

New Jersey Court of Errors and Appeals

EMMA McCUSKER,
Plaintiff-Appellee,
v.
COMMONWEALTH CASUALTY COM-
PANY,
Defendant-Appellant.

On Appeal.

NOTICE OF
MOTION TO DIS-
MISS APPEAL.

To

Messrs. SCHNEIDER & SCHNEIDER,
Attorneys of Appellant.

SIRS:

TAKE NOTICE that on Tuesday, the 21st day of May, 1929, at eleven o'clock in the forenoon (day-light saving time) or as soon thereafter as counsel may be heard, motion shall be made before the New Jersey Court of Errors and Appeals, sitting at the State House, Trenton, New Jersey, for an order dismissing the appeal taken in the above entitled cause upon the following grounds:

1. That no copies of state of the case have been served within twenty days of the opening of the term as required by rule 19A of the Court of Errors and Appeals.
2. That no briefs or points to be used on the argument of the appeal with citation of authorities have been served pursuant to the requirements of rule 20 of the Court of Errors and Appeals.

3. That the appeal taken in the above-entitled cause is without merit and frivolous.

Upon such motion, we intend to rely upon the affidavit hereto annexed and made part hereof.

Yours respectfully,

PATRICK J. O'CONNELL,
Attorney of Plaintiff-Appellee.

ALFRED BRENNER,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

<p style="text-align: center;">EMMA McCUSKER, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">COMMONWEALTH CASUALTY COM- PANY, <i>Defendant-Appellant.</i></p>	}	<p>On Motion to Dismiss Appeal. AFFIDAVIT.</p>
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State of New Jersey,)
County of Hudson,) ss.:

PATRICK J. O'CONNELL, of full age, being duly sworn, according to law, upon his oath deposes and says:

1. Emma McCusker, alleging that she was a passenger in a bus of the Public Service Co-Ordinated Transport when it collided with a bus owned and operated by the B & N Transportation Company, instituted suit in the New Jersey Supreme Court which was tried at the Union Circuit, resulting in a verdict being rendered on February

14, 1929, in the sum of \$12,500 against the Public Service Co-Ordinated Transport and B & N Transportation Co.

2. A rule to show cause why a new trial should not be granted was allowed to the Public Service Co-Ordinated Transport and submitted on brief in the Supreme Court at the present May term, decision thereon now pending.

3. A like application, I am informed, was made by the B & N Transportation Company and rule refused and thereafter an appeal taken into the New Jersey Court of Errors and Appeals. Although the time elapsed within which to file a bond as security pending appeal, no bond has been filed.

4. Owing to the failure of the B & N Transportation Company to file a bond, suit was instituted against the Commonwealth Casualty Company who had issued a policy of insurance to the B & N Transportation Company in the form provided for in the Kates Act of 1916, which permits suit to be directly instituted against the insurance company in the event that payment of the amount of the judgment is not made by the assured direct.

5. The complaint in such action against the Commonwealth Casualty Company alleged the issuance of the policy, that judgment had been recovered for an accident involving one of the buses insured thereby, that demand had been made for the payment of the judgment and which payment was not forthcoming, and demanding judgment for the amount of the insurance policy, the same being issued in the sum of \$5,000, besides costs of suit.

6. To this complaint, answer was filed generally denying the policy itself and alleging as the

only affirmative defense, that suit against the insurance company was prematurely brought because of an appeal pending on the judgment against the assured.

7. Notice was given to the attorneys for the insurance company of motion to strike out the answer and for summary judgment, and annexed to the notice was an affidavit setting forth the fact that judgment had previously been obtained against the B & N Transportation Company, that demand had been made for payment and that no payment having been made, suit was instituted directly against the Commonwealth Casualty Company, and further attached thereto was a photostatic copy of the policy of insurance previously issued.

8. Upon the motion, a brief affidavit was presented in behalf of the Commonwealth Casualty Company in which it was not denied that a policy of insurance had been delivered to the B & N Transportation Company, the only defense interposed being that the action was prematurely brought because of the pending appeal by the B & N Transportation Company and admission was made at the hearing that no bond had been filed by the B & N Transportation Company or by the Commonwealth Casualty Company in its behalf pending the determination of the appeal.

9. At the conclusion of the hearing, Honorable A. Dayton Oliphant, Circuit Court Judge, who heard the motion as Supreme Court Commissioner, held that the answer should be stricken out because it did not present a defense, as a suit could not be stayed against the insurance company unless it filed a bond or unless the B & N Transportation Company filed a bond staying further proceedings under the judgment; and upon agreement

of counsel representing Emma McCusker, said that he would make an order striking out the answer upon which judgment could be entered, and upon further agreement of counsel, would reopen the judgment if the B & N Transportation Company or the Commonwealth Casualty Company in its behalf filed a bond securing the judgment against the B & N Transportation theretofore entered, but notwithstanding such agreement of counsel and determination of the court, neither the B & N Transportation Company nor the Commonwealth Casualty Company have filed the bond referred to.

10. Instead of doing so, the Commonwealth Casualty Company took an appeal into this court from the summary judgment entered against the Commonwealth Casualty Company and from such judgment, the Commonwealth Casualty Company now appeals into this court.

11. The grounds of appeal are two in number and are as follows:

(1) The Circuit Court Judge sitting as Supreme Court Commissioner had no jurisdiction or authority to make the order striking out the answer of the defendant and entering summary judgment in favor of the plaintiff.

(2) The order made by the Circuit Court Judge sitting as Supreme Court Commissioner striking out the answer of the defendant and entering summary judgment was erroneously, improvidently and improperly made.

12. This question of jurisdiction was raised before Judge Oliphant who ruled that on motion to strike out an answer setting forth no defense, that the Circuit Court Judge as a Supreme Court Commissioner had the power under the rules of the Supreme Court to grant such motion but not the

right to enter a summary judgment; that therefore, if he determined that the answer did not set forth a defense, that without ordering the entry of judgment, he would abide by the rules and strike out the answer which would permit the Clerk of the Court to enter the judgment as of course, the time for filing the answer having expired. Following this determination, Judge Oliphant after the hearing determined that the answer did not set forth a defense and ordered the same to be stricken out and made an order, therefore, in the form of a postea merely adjudicating that judgment should be entered on the striking out of the answer without making a definite order to that effect. The Clerk of the Supreme Court upon this form of postea being transmitted to him, entered the judgment and taxed the costs.

13. The statement, therefore, that the Circuit Court Judge acting as Supreme Court Commissioner erroneously, improperly and improvidently made an order for the entry of summary judgment is incorrect as the effect of the order of the judge was to strike out the answer with a direction merely that summary judgment should be entered by the Clerk of the Supreme Court and there being no further answer filed setting up any defense, the Clerk of the Supreme Court was within his authority in entering the judgment.

14. It is self evident and an examination of the complaint and answer will clearly indicate, that there was no merit to the defense interposed to the suit instituted against the Commonwealth Casualty Company, but that such answer was filed and the appeal afterwards taken merely in the hope that the plaintiff should be prevented from collecting that portion of the judgment covered by the insurance policy pending an appeal taken by the

Commonwealth Casualty Company for the B & N
Transportation Company without bond being filed,
and by such dilatory tactics attempting to delay
the enforcement of a judgment without filing a
bond on appeal.

PATRICK J. O'CONNELL.

Sworn to and subscribed before me }
this 14th day of May, 1929. }

HYMAN H. COHEN,
Master in Chancery of N. J.

New Jersey Court of Errors and Appeals

<p style="text-align: center;">EMMA McCUSKER, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">COMMONWEALTH CASUALTY COM- PANY, <i>Defendant-Appellant.</i></p>	}	<p>On Motion to Dismiss Appeal.</p>
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MEMORANDUM OF APPELLEE.

Statement of Facts.

As shown by the preceding affidavit, suit was instituted by Emma McCusker against the Commonwealth Casualty Company in the New Jersey Supreme Court, the venue being laid in Hudson County.

The action was based on a policy issued pursuant to the Kates Act of 1916, requiring jitney bus owners to procure insurance which should have incorporated therein a provision that upon recovery of judgment against the assured an action could be instituted directly by the person injured for a recovery of the amount for which the policy was issued or the portion thereof represented by the judgment against the assured.

The Commonwealth Casualty Company issued such policy of insurance to the B & N Transportation Company against whom Emma McCusker recovered a judgment in the sum of \$12,500 which was in excess of the amount of insurance, the insurance policy being in the sum of \$5,000 and costs recovered as a part of the judgment.

To the complaint answer was filed generally denying the issuance of the policy and setting up as the only affirmative defense that the action was prematurely brought, because an appeal was then pending from the judgment against the B & N Transportation Company, such appeal having been taken by that Company from the Supreme Court into the Court of Errors and Appeals.

Notice of motion was given to strike out the answer and enter summary judgment. At the hearing upon this motion it was admitted that the policy sued upon had been issued and the only questions raised were

FIRST.—Whether the Judge of the Circuit Court sitting as Supreme Court Commissioner had jurisdiction to strike out the answer.

SECOND.—If the answer were stricken out, whether the Court could enter summary judgment, and

THIRD.—The Court had no authority to either strike out the answer or enter summary judgment, because of the affirmative defense set forth in the answer that the appeal aforesaid was pending.

Upon the third ground it was admitted that no bond had been filed by the B & N Transportation Company nor the Commonwealth Casualty Company in its behalf, securing the amount of the judgment if the appeal should be decided against it. The Court ruled that the answer did not set forth a meritorious defense and by order struck the same out. The Circuit Court Judge further ruled that he had no power to enter summary judgment, but that the Clerk of the Court could do so based upon the order striking out the answer. The Records of the Supreme Court will

disclose that the determination of the Circuit Court Judge was filed in the form of a postea ordering that the answer be stricken out, and adjudicated, but did not order that upon the striking out of the answer judgment should be entered for the amount of the policy and taxed costs. Such judgment was entered, but change was made in the Office of the Clerk of the Supreme Court so that the word "Postea" was elided and the word "Order" inserted below.

Appeal was then taken by the Commonwealth Casualty Company upon two grounds, both of which are to the effect that the Circuit Judge sitting as Supreme Court Commissioner had no authority first to strike out the answer and second to enter summary judgment.

Notice of motion was thereupon given to the attorneys for the Commonwealth Casualty Company that motion would be made before this Court to dismiss the appeal upon the ground that such appeal was without merit, was frivolous and upon the affidavit hereinbefore set forth, in which affidavit are set out the facts above related.

Argument.

Upon the second ground urged as a basis for the appeal it is conceded that the Circuit Judge sitting as Supreme Court Commissioner has no authority to enter summary judgment. An examination of the records of the Supreme Court, however, will show that there was no intention upon the Circuit Judge sitting as Supreme Court Commissioner to make an order for summary judgment, but, to the contrary, merely an adjudication or determination that, as the answer had been stricken out, judgment should be entered as a matter of course by the Clerk. As there seems to be no other form,

the means adopted to inform the Clerk of the ruling of the Court was in the form of a postea.

As to the first ground urged that the Circuit Judge sitting as Supreme Court Commissioner is without authority to strike out an answer, such objection is met by statute and rules of the Supreme Court, adopted pursuant to the provisions of such statute. The statute provides (P. L. 1926, p. 103) as follows:

“1. The New Jersey Supreme Court shall have the power by appropriate rules, revocable or amendable at the pleasure of said Court, to grant respectively to such Supreme Court Commissioners as shall respectively from time to time occupy the position of Circuit Court Judge, full control over the pleadings in any matter then pending in said Court, whether prior to or at the time of trial, and any motions addressed thereto, including motions to strike out, motions in lieu of pleas to the jurisdiction or pleas in abatement, and also motions to dismiss or nonsuit for failure to file notice of trial or for lack of prosecution, and if a decision be decisive of the whole case, the commissioner may order judgment for the successful party or make such order as may be just; and the action of Court upon such motions may be reviewed on appeal after final judgment.”

Under the authority of the statute, the following rules were adopted June, 1926:

“Rule 93. The several Circuit Court Judges of this State heretofore or hereafter appointed Supreme Court Commissioners are hereby severally designated as commissioners for the several counties of this State, with authority to hear and determine all motions preliminary to trial as specified in rules 94 and 95 of this Court, and in such other rules as may be hereafter promulgated in the premises.

"Rule 94. Such commissioners respectively, after hearing the parties or their attorneys (but not their evidence), on due notice, shall, on the application of any party, make such order as the Court might make and as may be just in respect to the following matters, subject to an appeal after final judgment:

"Objections to pleadings, amendments thereof.

"Striking out pleadings and leave for additional pleadings.

"Settlement of issue.

"Bills of particulars.

"Admissions.

"Interrogatories.

"Discovery of and inspection of books, papers and other documents.

"Examination of parties before trial.

"Any other interlocutory matter preliminary to and in preparation for trial (Rule 63, Practice Act, 1912, as amended June, 1926).

"Rule 95. Applications or motions in the cause before trial may be heard and determined by the Commissioners on two days' notice (Rule 64, Practice Act, 1912, as amended June, 1926)."

These rules have been passed upon by Mr. Justice LLOYD in *E. O. Painter Fertilizer Co. v. Kiltone Co.*, 136 Atl. 715, in which it was stated:

"Rules 93 and 94 and 95 of the Supreme Court were amended in June of last year in conformity with the amendment of the Procedure Act (P. L. 1926, p. 103) to meet just such a situation as is here presented by permitting judges of the Circuit Court (before one of whom the case in its entirety must ultimately be heard) to hear and determine the propriety and validity of pleadings. Such amendment of the rules was made necessary by the enormous burden of work (ever increasing) upon the justices of the Supreme

Court, due to the growth of population, industry and wealth in the State and consequent litigation. It is, we think, only less important also that the trial Judge should be the one who shall pass upon pleadings in the cases to come before him for trial. He can thus mould the issues in conformity with his own views, and not be obliged to follow the views of those with whom he may not be in accord. He is then enabled also to familiarize himself with the questions to be presented in time for reflection outside the hurry of trial work. To meet the added labor the number of circuit judges can be increased from time to time, while the number of justices in this Court cannot be thus increased to practical advantage."

It may be argued that the application to dismiss the appeal could be determined on the argument of the appeal and with this contention we, of course, could not take issue.

It is respectfully submitted, however, that this Court is sufficiently burdened with the hearing of meritorious appeals that a short cut should be found for disposing of those having absolutely no merit.

An examination of the entire record of this case will clearly indicate that the appeal is purely technical, has no merit, but, to the contrary, is merely taken with a view of thwarting the evident intention of the Legislature, which by its enactment required the filing of a bond as a prerequisite to stay proceedings on appeal.

The usual practice of this Court has been to consider appeals in the general conference. If like course is taken regarding the present appeal, it will probably mean that the appeal from the summary judgment against the Commonwealth Casualty Company will not be determined until there

is a determination on the main appeal by the B & N Transportation Company, with the result that the purpose of the appellant to defeat the intention of the Legislature will be accomplished.

It is, therefore, respectfully urged that this matter should receive attention at a preliminary conference.

Respectfully submitted,

PATRICK J. O'CONNELL,
Attorney of Appellee.

ALFRED BRENNER,
Of Counsel.

#116

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

EMMA McCUSKER,

Plaintiff-Appellee,

vs.

COMMONWEALTH CASUALTY Co.,

a corporation,

Defendant-Appellant.

*Action
at Law.*

*On Appeal
from Order
Striking Out
Answer and
Entering
Summary
Judgment.*

BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from an order made in the above-entitled matter by the Honorable A. Dayton Oliphant, one of the judges of the Hudson County Circuit Court sitting as Supreme Court Commissioner; made on April 15, 1929, and striking out the answer of the defendant and adjudging that summary judgment be entered in favor of the plaintiff on the ground that the answer was sham, frivolous and filed for the purpose of delay.

Suit was instituted by the plaintiff on the ground that a judgment obtained by the plaintiff for \$12,500 against the B & N Transportation Company, a corporation of New Jersey was recoverable in whole or in part under a policy of insurance alleged to have been issued by the defendant-appellant, which policy was alleged to cover a bus belonging to the B & N Transportation Company, which bus was alleged to have been operated as a jitney bus and, therefore, under the statute applicable to the use of jitneys, gave the plaintiff a right to sue the defendant directly on the judgment. An affidavit

of merits and an answer were filed by the defendant-appellant in which it was denied that a jitney bus owned and operated by the B & N Transportation Company was the proximate result of the plaintiff's original injury and in which it was further denied that the alleged jitney bus was insured by a policy issued by the defendant-appellant. The answer also alleged the fact that an appeal had been taken by the B & N Transportation Company from the original judgment which was still pending; and set forth as a separate defense not only the fact that the plaintiff's original judgment was the result of error on the part of the trial court, but that the cause of action against the defendant-appellant was prematurely brought.

A notice of motion was served upon the defendant to strike out the answer on the grounds that it was sham, frivolous and filed for the purpose of delay, and also of the intention of the plaintiff to make application to enter summary judgment upon an affidavit made by Patrick J. O'Connell, attorney of the plaintiff, a copy of which was annexed to the notice of motion.

The matter was brought on for hearing before the Honorable A. Dayton Oliphant, one of the judges of the Hudson County Circuit Court sitting as Supreme Court Commissioner, on April 15, 1929, at which time the affidavit of Patrick J. O'Connell, Esq., annexed to the notice of motion was introduced in behalf and in support of the same. Objection was made by and in behalf of the defendant-appellant on the ground that under Rules 84 and 94 a Supreme Court Commissioner had no jurisdiction over a motion; on the ground that the affidavit of Mr. O'Connell with respect to paragraphs 2, 5, 6 and 7 was based on hearsay; on the further ground that the plaintiff's

action was premature; on the ground that the motion was made on insufficient evidence and affidavits as well as allegations which stated conclusions and not facts; on the ground that the complaint and the facts alleged in the affidavit did not show a cause of action; and on the ground that an affidavit of William P. Braun introduced in behalf of the defendant raised sufficient question of fact to make a jury question.

All of the objections were overruled and exceptions granted, and the Court thereupon made an order striking out the answer on the ground that it was sham, frivolous and filed for the purpose of delay, and adjudging that summary judgment be entered in favor of the plaintiff in the amount of \$5,050 and costs, which will also include \$50 paid for a photostatic copy of the policy of insurance attached to the moving affidavit of the plaintiff.

Errors Alleged.

1. The circuit court judge sitting as Supreme Court Commissioner had no jurisdiction to make the order striking out the answer of defendant and entering summary judgment in favor of the plaintiff.

2. The order made by the circuit court judge sitting as Supreme Court Commissioner striking out the answer of the defendant and entering summary judgment was erroneously, improvidently and improperly made on the pleadings and affidavits before the court.

POINT I.

The Supreme Court Commissioner had no jurisdiction to strike out the answer of the defendant.

The answer of the defendant was stricken out by the order of a circuit court judge sitting as Supreme Court Commissioner (C., 43) over objection (C., 41, ll. 25-29) that it was in violation of Rule 94 of the Supreme Court. This rule defines the authority of Supreme Court Commissioners and provides that among other things they may make such orders as the court might make and as may be just in respect to the following matters: “ * * * Objections to pleadings (other than those provided for in Rules 40 and 56).”

Rule 40 provides for motions to strike out pleadings and it is respectfully contended that this exception from the authority of the Supreme Court Commissioner divested him of any jurisdiction in connection with that portion of the motion endeavoring to strike out the answer of the defendant-appellant and upon which he attempted to rule.

POINT II.

It was error for the Supreme Court Commissioner to make an order adjudging that summary judgment be entered in favor of the plaintiff and against the defendant.

This portion of the order (C., 43, ll. 31-40) was made on notice (C., 10, ll. 36-39) over specific objection to the jurisdiction of the Supreme Court Commissioner in this respect (C., 41, ll. 25-29), namely, that it was a violation of Rules 84 and 94 for any judicial officer other than a

justice of the supreme court to consider the motion.

Rule 84 provides: "No summary judgment shall be entered except by virtue of an order of the court or a justice at chambers." The issue was a supreme court matter and therefore that portion of the order that purports to adjudge that summary judgment be entered (C., 43, ll. 31-40), and upon which summary judgment was entered, was erroneous and outside the jurisdiction of the Supreme Court Commissioner.

POINT III.

The order of the Supreme Court Commissioner striking out the answer and adjudging that summary judgment be entered in favor of the plaintiff and against the defendant was erroneously, improvidently and improperly made.

The motion to strike out the answer was made on the ground that the answer was sham, frivolous and filed for the purpose of delay (C., 10, ll. 32-35) and the motion was granted on those grounds (C., 43, ll. 25-27).

Under the rule of the courts in this State, an answer cannot be both sham and frivolous (see *In re Beam*, 93 Equity 593; *Fidelity Mutual Life Insurance Co. v. Wilkesbarre and Hazelton Railroad Co.*, 98 L. 507). The answer, therefore, had to be one or the other, namely, a frivolous answer which, while true on its face, did not set forth a good defense; or a sham answer which, while setting forth a good defense, was false in fact.

An analysis and comparison of the complaint and answer, together with the affidavits, will clearly indicate that the answer is neither sham nor frivolous, nor filed for the purpose of delay.

The complaint alleged that the B & N Transportation Co. owned and operated a jitney bus (C., 4, Par. 2), which is admitted in the answer (C., 8, Par. 2), because the B & N Transportation Company was, among other things, engaged in the operation of a jitney bus, but the allegation that a jitney bus collided with a bus of the Public Service Coordinated Transport Co. and was the proximate result of plaintiff's injuries were denied (See complaint, C., 4, Par. 2; answer C., 8, Par. 2). In support of these allegations of the complaint, we find only the affidavit of Patrick J. O'Connell, Esq., attorney of plaintiff-appellee, (C., 11, Pars. 1 and 2), which allegations with respect to the accident are clearly heresay.

The complaint further states that under the provision of the Jitney Act, the B & N Transportation Company procured from the defendant-appellant a policy of insurance under which the defendant-appellant agreed to pay any loss from liability imposed by law upon the bus owner for damages as the result of an accident occurring by reason of the ownership, maintenance, or use of *such auto bus* (Par. 3 of complaint, C., pg. 4 and 5), referring by "such auto bus" to the alleged *jitney* bus referred to in paragraph 2 of the complaint. This allegation was denied in the answer (C., 8, Par. 3). The affidavit of Mr. O'Connell states as a conclusion, and without explaining the source, if any, of the information upon which the said conclusion was based, that the bus of the B & N Transportation Company involved in the alleged accident was covered by a policy of insurance issued by the defendant-appellant (C., 12, Par. 5) a photostatic copy of which policy was annexed to the affidavit (C., 14, ll. 22-26). As a matter of fact this policy covered only a scheduled number of buses (C., 45,

ll. 39-40; C., 26, ll. 1-10; C., 31, ll. 1-12). The identity of the bus involved in the accident alleged in the complaint nowhere appears, so that the conclusion above referred to seems unsupported in fact.

It is also respectfully called to the attention of the court that the policy and the act upon which the plaintiff relies for authority to institute this suit directly against the insurer apply only to *jitney* buses (C., 23, ll. 35-39) operated in Essex and Morris Counties (C., 24, ll. 13-17; C., 25, ll. 10-13; C., 33, ll. 20-37; see also Chapter 136 Public Laws of 1916).

The so-called Jitney Act of 1916 applies only to such automobile or motor buses "engaged in the business of carrying passengers for hire which is held out, announced or advertised to operate or run, or, which is operated or run over any of the streets or public places in any city of the State, and *indiscriminately accepts and discharges such persons as may offer themselves for transportation, either at the termini or points along the way or route on which it is used or operated or may be running.*" Even if the allegations in Mr. O'Connell's affidavit that the bus of the B & N Transportation Co. was a jitney (C., 11, Par. 2 and 3) were not based on hearsay, they are sufficiently rebutted by the affidavit submitted by the defendant-appellant (C., 39), wherein the attorney who appeared for the B & N Transportation Co. at the trial of the original action, alleges that according to the testimony introduced at that trial, the bus of the B & N Transportation Co. was not only being operated in the City of Elizabeth outside of the limits prescribed in the policy (C., 24, ll. 13-17; C., 25, ll. 10-13; C., 33, ll. 20-37), but it was not a jitney bus within the purview of the Act which has already

been quoted (C., 30, ll. 30-40; C., 40, ll. 4-5). It is respectfully contended that on the basis of this affidavit, the bus was not only outside of the coverage of the policy in question by reason of not having been identified as one scheduled therein, but also was eliminated from the policy and from the conditions, terms and regulations of Chapter 136 of Public Laws 1916, because it was being operated outside of Morris or Essex Counties and was not a jitney bus but was a motor bus privately chartered for a specific trip.

While admitting the allegation in paragraph three of the complaint, State of the Case—page five, that a judgment was obtained by the plaintiff against the defendant, B & N Transportation Co., in the sum of \$12,500.00, the answer alleges that an appeal has been taken from said judgment (C., 8, Par. 4), and further sets up as separate defenses that the judgment upon which the plaintiff's complaint is based, was illegal and was the result of error on the part of the trial court, and further that the plaintiff's action, if she has a cause of action, was prematurely brought (C., 9, ll. 12-20); and the affidavit offered by the plaintiff does not deny the allegations in the answer regarding the appeal, but lays great stress upon the failure to deposit a bond to stay execution presumably under Rule 142 of the Supreme Court. Plaintiff, evidently, is under the misconception that a bond filed in connection with the appeal could also bar this action, but, such is not the provision of the Rule which does not refer to other actions under the judgment, but merely provides for a stay of execution. The appeal was taken and is being prosecuted diligently and in good faith (C., 40, ll. 10-14), and the fact whether or not a bond was filed in the original action can hardly effect the right or the absence

of any right of the plaintiff to bring the action in the case at bar.

Even if the defendant-appellant were responsible under the judgment originally recovered against B & N Transportation Co. under the policy annexed to plaintiff's affidavit (C., 15), on plaintiff's own affidavit the defendant-appellant would only be responsible or liable for \$5,000.00 (C., 14, Par. 10), and surely the defendant-appellant could hardly be called upon to provide a bond covering the judgment of \$12,500.00.

But, it is respectfully contended that even if the so-called Jitney Act of 1916 applies to the case at bar, the plaintiff's action is premature in view of the fact that an appeal has been taken from the original judgment. It is hardly conceivable that the Legislature, when it provided for payment by the insurance carrier of any final judgment, had in mind the payment of erroneous judgments based upon illegally admitted or excluded evidence, erroneous charges, and, what more particularly effects the case at bar, a judgment resulting from a trial in which the trial court by improper and prejudicial remarks and comment with respect to not only facts but law, practically directed a verdict against the defendant (*see appeal in McCusker v. B & N Transportation Co., also before this Court in the current term*).

In conclusion, it is respectfully called to the attention of the Court that in the affidavit submitted on behalf of the defendant-appellant when the motion was made before the Supreme Court Commissioner, it solemnly declares that "the answer prepared and filed in the above cause of action was not so filed for the purpose of delay, but because deponent verily believes that the

above-named defendant corporation has a just and legal defense on the merits to the said cause of action," and that the appeal from the order of the Supreme Court Commissioner has been diligently brought on for argument, clearly indicating that the defendant-appellant has not been guilty of any attempts at unreasonable delay, but is willing to expedite an early disposition of the controversy on its merits.

For the reasons advanced, it is respectfully submitted that the judgment entered against the defendant-appellant and the order striking out the answer should be reversed, set aside, and the cause remanded for a proper trial on its merits before a jury.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant.

WM. P. BRAUN
OF COUNSEL

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New Jersey Court of Errors and Appeals

<p style="text-align: center;">EMMA McCUSKER, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">COMMONWEALTH CASUALTY COM- PANY, a corporation, <i>Defendant-Appellant.</i></p>	}	On Appeal.
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BRIEF OF PLAINTIFF-APPELLEE.

Statement of Facts.

Appeal was taken from an order made by the Honorable A. DAYTON OLIPHANT, Judge of the Hudson County Circuit Court, sitting as Supreme Court Commissioner, striking out the answer of the defendant upon which order summary judgment was entered.

Plaintiff had previously recovered a judgment of \$12,500 against the B. & N. Transportation Company to whom had been issued a policy of insurance by the defendant.

The policy issued contained an endorsement required by the so-called Kates or Jitney Act of 1916, which permits a suit to be instituted by a person injured directly against the Insurance Company after judgment against the assured.

Answer was filed by the defendant, which on motion was struck out and judgment thereupon entered.

Defendant's specifications of error are:

1. The Circuit Court Judge sitting as Supreme Court Commissioner had no jurisdiction to make the order striking out the answer of the defendant and entering summary judgment in favor of the plaintiff.

2. The order made by the Circuit Court Judge sitting as Supreme Court Commissioner striking out the answer of the defendant and entering summary judgment was erroneously, improvidently and improperly made on the pleadings and affidavits before the Court.

POINT I.

The Judge of the Circuit Court sitting as Supreme Court Commissioner had jurisdiction to strike out the answer.

Until 1926 the Circuit Court Judges had no authority to consider motions to strike out pleadings in Supreme Court issues. In that year remedial legislation was enacted conferring upon the Supreme Court power to adopt rules conferring such authority, the statute providing:

“The New Jersey Supreme Court shall have the power by appropriate rules, revocable or amendable at the pleasure of said Court, to grant respectively to such Supreme Court Commissioners as shall respectively from time to time occupy the position of Circuit Court Judge, full control over the pleadings in any matter then pending in said Court, whether prior to or at the time of trial, and any motions addressed thereto, including motions to strike out, motions in lieu of pleas to the jurisdiction or pleas in abatement, and also motions to dismiss or nonsuit for failure to file notice

of trial or for lack of prosecution, and if a decision be decisive of the whole case, the commissioner may order judgment for the successful party or make such order as may be just; and the action of Court upon such motions may be reviewed on appeal after final judgment."

P. L. 1926, page 103.

Under authority conferred by the statute, rule 93 of the Supreme Court was adopted in June, 1926, as follows:

"The several Circuit Court Judges of this State heretofore or hereafter appointed Supreme Court Commissioners are hereby severally designated as Commissioners for the several Counties of this State, with authority to hear and determine all motions preliminary to trial as specified in rules 94 and 95 of this Court, and in such other rules as may be hereafter promulgated in the premises."

Rule 94 adopted at the same time empowers Circuit Court Judges sitting as Supreme Court Commissioners to determine *inter alia*:

"Objections to pleadings, amendments thereof. Striking out pleadings and leave for additional pleadings, etc."

Rule 95 provides that applications or motions may be heard on two days' notice.

In passing upon these rules, Mr. Justice LLOYD in *E. O. Painter Fertilizer Co. v. Kiltone Co.*, 136 Atl. 715, stated the reason for their adoption in the following appropriate language:

"Rules 93 and 94 and 95 of the Supreme Court were amended in June of last year in conformity with the amendment of the Procedure Act (P. L. 1926, p. 103) to meet just such a situation as is here presented by permitting Judges of the Circuit Court (before one of

whom the case in its entirety must ultimately be heard) to hear and determine the propriety and validity of pleadings. *Such amendment of the rules was made necessary by the enormous burden of work (ever increasing) upon the justices of the Supreme Court, due to the growth of population, industry and wealth in the State and the consequent litigation.*"

In appellant's brief Rule 94 is cited as forbidding a Supreme Court Commissioner to strike out a pleading. Obviously appellant has failed to observe the amendment of Rule 94 and the case cited in support thereof.

POINT II.

It was not error for judgment to be entered after the answer had been stricken out.

It is conceded that the Circuit Judge as Supreme Court Commissioner has no authority to enter summary judgment.

The form of the order made by Judge OLIPHANT is not an order for summary judgment, but to the contrary, an order striking out the answer, for which he had authority.

The remainder of the order is merely a determination that judgment should be entered thereon and upon this the Clerk of the Supreme Court (there being no further answer) had authority to enter and did enter the judgment. To correct any misapprehension, application was subsequently made and an order *nunc pro tunc* signed by Mr. Justice KALISCH that summary judgment be entered (Case, pp. 47-48).

This of necessity eliminates from consideration the question of the authority of the Circuit Court Judge sitting as Supreme Court Commissioner to enter summary judgment.

POINT III.

The order of the Supreme Court Commissioner striking out the answer and the order subsequently made for the entry of summary judgment was not erroneously, improperly or improvidently made.

Under this point in the appellant's brief, three distinct propositions are argued:

A. That the bus was not being operated at a place or places designated in the policy of insurance.

B. That the bus had lost its identity as a jitney because it was not being operated over a designated route indiscriminately carrying passengers at the time of the accident.

C. That the action was prematurely brought.

For a better understanding of each contention this argument is being subdivided.

A.

If the defendant intended to interpose as a defense a lack of liability because of an alleged claim that the bus was outside of the territorial limits designated in the policy, it should have so alleged by affirmative defense. An examination of the answer (Case, pp. 8-9) will conclusively show that no such affirmative defense was set forth.

Neither can it be said that it was properly brought to the attention of the Judge hearing the motion, that the defendant intended to interpose this defense (Case, pp. 41-42).

Even though it be assumed that this defense was properly pleaded and subsequently brought to the

attention of the Court, it would not be a legally sufficient answer.

The only mention of territorial limits set forth in the policy of insurance are the following:

A—TERRITORIAL LIMITS.

“This policy does not cover any loss of expense arising or resulting from accidents occurring while any of the automobiles insured hereunder are being maintained or used beyond the limits of the United States of America and Canada” (Case, p. 17, lines 15-20).

WARRANTIES ITEM VIII.

“The automobiles are maintained, garaged and principally used in the town named in item II, except as follows:

‘Jitney buses in Essex and Morris Counties’ (Case, p. 24, lines 12-17). ‘Item II address of assured, street—68 Main Street. City or Town—Madison, Township. County Morris, State—New Jersey’ (Case, p. 23, lines 15-30).

‘ITEM XII. * * * Jitney End. For Newark, Irvington, Millburn, Florham Park, Madison, West Livingston and Boonton Attached’ ” (Case, p. 25, lines 10-15).

In *McClellan v. General Casualty and Surety Company*, 4 M. 926; 134 Atl. 911 (affirmed 137 Atl. 917), warranties similar to those in the instant policy were discussed.

As in the present case “Item VIII” warranted that the automobiles covered were principally maintained and garaged in Atlantic City and “Item IX” warranted that they were principally used in Atlantic City and its vicinity.

The Trial Judge decided as a matter of law that since the facts showed that the auto bus, at the time of the accident, was being operated for hire, although the accident occurred a distance of 18 miles from and while en route to Atlantic City, it

came within the requirements of Statement 9 and was being operated "in the vicinity."

Concerning such decision of the Trial Judge the Supreme Court held there was no error, citing with approval *Connell v. Commonwealth Casualty Company*, 96 N. J. L. 510; 115 Atl. 352, in which it had been previously held that Newark, a city in Essex County, came within the term "within the vicinity of Passaic in Passaic County and Garfield and Lodi in Bergen County."

In *Sculthorpe v. Commonwealth Casualty Company*, 98 N. J. L. 845; 121 Atl. 751, appeal was taken from an order striking out as sham an answer filed by the defendant. The suit, like the present action, was based upon a jitney bus insurance policy issued pursuant to an act entitled, "An Act concerning Auto-Buses commonly called jitneys and their operation in Cities" (P. L. 1916, p. 283) and was to recover a portion (corresponding to the amount of the policy) of a final judgment recovered by the plaintiff against the jitney bus owner.

That policy, like the instant one, contained a statement under Item VIII:

"The automobiles are maintained and principally used in the town named in Item II which is Newark except as follows: Asbury Park, N. J."

The answer set up as a defense that the accident occurred while the jitney bus was operated in passenger service three miles outside of the limits of Asbury Park. It was contended that a greater premium would have been charged if the bus were covered both in Asbury Park and Freehold, the place of its destination at the time that the accident occurred.

It was stated in the opinion of this Court:

"We think this answer was properly stricken out. It nowhere avers that the state-

ment that the 'automobiles are maintained and principally used in Newark and Asbury Park' was in fact untrue, and we are not, therefore, called upon to construe the meaning of the word 'principally' as used in this statement. There is no express limitation in the policy to a definitely described route as there was in that involved in the case of *Connell v. Commonwealth*, 96 N. J. L. 510, where we were required to construe the words 'and vicinity.' All that this policy contains on the subject is a warranty of the truth of the statement that the automobiles covered thereby are principally used in Newark and Asbury Park and the answer does not challenge the truth of this statement."

As in the case last cited, there is no allegation in the answer in the instant case that the statement appearing under Item VIII to the effect that the automobiles are maintained, garaged and principally used in the town stated in Item II (Madison), except as follows: Jitney buses in Essex and Morris Counties was an untrue statement. Therefore, the mere fact that the accident occurred in the City of Elizabeth would not justify a verdict for the defendant.

If this defense were considered at a trial of the cause instead of on motion to strike out, it would clearly have been the duty of the Trial Judge to direct a verdict in favor of the plaintiff. That being so, there is like justification for striking out the answer.

B.

Contention is now made that there is error in striking out the answer, because at the time of the accident it is alleged that the bus in question was carrying a private party from a basketball game in Elizabeth and was not used as a jitney indiscriminately carrying passengers for hire.

Attention is again directed to the fact that the answer contains no affirmative defense making this allegation (Case, pp. 8-9), nor does the argument on motion to strike out properly bring to the attention of the Court that this defense would be interposed.

Aside from this, however, the policy does not restrict the jitney bus to the carriage of passengers along its usual route for fare ordinarily charged, but to the contrary is much broader. Under Item III the business of the assured is given as "Jitney buses—TRANSPORTATION OF PUBLIC" (Case, p. 23, lines 30-33), and again under Item V it is stated:

"The purposes for which the automobiles are to be used and will continue to be used during the period of this policy are '*transportation of public—Jitney buses*'" (Case, p. 23, lines 35-40).

Manifestly by use of the term "transportation of the public" (much broader than the term "Jitney buses") the intention of the Insuring Company was to cover the vehicles insured under its policy whether used in the ordinary course of its business, operating jitney buses, or for the general transportation of the public, which would include carrying private parties.

Such intention is emphasized by the fact that the Insuring Company received a benefit from a proportionate share of the income derived from the buses, regardless of whether such income was received from jitney passengers or private parties. The premium paid to the Insuring Company was not upon a fixed basis, but to the contrary, was based on the earnings of the assured in the transportation of the public with only one exception, under which the assured could not operate

metered taxicabs. This is illustrated by the following provisions of the policy itself:

EARNINGS BASIS ENDORSEMENT.

* * * * *

“* * * This policy shall cover for public liability and property damage the operation of all public passenger carrying vehicles, except metered taxicabs owned by the assured and used by him for the purposes stated therein * * *”

“The actual earned premium for the policy shall be computed on the basis of the total gross livery earnings (whether collected or not) developed by audit for all public passenger carrying automobiles, except metered taxicabs owned and used by the assured during any part of the policy period * * *” (Case, pp. 26-27).

* * * * *

In addition to what has been said concerning the policy itself, the law is well settled that an Insuring Company can not escape liability on a jitney policy by reason of an alleged claim that it was not indiscriminately carrying passengers along a designated route.

In *Connell v. Commonwealth Casualty Company*, 96 N. J. L. 510; 115 Atl. 352, the bus causing the accident was being driven not along its accustomed route, but was being taken to Brooklyn to be used in passenger service pending a car strike.

Concerning the contention that there was no liability because the bus was not operated as a jitney at the time of the accident, Mr. Justice MINTURN speaking for this Court said:

“The vehicle lost none of its characteristics as a jitney bus because it was without passengers at the time, or because its movements

were directed to Brooklyn to engage in the passenger service there. Whether at rest or in operation, or in the act of undergoing repair, on the municipal route or apart from it, it still retained its passenger characteristics as a jitney bus under the policy of insurance, so far as the general public were concerned. Any violation of the provision of the Jitney Act was a matter between the operator and the municipalities, under whose license he was operating. But, while the policy of insurance remained in force, its legal effect as an indemnity to the traveling public, for whose benefit it was executed and exists, cannot be minimized by any extraneous act or default of the insured, so long as he is conducting the vehicle within the general scope of the purpose for which the jitney car was insured. *Gillard v. Manufacturers Ins. Co.*, 93 N. J. L. 215; 107 Atl. 446.

“That this construction was contemplated by the defendant is emphasized by subsection E of Section 5 of the policy, viz.:

‘This policy does not cover loss arising from claims made on account of accident resulting from the use of the automobile elsewhere than within the borders of the United States and Canada.’

“The policy therefore defines its own territorial limitations; and when we construe the language thus employed as comprehending the City of Newark as a municipality in the vicinity and within the territorial area of operation, and the accident as happening while the bus was in the ‘passenger service,’ until it has become manifest from the evidence, that the vehicle has lost the characteristics of a jitney bus—not by any incidental deviation from its licensed municipal route, but by an entire change in use and occupation thereby eliminating the vehicle both from the purview of the Jitney Act, and the express provisions and conditions of the policy—the liability of the insurer becomes obvious.”

In the brief of the appellant (p. 6) it is suggested that there was no proof that a bus of the B. & N. Transportation Company collided with one belonging to the Public Service Co-Ordinated Transport.

A complete answer to that contention will be found in paragraph 2 of the affidavit of O'Connell (Case, p. 11), in which he alleges that there was a collision between both buses. This allegation is not denied, but to the contrary is supported by the affidavit of William P. Braun, who represented the B. & N. Transportation Company in the suit of the plaintiff against it and now represents the Casualty Company, in which he states that the testimony was to the effect that the plaintiff sustained injuries as the result of an accident occurring while she was riding in a jitney owned and operated by the Public Service Co-Ordinated Transport, which ran into the side of an auto bus owned by the defendant B. & N. Transportation Company (Case, p. 39).

Again it is suggested that there was no proof that the particular bus involved in the accident was covered by the policy of insurance. Again the complete answer is that there was a positive allegation to that effect in paragraph 5 of the affidavit of O'Connell (Case, pp. 12-13) and not denied by any representative of the Casualty Company.

Whether the particular bus in question was mentioned in the schedule of the policy giving the numbers of the buses covered (and there is no denial as previously stated that the bus in question was covered by the schedule) could make no material difference as the policy particularly provides that in consideration of the fact that premium is to be determined by the actual earnings of the transportation company, all public passenger carrying vehicles, except metered taxi cabs

were covered by the policy "without a specific description of and specific premium charge for each automobile to be covered as required by the policy" (Case, p. 26, lines 30-40; p. 27, lines 1-15).

C.

In the answer it was alleged and at the time of argument on motion to strike out the answer it was contended that this action was prematurely brought because appeal had been taken in behalf of the B. & N. Transportation Company which was undetermined.

It is not disputed that after judgment had been entered against the B. & N. Transportation Company an appeal had been taken. No bond, however, had been filed. The plaintiff, therefore, was not stayed in proceeding against the Jitney Company by execution, nor would the plaintiff be prevented from proceeding on the policy, under which it is provided as required by Statute that an injured person may sue the Insuring Company direct without first resorting by levy or otherwise against the assets of the jitney operator.

That an appeal from a judgment does not preclude the institution of suit thereon was decided in the very early case of *Suydam v. Hoight*, 25 N. J. L. 230, in which Chief Justice GREEN, speaking for the Supreme Court, said:

"The pendency of a writ of error does not prevent the bringing of an action upon the judgment, nor does it enable the defendant to plead *nul tiel record*. It is in the discretion of the Court in which the action upon the judgment is brought pending a writ of error to stay the proceedings or not, and if the conduct of the plaintiff in error appears to be vexatious, the Court will suffer the action upon the judgment to proceed, notwithstanding error brought."

An exhaustive examination of the law of this State has failed to reveal any decision which directly or by implication reverses the rule in the case cited. To the contrary, the case has been cited with approval both in this Court and in the Supreme Court, but no specific reference is made to the approving cases by reason of the fact that they do not deal directly with the question now involved.

Issue is taken with the statement of the appellant to the effect that the appeal being conducted for the B. & N. Transportation Company is in good faith. Whether it is or is not is beside the issue. So also is the statement in the appellant's brief to the effect that it could hardly be called upon to provide a bond covering the judgment of \$12,500.

The only question involved is whether under the Statute and the case referred to, the plaintiff is entitled to security pending appeal and whether she has a right to proceed directly against the Insurance Company in the absence of such security being delivered.

The Circuit Court Judge who heard the motion, decided that she was not barred from proceeding, and it is now contended that the decision was justified by the well settled law of this State.

It is argued that the motion made to strike out the answer should not have prevailed and that the order striking out the answer should be set aside because in the notice of motion it is recited that the answer is both sham and frivolous.

It is conceded that under the cases cited by the appellant it has been held that an answer can not be both sham and frivolous. It is also conceded that the term "sham" indicates that the pleading is good on its face, but false in fact, while the term "frivolous" indicates that the pleading is one which on its face may be true, but presents no defense.

In the case at bar, the answer denies the allegation of the complaint that the defendant issued a policy. On its face, such pleading would be good, because the plaintiff would have no right of recovery if no policy had ever been issued. A photostatic copy of the policy used at the motion supported by affidavit and the later admission by the defendant that it had issued a policy of insurance to the B. & N. Transportation Company, clearly shows that concerning this phase of the case, the answer was false, therefore sham.

The answer further sets forth that an appeal is pending by or in behalf of the assured. This allegation is true, but if the contention of the plaintiff on the motion was well founded, it presents no defense and in that respect the answer is frivolous.

Realizing, therefore, that the appellant throughout the proceedings indicated an intention to be highly technical, it was considered advisable to insist that the answer was both sham and frivolous. If, however, the plaintiff was ill-advised concerning this attitude, no ground for reversal is afforded.

Sculthorpe v. Commonwealth Casualty Co., 98 N. J. L. 845-848;

McCarthy v. West Hoboken, 93 N. J. L. 247.

It is, therefore, urged that the answer was properly stricken out and summary judgment properly entered.

Respectfully submitted,

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