaintiff obtained a verdict of \$1000.00 against the defendants' assured for hospital and medical expenses incurred as the result of injuries sustained by his minor son. The policy issued by the insurance company provided:

“To pay on behalf of the assured * * * all sums which the assured shall become obligated to pay by reason of the liability imposed upon him by law for damages * * * on account of bodily injuries or death * * * accidentally suffered * * * by any person or persons due to any accident as a result of the ownership, maintenance or use * * * of the automobile described herein”.

The Court in deciding that the father was entitled to recover a judgment against the Insurance Company on the policy said,

“If John Kopka, Jr., had been of age and had himself incurred the expenses which constitute the basis of his father’s suit, his right to claim reimbursement therefor in his suit against the defendant Moulton would have been unquestioned. The expense of hospital and medical treatment would have been regarded as a necessary incident of his bodily injuries. The fact that payment for such treatment was made or assumed by his father did not change its character as a necessary concomitant of the bodily injuries suffered by the son. It therefore seems plain to us that by the verdict of the jury, the defendant Moulton became “obligated to pay” the amount of that verdict “by reason of the liability imposed upon him by law for damages * * * on account of bodily injuries * * * accidentally suffered” by John Kopka, Jr., “as a result of the use * * * of the automobile described” in the policy.

The plaintiff relies upon the case of *William v. Nelson*, 228 Mass. 191, 196, 117 N. E. 189,

191, Ann. Cas. 1918D, 538, in support of its position. In that case it was held that the compulsory insurance act of Massachusetts requiring insurance against "liability to pay damages to others for bodily injuries" did not "include damage to the financial resources of the husband arising from a bodily injury to his wife." This decision, as construed in the later case of *Cormier v. Hudson*, 284 Mass. 231, 187 N. E. 625, lends no support to the plaintiff's argument. On the contrary in the *Cormier* Case, upon a state of facts completely analogous to that here presented and under a policy containing language identical with that here involved, the insurer was held liable for medical expenses and loss of services resulting to the parents of minor children directly injured by the negligence of the defendant.

The conclusion which we have reached is also sustained by recent decisions in other jurisdictions. *Franklin v. Georgia Casualty Co.* 225 Ala. 58, 141 So. 702; *Antichi v. New York Indemnity Co.* 126 Cal. App. 284, 14 P. (2d) 598; *KULA v. Jersey Mut. Casualty Ins. Co.* 153 A. 265, 8 N. J. Misc. 929".

It is to be noted that this case cites with approval, *Kula vs. Jersey Mutual Casualty Insurance Co.* the New Jersey case above referred to.

In Antichi v. New York Indem. Co. (1932) 126 Cal. App. 284, 14 P. (2d) 598, an action by a husband for consequential damages resulting from injuries to his wife, based upon a judgment procured by him against insured, who, under the policy, was indemnified against "legal liability for bodily in-

juries or death," it was held that the judgment for consequential damages was covered by the policy. The Court's said at page 601:

"This judgment of W. J. McIntyre (husband) was for hospital bills, medical attention, and loss of services incurred by him by reason of the bodily injuries sustained by his wife in the said accident. Had the policy provided only for damages arising from bodily injuries, the authorities cited by appellant would be controlling, but it goes much further than that and indemnifies the assured against all legal liability arising from bodily injuries. There can be no question but that the judgment of W. J. McIntyre was a legal liability against the assured growing out of the bodily injury suffered by the wife."

In *FRANKLIN V. GEORGIA CASUALTY CO.* (1932) 225 Ala. 58, 141 So. 702, a suit by a father to recover damages for the loss of services on account of bodily injuries to his minor son, and for medical expenses incurred in treating such injuries, caused by the negligence of the assured in the operation of an automobile covered by the policy of insurance, by the terms of which the casualty company engaged to insure him against loss "*by reason of liability imposed by law upon the assured for damages on account of (a) bodily injuries, including death, at any time resulting therefrom to any person or persons, * * * accidentally suffered or alleged to have been suffered while this policy is in force by reason of the ownership, maintenance or use of the automobile mentioned in the policy,*" the right of the father to recover was sustained. The purpose of this suit was to compel the insurance company to pay the judgment recovered by the father against the person named as the insured in the policy.

In *FOX v. EMPLOYERS' LIABILITY ASSUR. CORP.* (1934) 239 App. Div. 671, 268 N. Y. S. 536, it was held that a claim by a husband for loss of his wife's services as the result of injury in an automobile accident was within the coverage of an automobile liability insurance policy agreeing to settle or to defend against claims resulting from liability imposed upon the assured by law for damages on account of bodily injuries.

In *KLEIN v. EMPLOYERS' LIABILITY ASSUR. CORP.* (1918) 9 Ohio App. 241, 29 Ohio C. A. 175, it was conceded that under a policy indemnifying against "loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom," suffered by any person or persons by means of the maintenance or use of an automobile, that a husband was entitled to recover damages sustained by him as the result of bodily injuries to his wife.

In *TULCHINSKY V. PUBLIC SERV. MUT. CASUALTY CO.* (1935) 245 App. Div. 382 N. Y. S. 944, a suit by a mother to recover damages for the loss of an infant child's services, and for incidental expenses incurred by reason of personal injuries suffered by the child when struck by a taxicab owned by one insured under a policy indemnifying him against "loss arising from the liability imposed by law upon the assured for damages in account of death or bodily injuries, * * * and including loss arising from the liability and responsibility imposed by law on the assured, as owner, for death or injuries to person" it was held that the mother was entitled to recover under the terms of the above policy.

In *CROMIER V. HUDSON* (1933) 284 Mass. 231, 187 N. E. 625, it was held that plaintiffs' consequen-

tial damages for medical expense for, and loss of services of their minor children, directly injured by the negligence of insured, were within the voluntary extraterritorial coverage clause of an automobile liability policy indemnifying insured against "liability * * * for damages on account of bodily injuries * * * suffered by any person" by reason of the ownership, operation, maintenance, control, or use of a motor vehicle anywhere within the limits of the United States other than the State of Massachusetts. The policy also contained a compulsory liability clause indemnifying against "liability to pay damages to others for bodily injuries" arising out of the maintenance, control, or use upon the ways of Massachusetts, and the Court, after remarking upon the difference between the words used in the compulsory liability clause and the voluntary extraterritorial clause, said at page 627 of 187 N. E.:

"If the same indemnity had been intended, naturally the same words would have been used. It seems plain that the words of the extraterritorial insurance are broader than those of the compulsory insurance".

In *UNITED STATES FIDELITY & GUARANTY CO. V. BAKER*, 134 So. 894 (1931 Ala.), a husband recovered a judgment against the insured for his wife's expenses incurred in treating the wife's injuries suffered in an automobile accident. The Insurance Company refused to pay and the husband sued the Insurance Company on the policy. The policy provided,

"Against liability for loss and for expense arising or resulting from claims upon assured (appellee) for damages in consequence of an accident * * * during the term of this

policy, of the automobile * * * enumerated and described herein resulting in, (a) bodily injuries, or death at any time therefrom, suffered by any person or persons, excepting" (exceptions not necessary to mention).

The Court in affirming a judgment for the husband said at page 895 of 134 So.:

"The husband of Mrs. Rainer sued appellee and recovered damages for expenses incurred by him for the necessary treatment of bodily injuries suffered by his wife from wrongfully inflicted injuries proximately resulting from the accident in appellee's automobile. This was a legitimate element of damage, and, when proven, is properly recoverable. Alabama City G. & A. Ry. Co. v. Appleton, 171 Ala. 324, 54 So. 638, Ann. Cas. 1915A. 1181; Morrison v. Clark, 196 Ala. 670, 72 So. 305. If Mrs. Rainer sustained bodily injuries as a result of the negligence of appellee and she had paid the hospital bills and doctors' fees reasonably necessary to her treatment and recovery, she certainly could have included such charges in a suit against appellee for personal injuries, and such would have been a claim against this appellant under the policy. We can see no difference in a claim for damages arising in favor of Mrs. Rainer's husband. If appellee was liable for the damage and the damage was "in consequence of the accident" the appellee is protected by the terms of her contract, which are construed liberally in favor of insured. Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 So. 399. Authorities cited by appellant in his brief from New

York Court of Appeals are not in point, and, if the cases of *Williams v. Nelson*, 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538, appears to be in conflict, the answer is that that decision is based upon a statute not here involved, in which recovery is limited to bodily injury, whereas in the instant case the recoverable damages are in consequence of an accident.

As we understand appellant's brief, it is contended that, as Mrs. Rainer sued and obtained judgment against appellee, the insured, for bodily injuries sustained as a proximate result of the accident for which appellee was liable, and this judgment was paid by appellant, any other and further damage growing out of the injury to Mrs. Rainer cannot be recovered. According to the agreed statement of facts, Mrs. Rainer did not include in her suit claim for necessary hospital and medical services, for the very good reason that they were not paid by her and for them she could not recover. The injury and damage was there nevertheless, and appellee was liable to the husband whose duty it was to pay these charges. Appellee, by suit, was compelled to pay, and it was thereby ascertained by a court, that such damage was in consequence of the accident covered by the policy issued by appellant to indemnify appellee against just such a loss".

No doubt the insurance company in the instant case will rely on the following cases:

Williams v. Nelson, 228 Mass, 191, 117 N. E. 189; *Hay v. Prime*, 197 Mass. 474, 84 N. E.

141, and *Brustein v. New Amsterdam Casualty Co.* 255 N. Y. 137, 174 N. E. 304.

The results in these cases are, of course, justified because of the language used in the policies involved therein. All three of the aforesaid cases are *distinguishable* from the instant case. The policies are entirely different. In fact all three cases have been distinguished time and time again. In *Franklin v. Georgia Casualty Co.* (Supra) 141 So. 702, the Court distinguishes the three cases as follows at page 703:

“The case of *Williams v. Nelson et al.*, 228 Mass. 191, 117 N. E. 189, 191 Ann. Cas. 1918D, 536, is cited by appellee casualty company to sustain its contention that the damages recovered by the complainant in his action against Moore are not covered by the policy. The pertinent utterances in that case are: ‘The Husband of the female plaintiff recovered judgment against the insured for the loss or damages sustained by him because of the physical injury to his wife. The question is whether this judgment is for the ‘bodily injury * * * of any person.’ Bodily injury imports harm arising from corporeal contact. In this connection ‘bodily’ refers to an organism of flesh and blood. It is not satisfied by anything short of physical, and is confined to that kind of injury. It does not include damage to the financial resources of the husband arising from a bodily injury to his wife. *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570, and cases cited.”

The Court in that case was not dealing with the coverage of the policy of insurance, but

was construing the statute of Massachusetts, providing that: "Upon the recovery of a final judgment against any person * * * by any person, including administrators or executors, *for loss or damage on account of bodily injury or death*, if the defendant in such action was insured against *said loss or damage* at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company and the defendant, applied to the satisfaction of the judgment" (Italics supplied). Statutes of Massachusetts 1914, c. 464, par. 2; General Laws of Massachusetts of 1921, page 1997, c. 175, par. 113, Vol. 2.

It may be noted that the language of that statute is more restricted than the language of the policy contract here involved, which covers the liability of the assured "*against loss by reason of the liability imposed by law upon the assured * * * on account of (a) bodily injuries or death * * * to any person or persons * * * accidentally suffered or alleged to have been suffered while this policy is in force by reason of the ownership, maintenance or use*" of the automobile covered by the policy. (Italics supplied).

The clause, "to any person or persons," refers to "loss by reason of the liability imposed by law upon the assured," and not to "bodily injuries or death".

To transpose the sentence, "against loss by reason of the liability imposed by law upon the assured, to any person or persons, on account of bodily injury or death."

In the case of *Hey v. Prime*, 197 Mass. 84 N. E. 141, 142, 17 L. R. A. (N. S.) 570, cited in *Williams v. Nelson et al.*, *supra*, the court was construing a statute providing for the survivor of certain causes of action, that is, "actions of * * * tort for assault, battery, imprisonment, or other *damage to the person*," and it was held that the common-law right of action in favor of the husband for the loss of the services of the wife could not be classed as "damage to the person" and abated by the death of the tort-feasor.

The question presented in *Brustein v. New Amsterdam Casualty Co.* 255 N. Y. 137, 174 N. E. 304, 305, was whether or not the policy was in conflict with the statute of New York requiring such policies to carry "a provision insuring such owner against liability for damages for death or injuries to *person or property* resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner"; and whether or not that statute deprived the insurer of the right to limit its liability in scope and amount. And the holding in that case was that the policy which covered "accidents resulting in 'bodily injuries or death' was not in conflict with the quoted statute, the primary purpose of which was "to meet the defense in an action on the policy that the owner was not at the time of the accident operating the car personally or by his agent, although it was being operated by a member of his family or another with his consent express or implied,"

and that, in cases where compulsory insurance was not required, the parties had the right to limit the amount and scope of the liability by their contract.

There is nothing in the report or the opinion in that case showing that the policy undertook to insure "*against loss by reason of liability to any person or persons imposed by law upon the assured, on account of bodily injury or death * * * accidentally suffered or alleged to have been suffered * * * by reason of the ownership, maintenance or use*" of the automobile covered by the policy. (Italics supplied).

Another point in the Brustein Case, *supra*, was the policy insured against "loss in respect to 'bodily injury or death' only," limiting liability to \$5,000. for one person injured or killed, and Brustein's wife had recovered a judgment for \$8,145. and the insurer had paid her \$5,000. and costs, which it claimed fully discharged its liability under the policy. We are persuaded that it was on this ground the judgment in that case was reversed and the complaint dismissed by the Court of Appeals of New York.

There is nothing in the statute regulating casualty insurance in Alabama that denies to the parties the right by contract to extend the coverage of the policy beyond the exact terms of the statute, and, after due consideration, it is our judgment that the undertaking of the policy here involved was to insure the assured against loss by reason of liability *imposed by law* to any person or persons,

on account of bodily injury or death, resulting from negligence in the operation of the automobile covered by the policy. *Indemnity Co. of America v. Bollas*, 223 Ala. 239, 135 So. 174; *United States Fid. & G. Co. v. Baker* (Ala App.) 134 So. 894; *Id.* 223 Ala. 172, 134 So. 896. And it is well settled that a father may recover, as damages resulting from the negligent bodily injury of a minor child, compensation for loss of services and medical expense in treating such injury. *Birmingham Railway, Light & Power Co. v. Baker*, 161 Ala. 135, 49 So. 135 Am. St. Rep. 118, 18 Ann. Cas. 477; *Bude v. Birmingham Railway, Light & Power Co.* 140 Ala 276, 37 So. 285, 103 Am. St. Rep. 33." (All asteriks and italics in the above cause supplied by that court).

OTHER REMARKS

The judgment recovered by Anna Kindervater (daughter) against the assured was for \$7500.00, the judgment of the mother, Mrs. Anna Kindervater was for \$500.00, and that of the father, Rudolph Kindervater, individually, for \$800.00. The latter judgment included loss to the father of the earnings of his infant daughter, medical expenses incurred by the father in an endeavor to cure his daughter, loss of consortium of his wife, medical expenses incurred on behalf of the wife and monies expended for household help during her incapacitation.

The policy of insurance limits the recovery for damages to one person in the sum of \$5000.00. At first blush it would seem that the judgment of Rudolph Kindervater, individually, the father (in so far as it concerns the loss sustained by him of the

earnings of his daughter, etc.) is part of said limitation of \$5000.00. Such limitation, however, does not apply to the father because of the ruling in the case of *Smith vs. Phoenix Indemnity Co.* 15 N. J. Misc. 678, wherein the Court held substantially that, where an automobile liability insurer controlled the defense in a suit by husband and wife against insured, its failure to try to prevent the husband from claiming or proving damages consequent to bodily injuries to his wife, as for loss of consortium and medical expenses or to request separate verdicts on separate items of damage, constituted a waiver of the policy provision restricting insurer's liability for bodily injuries to each person to \$10,000. in that the insurer was estopped from relying on \$10,000.00 payment on wife's judgment as a defense to husband's claim on his judgment, on the theory that husband's judgment partially represented injuries to his wife.

And so in the instant case, the Insurance Company controlling the defense in the original damage suit against the assured, Simoni, having failed to request the Trial Court to direct the Jury to bring in separate verdicts on the separate items of damage sustained by Rudolph Kindervater, individually, incident to the injuries sustained by the *daughter and wife* and complained of by them in their damage suit, constituted a waiver of the policy provision restricting the Insurance Company's liability for bodily injuries to each person for \$5000.00, in so far as the claim of Rudolph Kindervater is concerned.

CONCLUSION

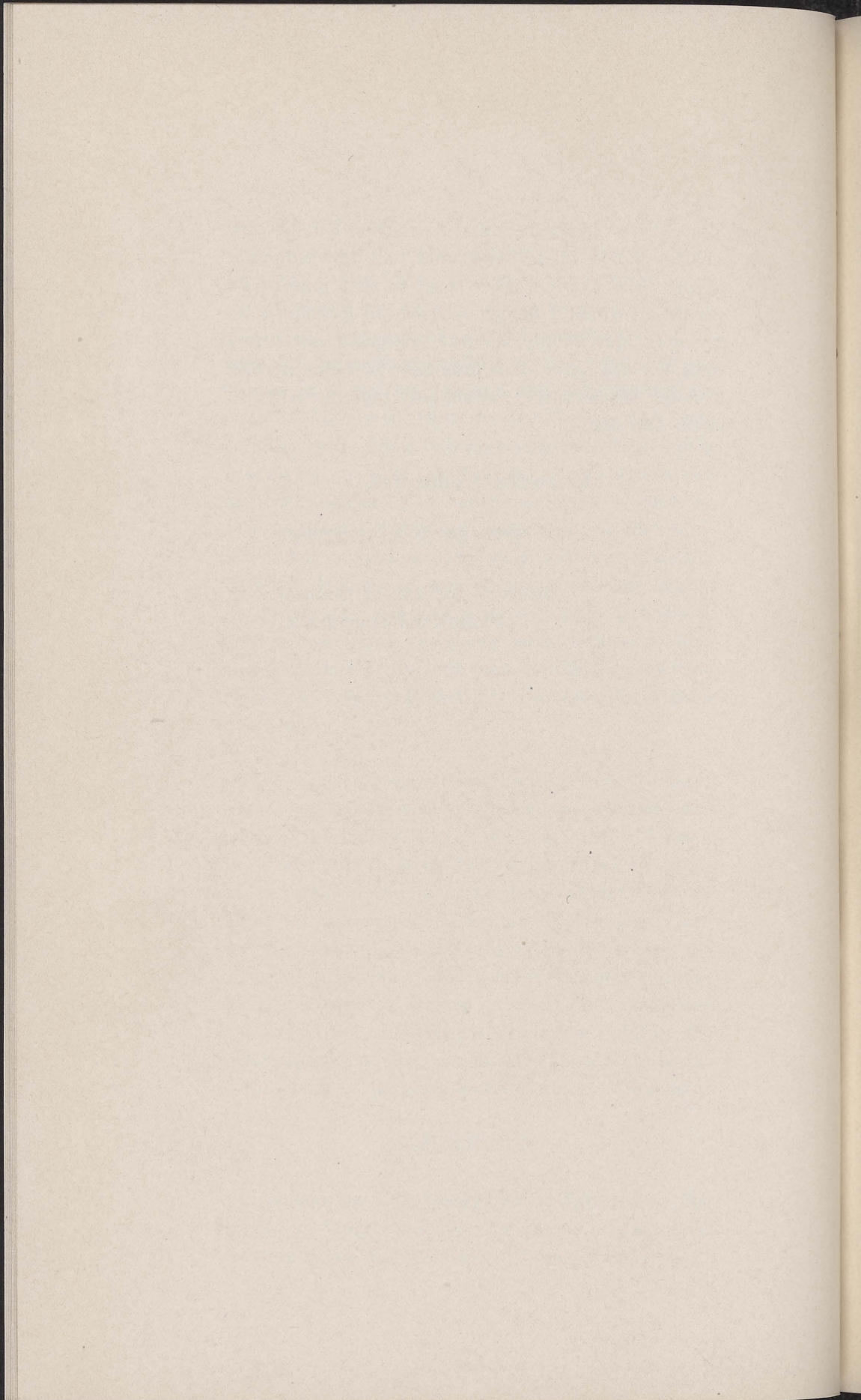
In conclusion it is respectfully submitted to this Honorable Court that the Judgment of the Trial Court in rendering verdicts in favor of Miss Anna

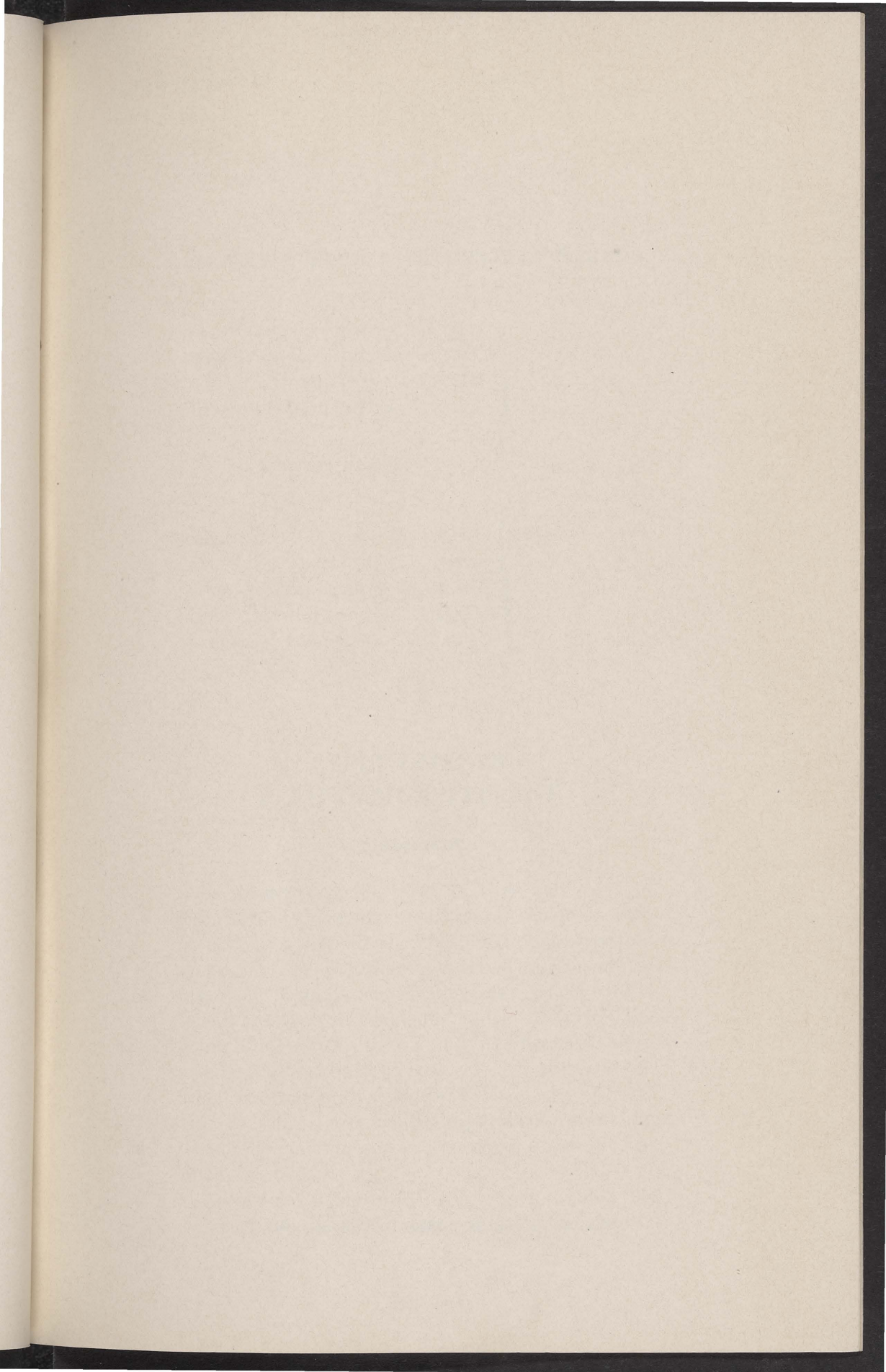
Kindervater (daughter) and Mrs. Anna Kindervater (wife) should be affirmed and that the judgment of the Trial Court with respect to that part of its verdict in which it denied recovery to Rudolph Kindervater, individually, should be reversed with directions for the entry of a judgment in favor of said Rudolph Kindervater, individually together with interest and costs.

Respectfully submitted,

HENRY H. EISENBERG,

Attorney for and of Counsel with
Plaintiffs-Respondents.





Karkus Brothers, Inc.  Perth Amboy, N. J.

12 FEB.T.1938

13 FEB.T.1938

New Jersey Court of Errors and Appeals

ANNA KINDERVATER (by her next friend Rudolph Kindervater),
ANNA KINDERVATER, individually and RUDOLPH KINDERVATER, individually,

Plaintiffs-Respondents,

vs.

MOTORISTS CASUALTY INSURANCE Co., (also known as the Motor Club Insurance Company) and now known as the Atlantic Casualty Insurance Company,
Defendant-Appellant.

Action at Law.

On Appeal from
New Jersey
Supreme Court.

**REPLY BRIEF OF
DEFENDANT-APPELLANT.**

Statement.

As appears by the state of case and brief of plaintiffs-respondents filed herein, the main case involves an appeal by the defendant-appellant from adverse judgments entered against it in favor of Miss Anna Kindervater by her next friend Rudolph Kindervater and in favor of Mrs. Anna Kindervater, individually. In the trial court, a judgment was entered in favor of this defendant-appellant and against Rudolph Kindervater, individually, and the said Rudolph Kindervater, individually has taken a cross-appeal herein (Case, pp. 1, 5a, 5b).

Accordingly, this reply brief will be divided into two sections, the first being a reply to the answer-

ing brief filed by the plaintiffs-respondents, Miss Anna Kindervater by her next friend Rudolph Kindervater and Mrs. Anna Kindervater individually, and the second being an answer to the brief of Rudolph Kindervater, individually, on his cross-appeal.

REPLY BRIEF.

Most of the contentions and arguments raised by plaintiffs-respondents have been anticipated and argued by this defendant-appellant in its main brief but there are several matters which require a reply.

I.

Defendant-appellant has already shown that the decision of this Honorable Court in the case of *Kindervater v. Motorists Casualty Insurance Co.*, (1936) 117 N. J. L. 131, does not determine the rights between the parties hereto, because in that case the only question for this Honorable Court on appeal was, whether the trial court erred in non-suiting the Kindervaters because they had issued an execution against the assured and had *ordered* it to be returned satisfied. That was the only ground of appeal. It must be remembered that in that case, the defendant insurance carrier had not yet put in its defense, because the trial court granted its application for a non-suit at the close of plaintiffs' case.

The learned trial judge herein, in discussing the effect of the former decision, wherein Chancellor Campbell stated—

“Finally respondent urges what appears to be tantamount to the proposition that the contract of insurance is void and unenforceable

by any and all parties because of the finding of the Supreme Court in *Brodsky v. Motorists Casualty Insurance Co.*, 112 N. J. L. 211, affirmed by this court, 114 Id. 154. But this is not so."

disposed of plaintiffs-respondents' contention that the opinion of Chancellor Campbell determined their rights on the policy and that they were not barred from recovering, said:

"However in view of the fact that the case was before the Court on appeal from a judgment of non-suit granted at the close of plaintiffs' case, and before the question of assumption of liability was so presented to the trial court as to become a part of the record before the Court of Errors and Appeals, I do not understand the opinion of that court to go any further than a decision that its ruling in the Brodsky case is neither *res judicata* of the issue involved in the case at bar nor does it establish the law of the instant case. So far as this litigation is concerned, the Brodsky case must be considered wholly distant and irrelevant" (Case, pp. 45, 46).

It is submitted that Judge Cleary's opinion is correct so far as it discusses the effect of the Chancellor's statement.

Plaintiffs on page 3 of their brief contend that the previous decision of this Honorable Court in the *Kindervater* case is *res adjudicata* so far as this case is concerned and respectfully request this Court to review the state of case and briefs filed therein, citing the case of *Camden, Atlantic & Ventnor Land Co. v. Ventnor City, et al.*, *Same v. West Jersey & S. R. Co., et al.*, (1929) 106 N. J. L. 125, 131.

Now what is shown by an examination of the papers in the former appeal? Resort should be made only to the State of Case, naturally, because that is the record and based on what the appeal

was. The testimony therein was short; the plaintiffs proved their judgments, proved that execution had been issued and returned unsatisfied at their own request, proved that the judgments were unpaid and that the assured had no funds with which to pay them, and proved (by stipulation) that the assured was covered by the policy sued upon. The plaintiffs then rested and the motion for a non-suit was made by the defendant insurance carrier, on the sole ground that the plaintiffs were not comprehended within the meaning of the policy protecting judgment creditors because no execution had been issued and returned unsatisfied against the assured, a condition prerequisite to recovery against the insurance carrier. The motion was granted.

Four grounds of appeal were alleged by the plaintiff therein and *each one cited error in the court for granting the non-suit.*

Now how can it be said that the issues in the former *Kindervater* suit are similar to the ones herein so that the doctrine of *res adjudicata* can be brought into play? And even if the opinion of Chancellor Campbell cited by plaintiffs-respondents herein to support their plea of *res adjudicata* did stand for what these plaintiffs-respondents insist it does stand for, is not that part of the opinion merely *obiter dictum*? It does seem so because already stressed, the only question before this Court in the former *Kindervater* appeal was whether the trial court had or had not committed error in non-suiting the plaintiffs because an execution had been returned unsatisfied against the assured, not because of his insolvency or bankruptcy, but because the plaintiffs had requested the sheriff to so return it.

It is therefore respectfully submitted that the holding that the former *Kindervater* decision was

not, and could not be, *res adjudicata* herein is correct.

On page 4 *et seq.*, of plaintiffs-respondents' brief, they contend that this Honorable Court had before it in the former *Kindervater* appeal all the issues involved in the case *sub judice* due to the fact that the issues making up the defense herein were included in motions and answering pleadings in that former case. *The appeal as prosecuted by themselves was solely on the question of the non-suit on the plaintiffs' case because of our alleged improper issuance of execution, and we did not put in our defense by reason of such non-suit.*

However, on the re-trial before Judge Cleary, appellant put in its proofs for the first time by way of the stipulation of facts, so that the record before this Honorable Court is entirely different from the first record, and this matter is not *res adjudicata*. Moreover, it must not be overlooked that this case was sent back for a re-trial *de novo*, so how can it now be contended that the judgment of this Honorable Court on the first appeal is *res adjudicata*?

II.

Point two of plaintiffs' brief is devoted in the main to the proposition that the instant case is not governed or controlled by the decision of the Supreme Court in *Brodsky v. Motorists Casualty Insurance Co.*, (1933) 112 N. J. L. 211, affirmed by this Honorable Court (1935) in 114 N. J. L. 154; that there is a distinction between that case and the case *sub judice* and that the decisions in both cases rest on different grounds. That the *Brodsky* case, while not *res adjudicata* herein, is controlling on the facts, has been gone into detail

in defendant-appellant's main brief and need not be gone into here.

Plaintiffs on pp. 8 and 9 state that the *Brodsky* decision was predicated on all or either of certain stated theories therein set out. The first two theories aver that the statement of assumption of liability was procured by George Brodsky (the plaintiff in that Supreme Court decision) through his agents or representatives. Not so.

The opinion of Mr. Justice Parker in the Supreme Court in *Brodsky v. Motorists Casualty Insurance Co.*, *supra*, is barren of any question of agency. He holds that the assumption of liability by the assured was a violation of the policy and excused performance by the insurance carrier of its obligations therein. He does not consider who obtained the assumption of liability, whether there was any agency or any thing similar thereto. All he considered was the action of the assured in assuming liability, for after all, the court was only interested in what the assured did and not what the plaintiff did. It cannot be denied, that if the assured could not recover, the plaintiff could not recover, and the test was what the assured did, which contravened the obligations imposed upon him under the policy.

Plaintiffs then on page 10 of their brief point out certain statements made by the carrier in its *Brodsky* brief to sustain its alleged contention that Moe Brodsky, alleged to have obtained the statement from the assured admitting liability, was the agent of the plaintiff George Brodsky, citing the case of *Tischler v. Steinholtz*, 99 N. J. L. 149, 152. There is nothing in the stipulation of facts to justify this contention, nor did Judge Cleary find any such agency. A citation from the brief follows, as quoting from the above case:

“Such proof of defendant’s ownership of automobile driven on a public highway raises a presumption of fact that such automobile was in the possession of the defendant, if not personally, then through his servant, the driver, and that such driver was acting within the scope of his employment * * *.”

Now without going into a deep discussion of that brief because same will only involve other matters alien herein, and which is not a part of the record, it is sufficient to say that *this presumption of agency applies only to the relationship between owner and operator of his car*. That is as far as it goes. It must be kept in mind that any question of agency of the one obtaining the statement for the plaintiff in the *Brodsky case*, George Brodsky is not dependent on an owner-operator status. We are not dealing with agency in the operation of a car owned by another. We are dealing with the question of agency in the obtaining of a statement, and in such a case there definitely is no presumption of agency as in the relationship of the owner and operator of an automobile. In fact, there is a presumption that a person is acting for himself and not as agent for another. 2 *Corpus Juris*, sec. 647, pp. 919, 920. The appeal in the *Brodsky case* was barren of evidence of any agency, and this, as already shown in main brief, was strenuously argued by the counsel for George Brodsky. Nevertheless, the Supreme Court held that George Brodsky, (innocent as he was in the procurement of the statement as argued by his counsel) could not recover from the insurance company, *the assured having breached the policy by assuming liability*. In fact, therefore, the plaintiff George Brodsky was as innocent in the matter as the present Kindervaters. Their situations are not only analogous, but four-square.

On page 13 of their brief, plaintiffs-respondents set forth six reasons why the policy should be held valid as to them regardless of the breach committed by the assured Simoni in assuming liability for the accident. Complete answers to these arguments have already been gone into in detail in the main brief of this defendant-appellant, namely, that the innocence of the Kindervaters is immaterial, as was the innocence of George Brodsky in the case of *Brodsky v. Motorists Casualty Insurance Co., supra*, the statement or breach need not be prejudicial and the only question is whether there has been a breach by the assured, that the statement admitted liability in the "*above mentioned accident*" (accident occurring on July 11th, 1931), in which "*above mentioned accident*" the Kindervaters were hurt, that liability is avoided not by reason of any forfeiture clause but because of a breach of condition.

Stress should be placed on the wording of the statement assuming liability on the part of the assured. (Case, p. 19.) The statement commences with an admission that the assured collided with the Brodsky car and injured the passengers therein. So far there is no admission of liability or fault. It goes so far as admitting that an impact and injury occurred. The rest of the statement is the damaging one, stating that the accident happening at the given location occurred on July 11th, 1931 and that he admits liability *in the above mentioned accident*. It does not state that he admits liability to the Brodskys and no one else. He admitted fault in an accident and of course, the Kindervaters being passengers in the assured's car, it is hard to conceive how an *admission of fault in the above mentioned accident* is not an admission of liability to them, even if it is necessary that the admission be directed to them as contended by plaintiffs-respondents.

Plaintiffs-respondents cite the case of *Dziadosc, et al., v. American Casualty Co.*, (E. & A.) 114 N. J. L. 137 as authority for the proposition that the statement was not binding on the Kindervaters because the assured was not the agent of the Kindervaters. This argument was anticipated by this defendant on page 28 of the main brief. Now plaintiffs-respondents are attempting to close any avenue of an insurance carrier in proving a breach of a policy by an assured where such breach consisted in a statement of the assured, as distinguished from an act. In the *Dziadosc* case, the evidence sought to be introduced was a statement made by the assured to the company's claim manager that he, the assured, had carried passengers for hire in his car, violative of the policy. Of course, this was hearsay and was objectionable. But here, this insurance company is not seeking to introduce as evidence a statement by the assured to the effect that he had made a statement assuming liability. The insurance carrier is here introducing the best evidence of the alleged breach, the statement itself, not hearsay evidence that the assured had made such a statement. The question of agency is of course unimportant for it cannot be doubted but that the assured is never the agent for the injured party, but it is also true and undoubted that the rights of the injured party are derivative of the rights of the assured against the insurance company. It is therefore respectfully submitted that the *Dziadosc* case and the issue herein is totally distinguishable.

Plaintiff then cites *Finkel v. Western Auto Insurance Co.*, (Mo. 1930) 224 Mo. App. 285, 26 S. W. (2d) 843, on page 18 of their brief to show that even though, as they allege, the assured was remiss in the performance of his obligations to the Brodskys, still he was not remiss in the performance of his obligations to the Kindervaters and

the policy covers their judgments. The citation from that case merely begs the question, assuming that such is the law. The statement of the court says that a recovery may be defeated as to a particular loss in connection with which the assured was remiss in the performance of his obligations under the contract. (Respondents' brief, p. 19.) Now the question is whether the assured was remiss in his obligations as to the losses sustained herein, even under the applicability of this case. It has already been shown that the admission of fault was not limited to the Brodskys or the Kindervaters or any other particular person. The admission of fault was *in the accident*, described in the statement, in which the Kindervaters were involved. This is a complete answer to the assertion that the assured was not remiss in his obligations as to the loss herein.

Of course, this defendant respectfully urges this Honorable Court to adopt the views of Mr. Justice Parker in the case of *Brodsky v. Motorists Casualty Insurance Co.*, (*supra*) and those of Circuit Judge William A. Smith in the case of *Rose and Moe Brodsky v. Motorists Casualty Insurance Co.*, (Opinion on p. 19 of main brief of defendant-appellant) in holding that the assumption of the liability by the assured was a breach of the policy and avoided liability on the part of this insurance carrier on the policy.

In discussing the effect of a breach of a condition, the decision of the Court of Appeals of Maryland in the case of *American Automobile Insurance Co. v. Fidelity and Casualty Co. of New York*, 152 Atl. Rep. 523, is germane thereto. Part of the opinion has already been cited on pages 13, 14 and 15 of the insurance company's main brief, but the following excerpt is important also (page 425):

“It cannot now be questioned that in this state policies of insurance are construed as other contracts and that when the language employed by the parties is clear and free from ambiguity, it is to be given its usual and ordinary significance thereby effectuating the intent of the parties as thus plainly expressed. It is not for the court to conclude the matter by determining whether or not a clear and plain provision of the contract which is not contrary to or forbidden by law is a proper or necessary part of the contract. That is a matter for the parties themselves. The law presumes the insurer and insured understood their contract as executed and every intelligible condition embraced therein was inserted by design and intended to accomplish some material purpose; and it has been held repeatedly by this court that when the terms of a contract are clear and unambiguous, courts have no right to make new contracts for the parties; or ignore those already made by them, simply to avoid seeming hardships; and that insurance contracts are construed with the view of arriving at the intention of the parties as gathered from the whole instrument * * *. The provision of the contract agreed to by the parties and expressed in unmistakable terms was that the assured should not voluntarily assume any liability or interfere in any negotiation for settlement or in any legal procedure or incur any expense or settle any claim except at his own cost, without the written consent of the company previously given. That was one of the conditions of the contract, not only by the acceptance of the policy but by the following provision in the policy: ‘This policy is issued by the company subject to the following conditions, limitations and agreements which are a part of this policy, and to which assured, by the acceptance of this policy, agrees’, after which last quoted provision, the condition as to the assured’s assumption of liability is set forth”.

The provision against the assumption of liability in the above case and the case *sub judice* is strikingly similar and for all purposes, identical (Case, p. 29). This policy also commences with the statement that the company does agree in consideration of the premium herein, the schedule of declarations and *compliance with the provision* hereinafter mentioned to insure, etc. This is also practically identical with the wording of the Maryland policy discussed above.

That the breach of a condition, even though not prejudicial, is enough to avoid liability on the policy is borne out by another Maryland case, *Employers Liability Assurance Corp. v. Perkins*, (Court of Appeals 1935) 181 Atl. Rep. 436, 442. Said the court:

“On principle and by the weight of authority the general rule is that, without reference to whether or not the assurer sustained any pecuniary loss or prejudice by the failure of the assured to forward to the company or its duly authorized agent the documents served upon the assured, this failure to fulfill a condition upon which performance by the assurer is dependent was a breach of the contract which denied the assured a right of recovery on the contract. *Lewis v. Commercial etc. Co.*, 142 Md. 472, 478-481, 121 A. 259, 28 A. L. R. 1287; *American etc. Co. v. Fidelity and Casualty Co.*, 159 Md. 631, 637, 640, 152 A. 523; *American Casualty Co. v. Purcella*, 163 Md. 434, 437-439, 163 A. 870; *Metropolitan Casualty Ins. Co. v. Colthurst*, (C. C. A.) 36 Fed. (2d) 559, certiorari denied in 281 U. S. 746, 50 Sup. Ct. 351, 74 L. Ed. 1158; *Kana v. Fishman*, 276 Mass. 206, 176 N. E. 922; *Stacey v. Fidelity &c. Co.*, 114 Ohio St. 633, 151 N. E. 718; *Id.*, 21 Ohio App. 70, 152 N. E. 794; *Heller v. Standard Acc. Ins. Co.*, 118 Ohio St. 237, 160 N. E. 360; *Meyer v. Iowa Mut. Liability Ins. Co.*, 240 Ill. App. 431; *Oakland Motor Co. v. American Fidelity*

Co., 190 Mich. 74, 155 N. W. 729; cases collected in 76 A. L. R. pages 191-195, 201-205 (general rule).”

This defendant does not dispute the law of the cases cited by plaintiffs that insurance contracts are construed strictly against the insurer; that forfeiture clauses are favored in law; that where there is the slightest ambiguity, such ambiguity is construed against the insurer, etc. But how is that applicable herein? Much of the main brief has already, in addition to what has been set out here, been devoted to a showing that there was no ambiguity in the policy conditions here. Mr. Justice Parker in *Brodsky v. Motorists Casualty Insurance Co.*, (*supra*) and Circuit Court Judge William A. Smith in *Rose and Moe Brodsky v. Motorists Casualty Insurance Co.*, (*supra*) encountered no ambiguity and on the contrary found a clear violation and excuse of performance by this insurance carrier.

**BRIEF IN ANSWER TO CROSS-APPEAL OF
RUDOLPH KINDERVATER, INDIVIDUALLY.**

The following part of the brief is devoted to an answer by the defendant-appellant Motorists Casualty Insurance Company to the brief of the plaintiff Rudolph Kindervater, individually on his cross-appeal from the judgment of the Supreme Court holding that said plaintiff had no cause of action against this insurance carrier for the judgment recovered by him against the insured, which judgment was confined to moneys spent for medical care in an effort to cure his wife and daughter, for loss of services, consortium, etc.

The trial court held as follows:

“The policy insured Simoni against loss by reason of the liability imposed by law

upon him for damages on account of bodily injury and damages to property including the loss of use of such property. Obviously, the husband received 'no bodily injury' from the loss of his daughter's earnings, nor from the loss of his wife's consortium, nor is his wife or his daughter 'his property' so that an injury to their persons is an injury to his property'' (Case, p. 49).

The plaintiff, Rudolph Kindervater, is not comprehended within the terms of the policy and therefore his judgment in the amount of \$800.00 representing compensation for loss of earnings, services and consortium is without the policy provision.

The policy in the case at bar insured the assured against loss by reason of the liability imposed by law upon the assured for damages on account of:

9. "(a) Bodily injuries, including death
* * *,"

"(b) Damage to property including the
loss of use of such property
* * *,"

The New York Court of Appeals had before it the identical issue now before this Court. In *Brustein v. New Amsterdam Casualty Co.*, (1931) 255 N. Y. 137, 174 N. E. 304, a husband obtained a judgment against an assured for the loss of consortium of his wife as the result of the negligent operation of his automobile by the assured, and thereafter instituted suit on the policy of insurance against the insurance company under section 109 of the New York Insurance Law which is identical with P. L. 1925, Chapter 153 of the Laws of New Jersey. The policy in the New York case was worded exactly as in the case at bar. Judge Pound, writing the opinion, stated that:

“The policy in suit covers accidents resulting in ‘bodily injuries or death’. The language limits the coverage to such injuries only and does not include all injuries to person or personal injuries as the term is defined by General Construction Law, section 37-A”

“* * * Obviously the husband received no ‘bodily injury’ from the loss of his wife’s services; nor is his wife his property so that an injury to her person is an injury to his property.”

“The courts below have held that the policy is inconsistent with the requirements of section 109 above quoted and that it must be deemed by operation of law to include a provision insuring the owner against liability for death or injuries to person or property, without limitation or qualification, and so to cover plaintiff’s cause of action for injuries to person as above defined. We find no warrant in the statute or in its history for such a conclusion. * * *”

The Court in a unanimous opinion reversed the court below and held that one of the primary purposes of this Statute was to extend the coverage of the policy, if issued, to those operating an automobile with the permission of the owner, and:

“* * * In the absence of a direct legislative mandate that the owner of a car must insure against all such injuries, a reasonable construction of the provision in question is that the policy must be read as if it contained an extended liability clause, but that it may be limited in amount and coverage as the parties may agree”.

The policy was held not to cover a claim by the husband for loss of services. To the same effect is *New Amsterdam Casualty Co. v. Nadler*, 115 Ohio State 472, 154 N. E. 736; (Ohio Supreme Court 1926). In that case, the court in construing the Ohio Statute held that it did not cover the claim of loss of consortium by the husband. It

cites and quotes with approval the case of *Williams v. Nelson*, 228 Mass. 191; 117 N. E. 189, where the court held that:

“Bodily injury, * * * of any person cannot reasonably be held to include the kind of loss suffered by the husband.”

In *Smith v. Red Top Taxicab Corp.*, 111 N. J. L. 439 (E. & A. 1933) this Honorable Court held that claims for medical expenses and loss of earnings incident to a personal injury are not separate causes of action but are incidents of the main cause of action, the personal injury. In the course of its opinion, the court said that:

“In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damages caused to him by the defendant’s negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession and has been deprived of the capacity of earning by the wrongful act of the defendant. *Vicksburg and Meridian Railroad Co. vs. Putnam*, 118 U. S. 545; 7 Sup. Co. 1; 30 L. Ed. 257. The personal injury is the gist of the action. The other elements of damage are incidents only of this main cause of action. The loss of time and diminution of earning power, in consequence of personal injuries, are to be considered in estimating the damages, but are not classified as property damage. *Sibley v. Nason*, 196 Mass. 125; 81 N. E. Rep. 887; 12 L. R. A. (N. S.) 1173; *Mahoney v. Boston Elevated Railway*, 221 Mass. 116; 108 N. E. Rep. 1033.

“Nor can disbursements made for physicians’ services be properly classified as damage to property, so as to make the cause of action divisible. They are made necessary

in the treatment of the personal injuries sustained, and are damages directly flowing therefrom. In such case claimant does not suffer injury both to his person and his property by the same wrongful act. As pointed out, the gist of the action is a trespass to the person, not a trespass to goods. And these are clearly not items of damage resulting from a trespass to goods."

So in the case at bar, the husband's claims flow from the main cause of action, the injury to his wife. They cannot be construed as damage to property and obviously are not within the term "bodily injury" so that plaintiff Rudolph Kindervater, individually has absolutely no action against this defendant in the insurance policy or under P. L. 1924, c. 153.

The legislature recognized the soundness of the *Brustein* opinion and in order to obviate the distinction therein made, enacted P. L. 1931, c. 194, which amends P. L. 1924, c. 153, by expressly providing that a policy of insurance must include the claim for loss of services and even though such provision is not included in the policy, the insurer shall, notwithstanding, be deemed to insure against such loss or damage.

The policy in the case at bar was written on September 17, 1930. P. L. 1931, c. 194, which corrected the situation above described, became effective on April 21, 1931, which date was several months later than the date of the issuance of the policy. Of course, the amendment is not retroactive and cannot effect a contract written prior to its enactment. To hold otherwise, would impair the obligation of a contract.

What has already been said as to the husband's judgment is of course applicable to the recovery by Rudolph Kindervater as the father of Miss Anna Kindervater and that also represents loss

of earnings and services and is within the same category.

By this, Rudolph Kindervater is therefore not comprehended within the policy of insurance or the statute at the time of the issuance of the policy and therefore he has no cause of action against this defendant.

The trial court relied on *Smith v. Red Top Taxicab Co.*, 111 N. J. L. 439, as authority for the entry of judgment in favor of this insurance carrier and against the plaintiff Rudolph Kindervater, individually.

Plaintiffs-respondents in their brief cite a number of cases holding that the damages recovered by Rudolph Kindervater for medical expenses, loss of services, etc., is within the purview of this insurance policy.

It cannot be denied that there are cases supporting the contention of plaintiffs elsewhere, but at the same time it must be admitted that there is a sharp conflict of authority on the precise issue involved herein. See annotation in 105 A. L. R. 1208 *et seq.*

However, we are bound in this State by the decision of this Honorable Court in the case of *Smith v. Red Top Taxicab Co.*, *supra*.

Plaintiffs-respondents go into a lengthy discussion of the case of *Brustein v. New Amsterdam Casualty Co.*, *supra*, as distinguished by the courts of states other than that of New York. The *Brustein* case is a decision of the New York Court of Appeals. It is submitted that the best way to determine the meaning of this case is to resort to an interpretation of that case by the New York courts.

Thus, in the *Roche v. United States F. & G. Co.*, (1936) 247 App. Div. 335, 247 N. Y. Supp. 38, affirmed in (1936) 273 N. Y. 473, 6 N. E. 410 (Court of Appeals), the Appellate Division which

was affirmed by the Court of Appeals in a memorandum opinion, said:

“However, in the action by the father of the injured person, the point raised by the defendant that this plaintiff has no cause of action against the defendant under section 109 of the Insurance Law for the reason that the policy covered only ‘bodily injury’ seems to be well taken.

“In the case of *Brustein v. New Amsterdam Casualty Co.*, 225 N. Y. 137, 141, 174 N. E. 304, 305, an action was brought by the husband to recover the amount of a judgment for loss of services resulting from injuries to the wife. The policy insured against loss in respect to ‘bodily injuries or death.’ The court said: ‘The policy in suit covers accidents resulting in “bodily injuries or deaths.”’ The policy limits the coverage to such injuries only and does not include all injuries to person or personal injuries as the term is defined by General Construction Law (Cons. Laws et. 22) section 31-a. Obviously, the husband receives no ‘bodily injury’ from the loss of his wife’s services; nor is his wife his property so that an injury to her person is an injury to his property.

“It is urged by plaintiff Thomas F. Roche that the *Brustein* case does not apply because the policy in this case under consideration is broader in scope and more nearly approaches the language of the policy in *Floyd Consolidated Indemnity & Insurance Co.*, 237 App. Div. 190, 194, 261 N. Y. S. 61, 65 (Second Dept.). There the language was ‘on account of death or bodily injuries,’ but went further by reading and including loss arising from the liability and responsibility imposed by law on the assured, as owner for death or *injuries to persons* or property resulting from negligence in the operation of such motor vehicles as any of them. There the Court said (237 App. Div. 190 at p. 194, 261 N. Y. S. 61, 65): If the policy had agreed to indemnify for ‘bodily injuries’ only, the appellant

would be correct in disclaiming liability for the husband's loss (*Brustein v. New Amsterdam Casualty Co.*), 255 N. Y. 137 (147 N. E. 304), but the broader language here, which includes loss for 'injuries to person' renders it clear that the loss in question was covered by the policy. It is settled law that the words 'injuries to person' include a husband's loss of the services of the wife.

"The policy with which we are concerned reads 'to pay as damages imposed upon him by law for bodily injury * * * accidentally sustained', etc.

"An action for the loss of a son's services and for medical expenses must come under the same classification as that of a husband's action for loss of his wife's services and medical expenses * * *."

It is apparent then that the distinction is whether the policy covered "bodily injury" or "injury to person".

It is therefore submitted that inasmuch as the policy involved herein covered damages on account of "bodily injuries" and not "injuries to person", the decisions in the *Brustein* case and the *Roche* case are the ones to be followed herein and those coupled with the case of *Smith v. Red Top Taxicab Co.* decided by this Honorable Court are the cases governing the instant situation.

Plaintiffs-respondents cite the case of *Kula v. Jersey Mutual Casualty Insurance Co.*, 8 N. J. Misc. Rep. 929 (Supreme Court 1930). Counsel apparently anticipated the arguments of this Insurance Company by stating on p. 39 of his brief that the decision in the *Kula* case rests upon a statute relating to taxicabs which was found in Laws of 1926, c. 231, p. 383.

Of course, that case is dependent on that statute and is wholly removed from the discussion herein.

Our legislature by the Laws of 1931, p. 194, amended the insurance laws of this State by providing that policies of insurance hereinafter written should include consequential damages such as are involved herein. Apparently this amendment was enacted so as to overcome the difficulty arising in the *Brustein* case in New York. If the *Kula* case was authority for the proposition advanced by these plaintiffs, there would have been no need for such an amendment. Apparently, the legislature in its wisdom saw that the *Kula* case was not binding on ordinary policies of insurance as here and enacted the amendment.

Furthermore, even if comprehended within meaning "bodily injuries", the question arises whether the judgment of \$800 or part of it awarded to Rudolph Kindervater can be recovered from this insurance carrier under the policy limitation of \$5,000 to one person, \$10,000 in one accident to more than one person. Of course, the judgment of Anna Kindervater was for more than \$5,000 and it is conceded by all parties hereto that \$5,000 is the limit of such recovery as against this company. Inasmuch as the medical expenses, loss of services, etc., are incidental to the personal injury claim, they merge with the amount recovered under said personal injury claim, and inasmuch as Anna Kindervater has already recovered the extent of the full coverage of the policy, so much of the \$800 as represents medical expenses incidental to her cure, cannot be recovered under any circumstances.

Under the case *re Employers' Liability Assur. Corp., Ltd., etc.*, (1934) 180 La. 406, 156 So. 447, etc., the facts were: Miss Sentilles, an infant, was injured by an automobile owned and operated by Frey Bros. Parents of infant obtained verdict for personal injuries (\$30,000) and another for medical expenses (\$6,457.09), loss of services,

etc. The car was insured by the insurance carrier but the policy carried a limitation of \$10,000 for bodily injuries of one person and a limit of \$20,000 for any one accident. The insurance company deposited \$10,000.00 and interest in court and asked the court to determine whether more was due under its policy. The trial court held that the limit of liability under its policy is \$10,000 including personal injuries, loss of services, etc. The court on page 450 of Southern Reporter says:

“The appeal of J. D. Sentilles (father) brings up his contention that the limit of liability of the insurance company is \$20,000, because two persons suffered a loss in consequence of the accident: that is, because Miss Sentilles suffered a loss of \$30,000 for which the Sentilles claim in the insurance company is liable to the extent of \$10,000 and J. D. Sentilles suffered a loss of \$6,457.09, for which also he claims the insurance company is liable. In support of the argument, the attorneys for the Sentilles cite several decisions to the effect that the liability of the insurer, under a policy like that of the Employers' Liability Assurance Corporation is not limited to the liability for the damages due to the party who has suffered the bodily injuries, but includes also the legal liability of the insured for any loss suffered by the parent or guardian, or husband, as the case may be, of the party injured, for medical, surgical, or other such expenses incurred because of the bodily injuries. The cases cited are *Psota v. Long Island Railroad Co.*, 246 N. Y. 388, 159 N. E. 180, 62 A. C. R. 1163; *Price v. National Surety Co.*, 246 N. Y. 586, 159 N. E. 662; *Kula v. Jersey Mutual Casualty Insurance Co.*, 107 N. J. Law 343, 153 A. 594; *Antichi v. New York Indemnity Co.* (*MacIntyre v. New York Indemnity Co.*), 126 Cal. App. 284, 14 Pac. (2d) 598; *United States Fidelity and Guaranty Co. v. Baker*, 24 Ala. App. 247, 134 So. 894 and *Franklin v. Georgia Casualty Co.*, 225 Ala. 58, 141 So. 702.

“The decisions cited went no further than to maintain that, by the language of the clauses defining the coverage, in the policies of insurance then under discussion, which clauses were substantially like the coverage clauses in the policy now under discussion, the insurance company was liable, not only for the damages inflicted by the bodily injuries to the person injured, but also for the damages suffered in consequence thereof, even by the parent or guardian, or husband of the person who was bodily injured, for expenses incurred for medical or surgical treatment of the bodily injuries. *But the financial limit of the liability of the insurer for the legal liability of the party insured, was not discussed or considered in any of the cases cited.* It appears that in *Williams v. Nelson*, in 1917, 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918 D. 538, and again in *Brustein v. New Amsterdam Casualty Co.*, in January 1931, 255 N. Y. 137, 174 N. E. 304, it was held that a liability policy covering automobile accidents resulting in bodily injuries or death did not cover losses or expenses incurred by the injured woman’s husband, in consequence of the injuries. Because of the ruling of the New York Court of Appeals in the Brustein case, the superintendent of insurance of the state of New York sent out a circular to the insurance companies writing liability policies on automobiles, instructing the companies to use such language in their policies as to leave no doubt that they covered consequential damages, such as medical and hospital bills incurred, even by the husband or guardian of the person suffering the ‘bodily injuries’. The results of those instructions is that all standard liability policies of insurance on automobiles such as the policy now under discussion, are so worded as to cover all legal liability, including liability for consequential damages, such as for medical or hospital bills incurred by the parent or guardian or husband of the one who suffered the bodily injuries. *But that has nothing to do with the financial limits of the insurer’s lia-*

bility stated in the policy, such as \$10,000 of liability for damages resulting from bodily injuries or death of one person, or \$20,000 of liability for damages resulting from one accident causing bodily injuries or death to more than one person. The attorneys for the Sentilles argue that the language of the policy in this case may and should be interpreted to mean that the limit of the insurer's liability is not \$10,000 but \$20,000, where more than one person has suffered a loss, for which each has a cause of action for damages resulting from bodily injuries to only one person. But the language of the policy leaves no doubt that the limit of the insurer's liability is \$10,000, if only one person suffers bodily injuries or death, no matter how many persons may suffer a loss, for which each one of them may have a cause of action for damages, resulting from the bodily injuries or death of the one person. The limit of \$20,000 on the insurer's liability, for bodily injuries or death resulting from one accident, applies only where the accident causes bodily injuries or death to more than one person. The pertinent paragraph in the policy under the head of 'Agreements', is this: 'The Corporation's liability as respects injuries resulting from bodily injuries or death of one person shall in no event exceed the limit expressed for one person in item 5 (a) of the Declarations and subject to such amount for injuries resulting from the bodily injuries or death of one person, the total liability on account of any one accident causing bodily injuries or death to more than one person shall not exceed the limit expressed for one accident in said item 5 (a) of the Declarations.

"Item 5 (a) of the declarations is simply this: 'Legal liability for Bodily Injuries or Death Limit, One person Ten Thousand Dollars (\$10,000) Limit, One accident Twenty Thousand Dollars (\$20,000).

"Substituting the word 'damages' for 'injuries' the language of the policy is paraphrased thus: The corporation's liability as respects damages resulting from bodily in-

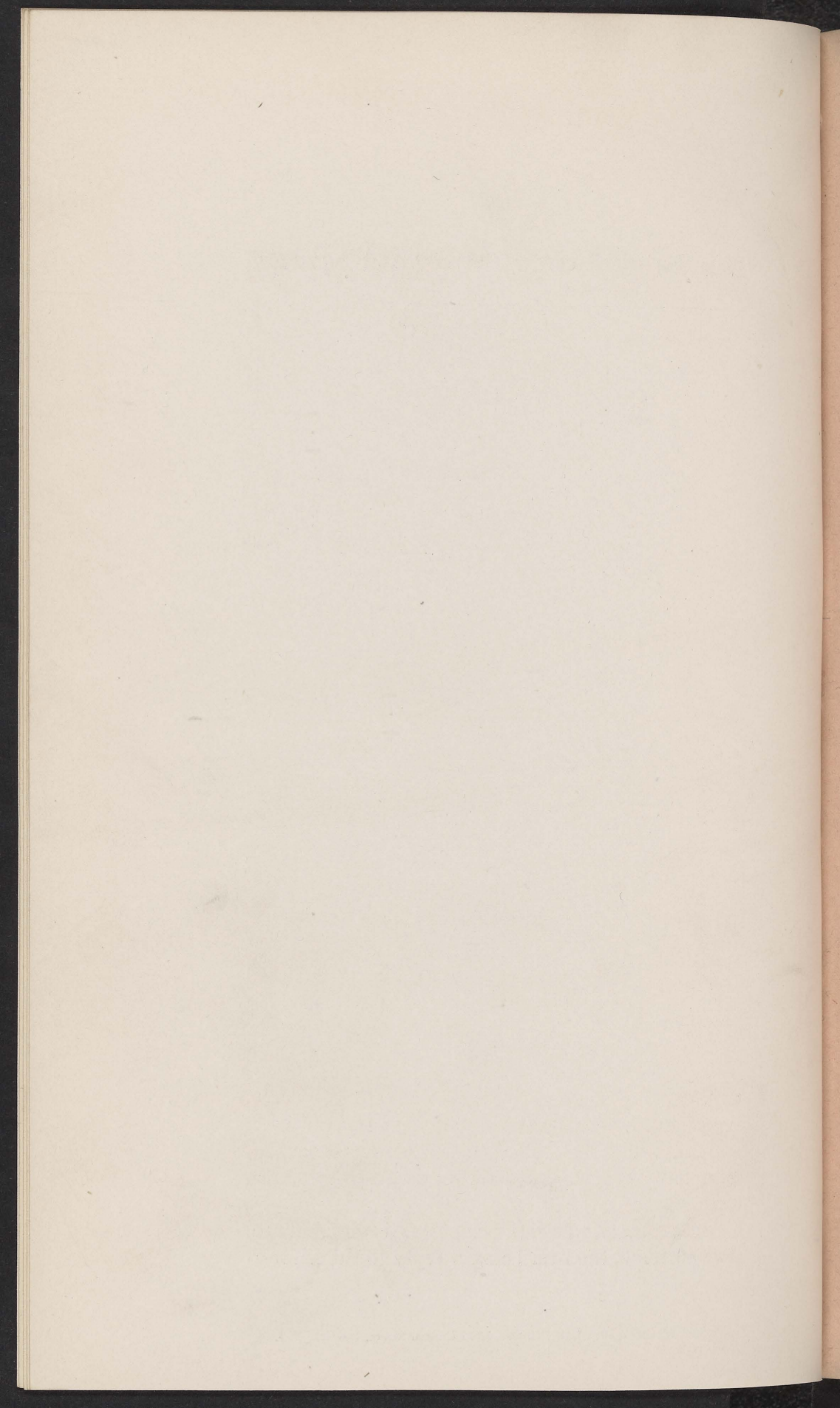
juries or death of one person shall in no event exceed \$10,000; and subject to that limitation for damages resulting from the bodily injuries or death to more than one person shall not exceed \$20,000. In other words, it is in only the case of 'one accident causing bodily injuries or death to more than one person' that the limit of the insurer's liability is increased from \$10,000 to \$20,000. It is not in the event that more than one person suffers damages, but it is in the event that more than one person suffers 'bodily injuries or death' that the limit of the insurer's liability is increased twofold 'on account of any one accident causing bodily injuries or death to more than one person'. The language of the policy leaves no doubt about that. The judgment appealed from, therefore, is correct in discharging the Employers' Liability Assurance Corporation from further liability beyond the \$10,000 and interest, which the corporation has deposited in court" (Italics ours).

Conclusion.

Wherefore defendant-appellant respectfully submits that the judgments in favor of Anna Kindervater by her next friend Rudolph Kindervater, and Anna Kindervater be reversed and the judgment in favor of this defendant-appellant and against Rudolph Kindervater individually, be affirmed.

Respectfully submitted,

HARRY GREEN,
Attorney for and of Counsel
with Defendant-Appellant.



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