

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1699

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GEORGE SIMPSON AND KATHLEEN SIMPSON,

PLAINTIFFS,

V.

TITLE INDUSTRY ASSURANCE COMPANY,

DEFENDANT-RESPONDENT,

CHERRYLAND TITLE SERVICES, INC.,

**DEFENDANT-THIRD-
PARTY PLAINTIFF-APPELLANT,**

V.

**JOHN T. O'BRIEN, D/B/A O'BRIEN CONSTRUCTION &
CABINETRY, AND AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, A WISCONSIN INSURANCE
CORPORATION,**

THIRD-PARTY DEFENDANTS.

APPEAL from an order and a judgment of the circuit court for Door County: JOHN D. KOEHN, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Cherryland Title Services, Inc., (Cherryland) appeals an order and a judgment granting summary judgment to its insurer Title Industry Assurance Company (TIAC); denying Cherryland's cross-motion for summary judgment; and dismissing Cherryland's cross-claim against TIAC. Cherryland contends that: (1) it, not TIAC, was entitled to summary judgment because based on the allegations in the third-party complaint, TIAC has a duty to defend Cherryland, and that TIAC's liability policy covered the loss, an exclusion notwithstanding; (2) TIAC waived its right to contest coverage when it breached its duty to defend; and (3) it is entitled to attorney fees and costs under *Elliott v. Donahue*, 169 Wis.2d 310, 315-16, 485 N.W.2d 403, 405 (1992).

Based on the allegations in the complaint, we conclude that TIAC has a duty to defend Cherryland. We further determine, however, that TIAC did not waive its right to contest liability or breach its duty to defend because it timely sought a bifurcated trial on coverage and liability and moved for a stay of the liability issue. Moreover, we hold that the trial court erred by granting summary judgment on the duty to indemnify because there are genuine issues of material fact concerning that issue. Finally, we remand to the trial court for its determination of whether Cherryland is entitled to attorney fees and costs.

I. FACTS

On March 4, 1995, George and Kathleen Simpson (the Simpsons) entered into a written contract with O'Brien Construction & Cabinetry (O'Brien) to build a cabin in Sturgeon Bay for \$44,682.02. The contract provided a payment schedule, including a down payment at signing and draws due at various stages of completion, including a third and final draw upon issuance of an occupancy permit. Additionally, the contract stated that: (1) the general contractor is responsible "for all payments towards Sub-Contractors and permit acquisitions, as well as to acquire lien waivers from all Sub-Contractors prior to final Draw"; and (2) at the time of the third draw "the General Contractor is responsible to Bank or Lending Institution in providing necessary lien waivers to ensure the home has no encumbrances upon it."

The Simpsons, who lived in Port Washington, made an \$11,170.51 down payment directly to O'Brien. They subsequently hired Cherryland to act as their escrow agent and provided Cherryland with a copy of their contract with O'Brien, which included the payment schedule. There was no written contract between the Simpsons and Cherryland, but in a March 23 letter from Cherryland to O'Brien, Cherryland asked that O'Brien provide "original lien waivers" with its draw requests.¹ Regarding the final draw, the letter asked O'Brien to submit: (1) the original draw request/contractor's affidavit fully completed and executed; (2) any full waivers of lien not yet received and accepted by escrow agent; and (3) a completed and executed builder's affidavit. Cherryland also requested

¹ Cherryland's letter to O'Brien states: "When requesting funds please forward the original of the draw request to us along with the original lien waivers, I can then fax it to the lender."

masonry supplier waivers and supplier waivers for drywall materials, but further indicated that: "Full waivers are required from all subcontractors, materialmen or suppliers upon 100% completion and from all parties in regard to the final draw request."

O'Brien submitted two draw requests, one for \$12,687.30 on May 26 and another for \$11,538.87 on June 24. Contractor's affidavits accompanied both requests. The Simpsons okayed both, and Cherryland paid O'Brien the first two draws. After the first and second draws, which Cherryland believed covered the labor and materials² O'Brien was supplying, O'Brien provided partial lien waivers. The final draw was never paid, however, because days after the second draw, the Simpsons began receiving notices of intent to file lien from subcontractors and material suppliers. In this way, Cherryland discovered that O'Brien was in fact not the material supplier and had not paid its material suppliers and subcontractors with the two draws. The Simpsons paid both the subcontractors and the suppliers.

In April 1996, Cherryland learned that the Simpsons might file suit, so it notified TIAC, which denied coverage in May 1996. In December 1997, the Simpsons filed a complaint against Cherryland and TIAC for the payments it had made to the subcontractors and material suppliers. In their complaint, the Simpsons alleged that Cherryland: (1) breached its fiduciary duty as the Simpson's escrow agent by "failing to confirm payment of subcontractors and suppliers, including but not limited to, contacting subcontractors and suppliers directly or demanding lien waivers to confirm payment" (count one); (2) was negligent in carrying out its fiduciary duty to the Simpsons because it "failed to

² O'Brien had furnished a list of its subcontractors to Cherryland and listed itself as the material supplier.

confirm payment of subcontractors and suppliers, including but not limited to ... demanding lien waivers" (count two); and (3) breached its contractual duty by failing to obtain lien waivers from subcontractors before disbursing funds (count three). The complaint further alleged that TIAC had a contractual duty to indemnify the Simpsons for damages Cherryland directly caused (count four). Each count realleged and incorporated all previous allegations.

After being served with the complaint in January 1997, Cherryland tendered its defense to TIAC and cross-claimed against TIAC, alleging coverage and a duty to defend. TIAC denied the tender of defense on the basis of an exclusion for Cherryland's failure to obtain appropriate lien waivers from subcontractors and suppliers prior to payment. TIAC also filed a motion to bifurcate coverage and liability issues and for a stay of the liability portion. In response, Cherryland filed a motion for an order declaring that TIAC had breached its duty to defend and had therefore waived its right to contest coverage.

Although the trial court granted the motion for bifurcation and stay, it denied Cherryland's motion regarding the duty to defend. After the Simpsons and Cherryland employees were deposed, TIAC moved for summary judgment, alleging no duty to defend or indemnify Cherryland. Cherryland also moved for summary judgment, alleging that TIAC breached its duty to defend, waived its right to contest coverage, and that the policy covered the allegations in the Simpsons' complaint. Additionally, Cherryland prayed for actual costs and attorney fees. The trial court granted TIAC's motion for summary judgment and held that TIAC had no duty to defend or indemnify Cherryland because the first three counts allege Cherryland's failure to obtain lien waivers and therefore fell within the policy's exclusion. The trial court also concluded that TIAC's timely denial of coverage and demand for bifurcation preserved its right to contest

coverage. Further, the trial court denied Cherryland's motion and dismissed all claims against TIAC. Cherryland appeals.

II. ANALYSIS

We review a trial court's summary judgment de novo. *M&I First Nat'l Bank v. Episcopal Homes Mgmt.*, 195 Wis.2d 485, 496-97, 536 N.W.2d 175, 182 (Ct. App. 1995). In making this determination, we apply the same methodology as the trial court. *Id.* Summary judgment is appropriate if there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Section 802.08(2), STATS. Further, summary judgment may be used to address insurance policy coverage issues. *Link v. General Cas. Co.*, 185 Wis.2d 394, 398, 518 N.W.2d 261, 262 (Ct. App. 1994).

The professional liability policy TIAC issued to Cherryland provided coverage for Cherryland's:

negligent act, error or omission ...

....

PROVIDED ALWAYS THAT such negligent act, error or omission arises out of professional services rendered or that should have been rendered by the Insured or other persons for whom the Insured is legally responsible, and arising out of the conduct of the Insureds' profession as:

....

(c) an escrow agent, provided a specific premium charge is indicated on the Declarations page hereof. Escrow agent means the business solely of complying with written escrow instructions received and acknowledged by the Insured.

The policy further contains the following exclusion, "Exclusion K":

THIS POLICY DOES NOT APPLY TO ANY CLAIM OR CLAIMS EXPENSE BASED UPON OR ARISING OUT OF OR WITH RESPECT TO:

....

(k) situations where work or materials have been supplied by subcontractors or other suppliers and the insured makes a payment *without prior receipt of appropriate waivers* or releases of lien from the subcontractors or other suppliers involved. (Emphasis added.)

1. Duty to Defend

We first address whether TIAC has a duty to defend Cherryland. An insurance policy imposes duties on the insurance company to defend the insured in a third-party claim and indemnify the insured. See *Barber v. Nylund*, 158 Wis.2d 192, 195, 461 N.W.2d 809, 811 (Ct. App. 1990). In Wisconsin, the duty to defend is broader than the separate duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual coverage. See *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis.2d 824, 834-35, 501 N.W.2d 1, 5 (1993); see also *Elliott*, 169 Wis.2d at 320-21, 485 N.W.2d at 407. An insurer has a duty to defend its insured in a third-party lawsuit if the complaint "alleges facts which, if proven, would give rise to liability covered under the terms and conditions of the policy." *Sola Basic Ind. v. USF&G*, 90 Wis.2d 641, 646, 280 N.W.2d 211, 213 (1979); accord *Professional Office Bldgs. v. Royal Indem. Co.*, 145 Wis.2d 573, 580, 427 N.W.2d 427, 429 (Ct. App. 1988).

To determine if the insurer has a duty to defend, we examine only the complaint. See *Professional Office*, 145 Wis.2d at 581, 427 N.W.2d at 430. An insurer has a duty to defend its insured against all actions, even those that may be fraudulent, groundless, or false, if the nature of the claim is one the insurer had insured against. See *Grieb v. Citizens Cas. Co.*, 33 Wis.2d 552, 557-58, 148

N.W.2d 103, 106 (1967). In other words, the nature of the claim, not its merits, control the duty to defend. See *General Cas. Co. v. Hills*, 209 Wis.2d 167, 176, 561 N.W.2d 718, 722 (1997). If the possibility of recovery exists on any covered claim in the complaint, an insurer must defend the entire lawsuit, even if the policy does not cover other allegations. See *Shorewood School Dist. v. Wausau Ins. Cos.*, 170 Wis.2d 347, 366, 488 N.W.2d 82, 88 (1992); *Grube v. Daun*, 173 Wis.2d 30, 73, 496 N.W.2d 106, 122-23, (Ct. App. 1992). We must resolve any doubts about the duty to defend in favor of the insured. See *Grube*, 173 Wis.2d at 73, 496 N.W.2d at 123.

Thus, to determine whether TIAC has a duty to defend Cherryland, we must compare the complaint to the liability policy TIAC issued to Cherryland and decide whether the facts alleged therein raise the possibility of coverage. See *Shorewood School Dist.*, 170 Wis.2d at 364-65, 488 N.W.2d at 87-88. The interpretation of an insurance policy is a question of law we review de novo, and we apply the same rules of construction that we apply to contracts generally. *Smith v. Atlantic Mut. Ins. Co.*, 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990).

The parties contest whether the complaint alleges a negligence theory other than failing to obtain lien waivers. TIAC maintains that looking at the four corners of the complaint, Cherryland's failure to obtain appropriate lien waivers was the factual premise for the plaintiff's claims of negligence, breach of contract, and breach of fiduciary duty. It then states that a "simple comparison" of the complaint's allegations to the clear and unambiguous language of Exclusion K, which excludes claims arising out of Cherryland's failure to obtain appropriate lien waivers before payment "makes it obvious" that its policy provides no coverage for the claims asserted. By contrast, Cherryland contends that the complaint not only clearly alleges that it was negligent in carrying out its fiduciary duty in failing to obtain lien

waivers, *but also* negligent in failing to contact the subcontractors and contractors directly to determine if payment had been made. Therefore, Cherryland asserts, Exclusion K does not negate coverage. In response, TIAC claims that "failure to confirm payment is simply a short hand way of stating that no lien waivers were obtained"³ and that Exclusion K applies.

The policy provides coverage for Cherryland's negligent acts as an escrow agent provided that a specific premium charge appears on the declarations page. Additionally, the policy defines an escrow agent as the business of complying with written escrow instructions the insured receives and acknowledges. Here, the policy includes a specific premium charge for escrow agent coverage, and the parties do not dispute that Cherryland provided professional services as an escrow agent to the Simpsons. The complaint alleges that Cherryland was negligent in carrying out its fiduciary duty to the Simpsons because it failed to confirm payment to subcontractors and suppliers, including obtaining lien waivers.

Resolving any doubts in Cherryland's favor, *see Sola Basic*, 90 Wis.2d at 646-47, 280 N.W.2d at 214, we conclude that the complaint states a negligence claim independent from failing to obtain lien waivers. Knowing who is owed is necessary to confirm that suppliers and subcontractors owed were paid and is therefore implicit in counts one and two. Thus, the complaint alleges that Cherryland was negligent in failing to learn who these people were; this is not the same as obtaining lien waivers. Therefore, while Exclusion K would apply to claims

³ TIAC asserts that count two of the complaint alleges that Cherryland was "negligent in carrying out its fiduciary duty by failing to demand subcontractor lien waivers." This mischaracterizes the complaint, which alleges negligence by failing "to confirm payment of subcontractors and suppliers, including but not limited to, demanding subcontractor lien waivers in exchange for payment."

arising out of Cherryland's failure to obtain appropriate lien waivers before payment, at least based on the complaint's allegations, it does not apply to the claim that Cherryland was negligent in failing to contact the subcontractors and suppliers directly to determine if payment had been made. Even though the complaint may contain other theories of liability not covered by the policy, TIAC must defend the entire action if just one theory appears to fall within the policy's coverage. *See Shorewood*, 170 Wis.2d at 366, 488 N.W.2d at 88. One reason for this is that it is impossible to determine upon which claim the plaintiff may recover until the action is completed. *See Grube*, 173 Wis.2d at 73, 496 N.W.2d at 122-23. Accordingly, based on the allegations in the complaint, TIAC has a duty to defend under the policy.

2. *Breach of Duty to Defend & Waiver of Right to Contest Coverage*

Cherryland also argues that because TIAC has a duty to defend and refused to defend the case on the merits, it breached its duty to defend and thus waived any right to contest coverage. TIAC contends that it owed Cherryland no duty to defend and therefore could not have breached such duty. Alternatively, TIAC argues that even if we conclude that a duty to defend exists, it did not breach that duty because it followed the procedure for contesting coverage as set forth in *Newhouse*. While TIAC's first argument fails because it has a duty to defend, we agree with TIAC that it did not breach that duty.

When an insurance company disputes coverage, it may request a bifurcated trial on coverage and liability and move to stay liability proceedings until the coverage issue is resolved. *See Newhouse*, 176 Wis.2d at 836, 501 N.W.2d at 6 (discussing *Elliott*); *see also Mowry v. Badger State Mut. Cas. Co.*, 129 Wis.2d 496, 521-23, 385 N.W.2d 171, 183-84 (1986). When the insurance

company follows this procedure, it "runs no risk of breaching its duty to defend." *Newhouse*, 176 Wis.2d at 836, 501 N.W.2d at 6. Here, TIAC filed a motion for bifurcation and stay; the case was bifurcated, and the liability portion was stayed. Because TIAC followed the proper procedure, it did not breach its duty to defend. *See id.*

Further, Cherryland argues that under *Professional Office*, 145 Wis.2d at 584, 427 N.W.2d at 431, TIAC waived its right to contest coverage. The general rule is that when the insurer breaches its duty to defend its insured, it waives any later challenge regarding its duty to indemnify. *United States Fire Ins. Co. v. Good Humor Corp.*, 173 Wis.2d 804, 816-19, 496 N.W.2d 730, 734 (Ct. App. 1993) (citing *Professional Office*). However, the insurer can avoid this "harsh result" by seeking a timely resolution of the coverage issue by a court instead of determining coverage for itself by refusing to defend. *Professional Office*, 145 Wis.2d at 585, 427 N.W.2d at 431.

Professional Office does not support Cherryland's argument. In that case, we addressed waiver of an insurer's right to contest coverage as a remedy for an "improper refusal to defend" on the liability issue when the coverage issue was later raised. *See Barber*, 158 Wis.2d at 197, 461 N.W.2d at 811. In this case, TIAC followed our supreme court's recommended bifurcation procedure, *see Grieb*, 33 Wis.2d at 558, 148 N.W.2d at 106; *see also Newhouse*, 176 Wis.2d at 836, 501 N.W.2d at 6, and made a timely denial of coverage and timely demanded a bifurcated hearing on the coverage issue. Thus, because TIAC did not improperly refuse to defend Cherryland, it did not waive its right to contest coverage. *See Barber*, 158 Wis.2d at 194, 461 N.W.2d at 810; *accord Mowry*, 129 Wis.2d at 528-29, 385 N.W.2d at 186.

3. *Duty to Indemnify*

Cherryland argues that it, not TIAC, is entitled to summary judgment based on the following undisputed facts: (1) lien waivers were not due until the final draw; (2) the final draw was never made; (3) it could not have failed to obtain "appropriate lien waivers" as provided in Exclusion K because no lien waivers were due when the first two draws were made; and (4) the policy does not exclude any other of Cherryland's actions as an escrow agent. Further, Cherryland also contends that Exclusion K does not apply because it indeed obtained "appropriate" lien waivers from O'Brien, not knowing that the waivers were fraudulent.

TIAC concedes that the only exclusion upon which it relies is Exclusion K and sets forth a number of arguments why Exclusion K applies. First, it argues that Exclusion K reflects its unwillingness to insure against the risk that subcontractors and suppliers would not avail themselves of the right to assert property liens against the owners under ch. 779, STATS. Additionally, it argues the broad exclusion applies because the Simpsons' liability arose out of their exposure to liens threatened by subcontractors and suppliers who had not been paid. TIAC further contends the allegation that Cherryland failed to confirm payment is another way of saying that they failed to obtain appropriate lien waivers. Finally, TIAC reasons that an exclusion is directed at risk, not a person's status and that Exclusion K puts a reasonable insured on notice that he will not be covered for claims arising out of situations in which he fails to obtain "appropriate" lien releases, and cites Webster's New World Dictionary (2d college ed.) defining "appropriate" as "right for the purpose; suitable; fit; proper." TIAC claims that it would be absurd to hold that fraudulent lien waivers are appropriate. Additionally, it claims that lien waivers were required from the subcontractors and suppliers before Cherryland was to make

any payments. Thus, it reasons that Cherryland's failure to get lien waivers before payment triggers Exclusion K.⁴

Whether Exclusion K is ambiguous is a question of law. *See Western Cas. & Surety Co. v. Budrus*, 112 Wis.2d 348, 351, 332 N.W.2d 837, 839 (Ct. App. 1983). An insurance policy is ambiguous if the language when read in context is fairly or reasonably susceptible to more than one construction. *See Sprangers v. Greatway Ins. Co.*, 182 Wis.2d 521, 536-37, 514 N.W.2d 1, 6 (1994). We resolve ambiguities in an insurance policy against the insurer and in favor of the insured. *See Garriguenc v. Love*, 67 Wis.2d 130, 135, 226 N.W.2d 414, 417 (1975). Policy exclusions are narrowly construed against the insurer. *See Smith*, 155 Wis.2d at 811, 456 N.W.2d at 598.

As set forth above, Exclusion K excludes any claim or claims expense arising out of a situation in which subcontractors or other suppliers have supplied work or materials "and the Insured makes a payment *without prior receipt of appropriate waivers* or releases of lien from the subcontractors or other suppliers involved." TIAC's policy does not define the word "appropriate," but that does not render the term ambiguous. *See Welter v. Singer*, 126 Wis.2d 242, 248-49, 376 N.W.2d 84, 86 (Ct. App. 1985). Rather, we conclude that the term is ambiguous because when we use the common and ordinary meaning of "appropriate" in context, the meaning of the exclusion is reasonably susceptible to more than one construction.

⁴ The preceding two paragraphs reflect arguments that the parties made regarding the duty to defend. The complaint neither alleges that the lien waivers were fraudulent nor that no waivers were due until the final draw. We are not required to address an appellate argument in the manner which a party has structured the issues. Accordingly, Cherryland's arguments are more appropriately considered in the duty to indemnify context. *See State v. Waste Mgmt.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978). In the section of its brief regarding the duty to indemnify, TIAC refers to its argument that the policy excludes the Simpsons' claims and discusses the arguments Cherryland made regarding the duty to defend and Exclusion K.

See Sprangers, 182 Wis.2d at 536-37, 514 N.W.2d at 6. Because the policy does not define "appropriate," we may resort to a recognized dictionary to ascertain its meaning. *See Holsum Foods v. Home Ins. Co.*, 162 Wis.2d 563, 569, 469 N.W.2d 918, 921 (Ct. App. 1991). According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 106 (unabr. 1993), "appropriate" means "specially suitable," "FIT," "PROPER." The question then becomes whether the lien waivers Cherryland obtained from O'Brien were suitable, fit, or proper.

Using this definition of "appropriate," Exclusion K is ambiguous. The exclusion neither indicates from whose perspective or at what time we determine whether the lien waivers were appropriate. It is unclear whether appropriateness is determined by reference to purpose or simply form. From Cherryland's perspective at the time it obtained the waivers, the lien waivers were suitable, fit, or proper because they were indeed lien waivers from the contractor before payment. Later, after Cherryland had obtained the waivers, it learned they were not proper, but fraudulent. Construing this ambiguous exclusion narrowly against the insurer, *see Smith*, 155 Wis.2d at 811, 456 N.W.2d at 598, we hold that the exclusion is measured from the escrow agent's view at the time it obtains the lien waivers. Cherryland therefore obtained appropriate lien waivers from O'Brien even though the lien waivers were later found to be fraudulent.

TIAC also contends the lien waivers were inappropriate because they were not obtained before Cherryland paid the first and second draws to O'Brien. This determination depends on the facts and circumstances of the case, particularly under which contract we determine whether the waivers were appropriate. Again, there was no written contract between Cherryland and the Simpsons. Based on differences between the lien requirements in the Simpsons' and O'Brien's contract on the one hand, and in Cherryland's letter to O'Brien on the other, Cherryland and

TIAC disagree as to whether lien waivers were due before the final draw and whether lien waivers were due at the time the two draws were made. We conclude that whether lien waivers were due before the final draw is a disputed material fact regarding whether the lien waivers were appropriate. Additionally, the failure to obtain lien waivers is not the sole claim of liability asserted against Cherryland. The complaint also alleges that Cherryland was negligent in failing to contact the subcontractors and suppliers directly to determine if payment had been made. Therefore, if a jury determined Cherryland's liability based on a negligence theory other than failing to obtain lien waivers, Exclusion K would not relieve TIAC of its duty to indemnify. Thus, because there is a genuine issue of material fact and because TIAC is not entitled to judgment as a matter of law, the trial court's grant of summary judgment was premature. Because a duty to defend exists and a material issue of fact exists regarding the duty to indemnify, we reverse the trial court's grant of summary judgment and remand for further proceedings.⁵

4. *Attorney Fees and Costs*

Last, citing *Elliott*, Cherryland argues that because it was entitled to a defense, it is also entitled to attorney fees and costs incurred in defending the action and establishing coverage. The trial court found that TIAC had no duty to defend or indemnify Cherryland and therefore denied Cherryland's request for attorney fees and costs. Because we conclude that the duty to defend exists, and because this case is remanded, we direct the trial court to consider whether Cherryland is entitled to the attorney fees and costs it incurred in establishing the

⁵ We need not address Cherryland's argument that accepting TIAC's arguments would render its escrow agent coverage "a nullity and illusory." See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (only dispositive issues need be addressed).

duty to defend, and if so, the amount. The trial court may find *Elliott*, 169 Wis.2d at 314-15, 485 N.W.2d at 403-05; *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559, 569, 547 N.W.2d 592, 595 (1996), and ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW § 7.9 (4th ed. 1998), helpful to its determination.

By the Court.—Order and judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

