

IN THE SUPREME COURT OF OHIO

United Farm Mutual
Insurance Company,

Appellee,

v.

Michael N. Pearce, Jr., et al.,

Appellees,

and

Carol Shaner and Phillip Shaner

Appellants.

08-2318

ON APPEAL FROM THE
AUGLAIZE COUNTY COURT
OF APPEALS, THIRD
APPELLATE DISTRICT

COURT OF APPEALS
CASE NO. 02 2008 0007

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS,
CAROL SHANER AND PHILLIP SHANER

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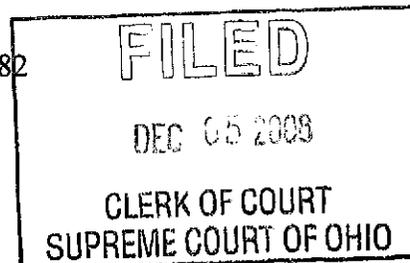


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**Opinion of the Third District Court of Appeals
(October 20, 2008)..... A-1**

**Judgment Entry of the Third District Court of Appeals
(October 20, 2008)..... A-16**

I. EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC AND GREAT GENERAL INTEREST

The two guiding principles of Ohio law regarding interpretation of an insurance policy are: (1) Any ambiguity must be construed against the insurer, *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211; and (2) Any reasonable construction that results in coverage of the insured must be adopted. *Sterling Merchandise Co. v. Hartford Ins. Co.* (1986), 30 Ohio App.3d 131, 137. The latter principle, though arguably necessarily resulting from the former, has been articulated by various Courts of Appeals throughout Ohio, but apparently never formally adopted by this Court. It is time that this Court does so.

There are, of course, compelling reasons for these principles. For many Ohioans, their life, auto, health and/or homeowner's insurance policies are the only contracts to which they are parties. Insurers, as sophisticated, repeat players in the system, and more importantly as the drafters of the policies, are far better equipped to protect their rights in these policies than individuals are to protect their own. As a result, the law recognizes that any ambiguities in insurance policies are to be resolved in favor of the insured, and any reasonable construction of the policy that results in coverage must be adopted.

Every so often, a lower court runs far enough astray from these guiding principles that it behooves this Court, on behalf of all insurance policy holders throughout Ohio, to remind the lower courts to comply with these rules of interpretation. This is especially so in a case such as this, where the critical term in the insurance policy is left undefined, where the court is forced to resort to a dictionary to define the term, and where, in fact, that dictionary definition actually supports the insured's reading of the policy. In the present case, the commercial general liability policy covered equipment vehicles maintained primarily to provide mobility to permanently mounted loaders. The dump truck at issue contained a permanently mounted bed that was used only to load and unload asphalt. This is a loader. The Court of Appeals turned to Webster's

Dictionary, which defined a loader as "a device or machine used for loading." Despite the fact that the equipment at issue clearly fell within this definition, the Court of Appeals determined that bed of the dump truck somehow failed to qualify as a loader.

Additionally, contracts must be examined as a whole by Ohio courts. *Wohl v. Swinney* (2008), 118 Ohio St.3d 277, 279. The insurance policy in the present case was a general commercial liability policy, designed to provide coverage to the insured for liabilities incurred as a result of his paving business. Separately, Mr. Pearce had an auto liability policy designed to provide him coverage if he caused an auto accident while driving on the public roadways. Here, while engaging in his paving business and actually paving a driveway, Mr. Pearce's dump truck was parked in a manner that caused it to stick out into the street, was not discernable to oncoming traffic, and caused a horrific collision resulting in life-altering injuries to Ms. Shaner. Because the injuries occurred as a result of Pearce's paving business, rather than his driving of a vehicle on the roads, the commercial policy clearly was intended to apply. The lower courts, however, ignored the intent of the policy, and construed it to deny coverage for the crash that nearly killed Carol Shaner.

II. STATEMENT OF THE CASE AND FACTS

A. The October 18, 2006 Collision

On October 18, 2006, Michael Pearce and his employees were performing blacktop work at a home located along State Route 66 in St. Mary's Ohio. Mr. Pearce does business as Blacktop Services, and advertises that his business performs paving and blacktop work. On October 18, 2006, Mr. Pearce employed four individuals to assist in performing blacktop work. He paid his employees cash at the end of each day and did not keep records of their names and addresses. Mr. Pearce's blacktop equipment included a paver, a bobcat, a

lowboy, a roller, and a dump truck. Mr. Pearce also owned a pick-up truck that he used to drive to and from the job sites.

The dump truck involved in the collision was used solely as mobile equipment. It had a permanently mounted loader used to load and unload asphalt and it was used to transport the roller, bobcat, and paver. Mr. Pearce did not own a CDL license and did not drive the dump truck. In fact, Mr. Pearce admits that the purpose of the dump truck was not to drive on the roads but, rather, to use it to load and unload asphalt onto driveways. There is little question that Mr. Pearce's own testimony establishes that the dump truck constitutes mobile equipment since it had a permanently mounted loader, was used for loading and unloading asphalt and transported equipment for Pearce's blacktop business.

During the early evening of October 18, 2006, Mr. Pearce and his crew began to perform asphalt work on Ms. Jamison's driveway in St. Mary's Ohio. Mr. Pearce and his crew first brought all the equipment and tools to the site and then sent one worker with the dump truck to obtain the asphalt. The laying of the new driveway began at about 5:30 p.m., about an hour prior to the collision. After initially unloading the asphalt in the driveway, the dump truck was moved to a second driveway adjacent to the driveway being paved. Mr. Pearce was nearly finished paving the driveway when he ran out of asphalt and needed to unload more from the dump truck. At that time, there were only two and a half feet of driveway left to pave. Mr. Pearce could have unloaded enough asphalt into the paver and driven the paver to the area that needed to be paved or backed the dump truck into the road and unloaded the remaining asphalt. Mr. Pearce elected to back the dump truck onto the edge of the driveway, leaving the truck in the roadway blocking the northbound lane of SR-66. This careless decision forever altered the course of Carol Shaner's life.

At this time, it was dusk and little light remained. Mr. Pearce unloaded the remaining asphalt and left the dump truck completely blocking the northbound lane of SR-66, parked at a slight angle facing northwest. The bed of the dump truck malfunctioned and Mr. Pearce left the truck blocking the northbound lane of SR-66 while he attempted to fix the bed. By this time it was dark and Mr. Pearce did not have any lights, cones, flags, or flares to warn motorists that the truck was parked in the road. In fact, the only effort Mr. Pearce took to warn northbound motorists was the illumination of a cell phone. Mr. Pearce readily admits that "by all means the truck shouldn't have been out there."

At approximately 6:35 p.m., Mrs. Shaner was traveling northbound on SR-66 when she suddenly encountered Mr. Pearce's unlit dump truck in the roadway. Mrs. Shaner was unable to avoid the dump truck and crashed into the side of the parked dump truck. Mrs. Shaner sustained catastrophic personal injuries including severe injuries to her foot (which required three surgeries and an ultimate fusion of her ankle), a broken neck, broken ribs and other injuries which resulted in permanent injuries and months of hospitalizations.

B. The Commercial General Liability Policy

Mr. Pearce purchased both an automobile policy and a Commercial General Liability policy ("CGL") relating to his blacktop business. The CGL policy describes the business as a "driveway paving" business and provides coverage in the amount of \$1,000,000 per occurrence. *See* Appendix. The CGL policy provides coverage for all aspects of the business including the contractor's equipment, paving driveways and parking lots as well as for any equipment defined as "mobile equipment." There also is no dispute whatsoever that Carol Shaner's injuries occurred in the course and scope of Mr. Pearce's commercial business. The CGL policy, however, does not provide coverage for the defined term "auto."

The dump truck parked on the roadway was the contractor's equipment and is covered under the CGL policy. The CGL policy specifically provides coverage for injuries resulting from the use of "mobile equipment":

11. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

- a.** Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b.** Vehicles maintained for use solely on or next to premises you own or rent;
- c.** Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:**
 - (1) Power cranes, shovels, **loaders**, diggers or drills; or
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

* * *

f. Vehicles not described in **a.**, **b.**, **c.** or **d.** above maintained for purposes other than the transportation of persons or cargo.

The trial court erroneously found that the dump truck was not "mobile equipment" and declared that the CGL policy does not provide insurance coverage for Mrs. Shaner's injuries. The dump truck, however, served only to load and unload asphalt and had a permanently attached loader. Because the dump truck is plainly mobile equipment, coverage exists under the plain terms of the CGL policy.

C. Procedural History

Plaintiff-Appellee, United Farm Family Mutual Insurance Company, filed this declaratory judgment action against Michael Pearce, Jr., Defendant-Appellee, on October 4, 2007. The trial court subsequently granted Intervenor-Appellants, Carol and Phillip Shaner's, request to intervene in this coverage dispute. This declaratory judgment action was brought as a

result of injuries Carol Shaner sustained in an October 18, 2006 collision with Mr. Pearce's dump truck which was carelessly parked and completely blocking her lane of travel on S.R. 66. Mrs. Shaner sustained severe, permanent and life-threatening injuries in the crash.

Mr. and Mrs. Shaner filed suit against Mr. Pearce in a separate matter, captioned *Carol Shaner, et al. v. Michael Pearce* (the "personal injury litigation"). Mr. Pearce purchased two policies of insurance for his driveway paving/blacktop business -- an automobile policy with policy limits of \$100,000, and a Commercial General Liability policy with policy limits of \$1,000,000. Mrs. Shaner suffered catastrophic injuries and sought to recover under both Pearce's automobile policy and his Commercial General Liability policy since the negligence occurred in the course of Pearce's paving/blacktop business. Plaintiff-Appellee, United Farm Family Insurance, then commenced this action to determine whether Mr. Pearce's Commercial General Liability policy provides coverage for Mrs. Shaner's injuries.

On March 26, 2008, Plaintiff-Appellee filed a motion for summary judgment seeking a declaration that Mr. Pearce's Commercial General Liability policy does not provide coverage for Mrs. Shaner's injuries. On April 14, 2008, Intervenor-Appellants Carol and Phillip Shaner filed a memorandum in opposition to Plaintiff-Appellee's motion as well as their own cross-motion for summary judgment. Just three days later, on April 17, 2008, the trial court granted Plaintiff-Appellee's motion for summary judgment.

The Shaners appealed to the Third District Court of Appeals. The parties briefed the issues and the Court heard oral argument. On October 20, 2008, the Court of Appeals affirmed the judgment of the Court of Common Pleas.

III. PROPOSITION OF LAW AND SUPPORTING ARGUMENT

Proposition of Law No. 1: ANY REASONABLE CONSTRUCTION OF AN INSURANCE POLICY THAT RESULTS IN INSURANCE COVERAGE MUST BE ADOPTED BY COURTS INTERPRETING THAT POLICY.

Various appellate courts across Ohio have stated that any reasonable construction of an insurance policy that results in coverage must be adopted. *See, e.g., Sterling Merchandise Co. v. Hartford Ins. Co.* (9th Dist. 1986), 30 Ohio App.3d 131, 137; *Nationwide Mut. Ins. Co. v. Wright* (3rd Dist. 1990), 70 Ohio App.3d 431, 434; *Employers Reinsurance Corp. v. Worthington Custom Plastics, Inc.* (10th Dist. 1996), 109 Ohio App.3d 550, 558-59. This Court should adopt this rule and clarify its importance for lower courts throughout the State of Ohio that, as in the case at bar, fail to follow this principle.

Applying that principle to the present case, it is clear that the lower courts erred by failing to adopt the reasonable construction of the insurance policy that would have resulted in coverage. The CGL policy at issue in this case provides coverage for mobile equipment which is specifically defined in the policy and includes the dump truck used by Mr. Pearce. The CGL Policy explicitly defines "mobile equipment" in a manner that unequivocally includes Mr. Pearce's dump truck. The definition of "mobile equipment" includes vehicles "maintained primarily to provide mobility to permanently mounted . . . loaders." Mr. Pearce's dump truck -- in addition to providing mobility to rollers -- plainly included a permanently mounted loader. The loader was used to load asphalt to use on Pearce's paving blacktop jobs. It is crystal clear that a dump truck is a vehicle maintained to provide permanent mobility to the loading function which is permanently affixed to the truck.

Coverage exists for a second, and equally important, reason. Section V.11.d.2. of the policy states that mobile equipment includes "vehicles ... maintained primarily to provide mobility to permanently mounted ... resurfacing equipment, such as graders, scrapers, or rollers."

Here Mr. Pearce testified that he used the dump truck to provide mobility to permanently mounted resurfacing equipment such as a roller. Despite the fact that Mr. Pearce used the dump truck to provide mobility to resurfacing equipment such as rollers, and the policy itself defines mobile equipment to include vehicles maintained to provide mobility to resurfacing equipment such as rollers, the trial court somehow concluded that the dump truck was not included in the definition of "mobile equipment." This was a blatant error.

Importantly, Section V.11.d.2 of the policy focuses on how the dump truck was "maintained." The use of the term "maintained" is critical and requires an inquiry into why Mr. Pearce maintained the dump truck. Thus, the trial court was required to assess how Mr. Pearce used the dump truck in order to determine how it was maintained by Pearce. The trial court completely ignored this fact. In other subsections, the policy uses objective language that does not turn on how the insured utilizes the equipment. For instance Section V.11.a. states that "mobile equipment includes "bulldozers, farm machinery, forklifts, and other vehicles designed for use principally off public roads." (emphasis added). This language does not turn on how the insured used the equipment. A forklift is designed for use principally off public roads, even if Mr. Pearce used his forklift principally on public roads. Had United Farm Family Mutual used the word "designed" in Section V. 11.d.2., there may have been a legitimate dispute about whether Mr. Pearce's dump truck is "mobile equipment." But United Farm Family Mutual did not use the word designed; it used the word *maintained*. There is no dispute that Mr. Pearce *maintained* the dump truck principally to transport resurfacing equipment such as rollers. Thus, the dump truck must be deemed to be "mobile equipment."

IV. CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court exercise jurisdiction over the present appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellants was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 4th day of December, 2008:

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APPENDIX

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY**

**UNITED FARM FAMILY MUTUAL
INSURANCE COMPANY,**

CASE NUMBER 2-08-07

PLAINTIFF-APPELLEE,

v.

OPINION

MICHAEL N. PEARCE, JR., ET AL.,

DEFENDANTS-APPELLEES,

and

CAROL SHANER, ET AL.,

INTERVENORS-APPELLANTS

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: October 20, 2008

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PRESTON, J.

I. Facts/Procedural Posture

{¶1} Intervenors-appellants, Carol and Phillip Shaner (hereinafter “the Shaners”), appeal the Auglaize County Court of Common Pleas grant of summary judgment in favor plaintiff-appellee, United Farm Family Mutual Insurance Company (hereinafter “United Farm”). For reasons that follow, we affirm.

{¶2} Defendant-appellee, Michael N. Pearce, Jr. (hereinafter “Pearce”), owns and operates a blacktop business called “Blacktop Services.” On October 18, 2006, Pearce was blacktopping a private driveway off of State Route 66 near St. Mary’s, Ohio. Toward the evening hours and the end of the job, Pearce backed his dump truck up to the back of the driveway to unload some blacktop and finish the job. The dump truck was blocking State Route 66’s northbound lane. Carol

Shaner was driving northbound on State Route 66, struck the dump truck, and was injured.

{¶3} On November 15, 2006, the Shaners filed a complaint against Pearce, Blacktop Services, and Motorists Mutual Insurance Company¹ alleging negligence and seeking damages sustained as a result of the accident. Sometime after the accident, Pearce notified United Farm of a potential claim by the Shaners under the commercial general liability (CGL) policy it issued for Blacktop Services. On October 4, 2007, United Farm filed a declaratory action with the trial court seeking a declaration of its rights and responsibilities under the policy. United Farm argued that it was not required to defend against claims or provide coverage, because bodily injury arising out of the ownership, maintenance, or use or entrustment to others of an “auto,” as that term is defined in the policy, is excluded.

{¶4} On October 31, 2007, the Shaners filed a motion to intervene in the declaratory action, and the trial court granted the motion on November 2, 2007. On March 27, 2008, United Farm filed a motion for summary judgment. On April 14, 2008, the Shaner’s filed a memorandum in opposition to summary judgment. On April 17, 2008, the trial court granted United Farm’s motion for summary judgment finding that the insurance policy excludes coverage because Pearce’s

¹ The complaint named several “John Does” as well. It is unclear from the record herein whether the complaint was later amended to add United Farm or whether Motorists Mutual Ins. Co. is a subsidiary of

dump truck is an “auto” and not “mobile equipment,” as those terms are defined in the policy.

{¶5} On May 16, 2008, the Shaners filed a notice of appeal to this Court and now assert two assignments of error for review.

II. Standard of Review

{¶6} An appellate court reviews a grant or denial of summary judgment pursuant to Civ.R. 56(C) de novo. *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 127, 752 N.E.2d 962, citing *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. To prevail under Civ.R. 56(C), a party must show: (1) there are no genuine issues of material fact; (2) it appears from the evidence that reasonable minds can reach but one conclusion when viewing evidence in the nonmoving party’s favor, and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *Shaffer*, 90 Ohio St.3d at 390; *Grafton*, 77 Ohio St.3d at 105.

{¶7} Material facts have been identified as those facts “that might affect the outcome of the suit under the governing law.” *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248 91 L.Ed.2d 202, 106 S.Ct. 2505. “Whether a genuine

United Farm. However, it appears that United Farm issued a separate motor vehicle insurance policy for Pearce’s dump truck. (Doc. No. 20, Ex. C).

issue exists is answered by the following inquiry: Does the evidence present “a sufficient disagreement to require submission to a jury” or is it “so one-sided that one party must prevail as a matter of law[?]” *Id.*, citing *Liberty Lobby, Inc.*, 477 U.S. at 251-52.

{¶8} Summary judgment should be granted with caution, resolving all doubts in favor of the nonmoving party. *Perez v. Scripts-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 217, 520 N.E.2d 198. “The purpose of summary judgment is not to try issues of fact, but is rather to determine whether triable issues of fact exist.” *Lakota Loc. Schools Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 643, 671 N.E.2d 578.

III. Analysis

ASSIGNMENT OF ERROR NO. I

The trial court erred in granting summary judgment finding that the commercial general liability policy of insurance excludes coverage for the injuries sustained by Carol Shaner on October 18, 2006.

{¶9} In their first assignment of error, the Shaners argue that the trial court erred in granting summary judgment in favor of United Farm because it incorrectly determined that the dump truck was an “auto” and not “mobile equipment,” as those terms are defined in the CGL policy. Specifically, the Shaners argue that the dump truck qualifies as “mobile equipment” under policy section V.11.d.(1) because the dump truck was maintained primarily to provide

mobility to a permanently mounted loader. The Shaners also argue that the dump truck qualifies as “mobile equipment” under policy section V.11.d.(2) because it was used to haul the roller. Finally, the Shaners argue that the dump truck qualifies as “mobile equipment” under policy section V.11.f. because it was maintained for purposes other than the transportation of cargo and persons.

{¶10} “An insurance policy is a contract whose interpretation is a matter of law.” *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶7, citing *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶6. In determining a contract’s interpretation, a reviewing court must give effect to the parties’ intent. *Id.*, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11. A contract is examined as a whole, and the court presumes that the parties’ intent is reflected by the language of the policy. *Id.*, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus. “When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.” *Id.*, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus. A contract is unambiguous as a matter of law if it can be given a definite legal meaning. *Id.*, citing *Gulf Ins. Co. v. Burns Motors, Inc.* (Tex. 2000), 22 S.W.3d 417, 423.

{¶11} “Ambiguity in an insurance contract is construed against the insurer and in favor of the insured.” Id. at ¶8, citing *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus. However, a court should not apply this rule if it results in an unreasonable interpretation of the words of the policy. Id., citing *Morfoot v. Stake* (1963), 174 Ohio St. 506, 190 N.E.2d 573, paragraph one of the syllabus.

{¶12} With the applicable rules of law in view, we now turn to the CGL policy language at issue in this case. The policy provides the following pertinent exclusion:

g. Aircraft, Auto, or Watercraft

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or water craft owned or operated by or rented or loaned to any insured. Use includes operation and “loading and unloading”.

(CGL Policy Section I, 2.g.). The policy provides the following applicable definitions:

2. **“Auto” means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But “auto” does not include “mobile equipment”.**

11. **“Mobile equipment” means any of the following types of land vehicles, including any attached machinery or equipment:**
 - a. **Bulldozers, farm machinery, forklifts, and other vehicles designed for use principally off public roads;**
 - b. **Vehicles maintained for use solely on or next to premises you own or rent;**

- c. **Vehicles that travel on crawler treads;**
- d. **Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:**
 - (1) **Power cranes, shovels, loaders, diggers, or drills; or**
 - (2) **Road construction or resurfacing equipment such as graders, scrapers, or rollers;**
- e. **Vehicles not described in a., b., c., or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:**
 - (1) **Air compressors, pumps, and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or**
 - (2) **Cherry pickers and similar devices used to raise or lower workers;**
- f. **Vehicles not described in a., b., c., or d. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not “mobile equipment” but will be considered “autos”:**
 - (1) **Equipment designed primarily for:**
 - (a) **Snow removal;**
 - (b) **Road maintenance, but not construction or resurfacing; or**
 - (c) **Street cleaning;**
 - (2) **Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise and lower workers; and**
 - (3) **Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.**

(CGL Policy Sections V, 2; V, 11).

{¶13} The Shaners first argue that the dump truck qualifies as “mobile equipment” under policy section V.11.d.(1) because the dump truck was maintained primarily to provide mobility to a permanently mounted loader. We

disagree. The Shaners argue that the dump bed on the truck is a permanently mounted loader. “Loader” is not defined in the contract, so we must use the “ordinary meaning unless manifest absurdity results, or some other meaning is clearly evidenced from the face or overall contents of the instrument.” *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559, 2004-Ohio-7102, 820 N.E.2d 910, ¶23, citing, *Alexander*, 53 Ohio St.2d 241, paragraph two of the syllabus. “Loader” is defined, in pertinent part as: “a device or machine used for loading * * *; a machine (as a belt or bucket conveyor or a power scoop shovel) that picks up loose material (as snow or gravel) and loads it upon a vehicle or into a container within the same unit.” WEBSTER’S THIRD INTERNATIONAL DICTIONARY (2002) 1326. Pearce’s dump truck, on the other hand, has a “dump body,” which is defined as: “a motor-truck or trailer body that can be manipulated to discharge its contents by gravity.” *Id.* at 701. Consequently, Pearce’s dump truck does not have a “permanently mounted loader” as the Shaners argue; and therefore, it is not “mobile equipment” under section V, d., (1).

{¶14} The Shaners also argue that the dump truck qualifies as “mobile equipment” under policy section V.11.d.(2) because it was used to haul the roller. We disagree. Although the dump truck was used to haul a roller, the roller was not “permanently mounted” to the dump truck, as required under section V.11.d(2). Pearce testified that he hauled various pieces of paving equipment,

including the roller, with the dump truck using a lowboy trailer.² (May 10, 2007 Tr. at 32, 37-38). Pearce testified that he loaded these pieces of equipment onto the lowboy trailer, which indicates that the roller was not permanently mounted to the dump truck as required under section V.11.d(2). Therefore, the dump truck is not “mobile equipment” as the term is defined under subsection V.11.d(2) either.

{¶15} The Shaners next argue that the dump truck qualifies as “mobile equipment” under policy section V.11.f. because it was “maintained primarily for purposes other than the transportation of persons or cargo.” In support of their argument, the Shaners contend that the word “maintained” requires that the court examine how the vehicle at issue was used by the owner, regardless of its intended design. Although we agree with the Shaners that a vehicle may be maintained for purposes different than its intended design, we cannot agree that the dump truck was “maintained primarily for purposes other than the transportation of persons or cargo.” (Section V.11.f). Pearce testified that he used the dump truck primarily to haul asphalt and equipment to the job site. Pearce testified:

Q: Okay. So you buy [the asphalt], your dump truck goes there, loads it and then takes it to the job site?

A: Yeah. And the dump truck also is what pulls the equipment, too.

* * *

² Although Pearce did not specifically use the term “trailer,” it is apparent from the context of his testimony that he was referring to a type of trailer, which was “hitched” to the dump truck for purposes of hauling the paving equipment. (May 10, 2007 Tr. at 32, 37)

Q: Sometimes the dump truck will take the equipment there, leave, go get the asphalt and then come back?

A: Yeah.

Q: Okay. And when the dump truck gets to the job site, does it then unhitch from the Lowboy?

A: Yes.

*** * ***

Q: Okay. So the dump truck then transports the equipment on the Lowboy and it also loads and unloads the asphalt. Does it do anything else?

A: I don't know. I don't think so.

Q: In the course of your business, does it serve any other purpose?

A: No, that's about it.

(May 10, 2007 Tr. at 37-40). “Cargo” is defined as “the lading or freight of a ship, airplane, or vehicle: the goods, merchandise, or whatever is conveyed; LOAD, FREIGHT—usu. used of goods only and not of live animals or persons.” WEBSTER’S THIRD INTERNATIONAL DICTIONARY (2002) 339. “Goods” are “tangible movable personal property having intrinsic value * * *” Id. at 978. “Convey” means “to bear from one place to another: CARRY, TRANSPORT.” Id. at 449. Asphalt and equipment fall within the definition of a good, and thus, cargo. According to the record, then, the dump truck was maintained primarily for the transportation of cargo; and therefore, is not “mobile equipment” under Section V.11.f.

{¶16} The dump truck is an “auto” as that term is defined in the policy; and therefore, the injuries sustained by Carol Shaner are excluded from coverage. The dump truck was designed for travel on the public roads. It was registered with the

Bureau of Motor Vehicles (BMV), and its operator was required to have a commercial driver's license. (May 10, 2007 Tr. at 34, 24). Furthermore, Pearce's testimony indicates that he used the dump truck to haul asphalt and equipment to the job site, which, by necessity, would require that the dump truck travel on public roads. (May 10, 2007 Tr. at 37-40). Accordingly, the dump truck is an "auto" as defined in the CGL policy and is not "mobile equipment" as defined in the CGL policy. As an additional matter, Pearce obtained a separate automobile liability policy to cover the dump truck, and the CGL policy did not list the dump truck on the scheduled list of equipment. (Do. No. 20, Exs. C, D). These two facts, though not dispositive, certainly indicate that it was the parties' intention that the dump truck not be covered under the CGL policy. Since the dump truck is an "auto" and not "mobile equipment," any "bodily injury" or "property damage" arising out of its ownership, maintenance, use or entrustment to others is excluded from coverage. (CGL Policy Section I, 2, g.). Therefore, the trial court did not err in granting summary judgment in United Farm's favor.

{¶17} The Shaners' first assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR NO. II

The trial court erred in following *Brookman v. Estate of Gray* (3rd District, December 22, 2003), Allen County Case No. 1-03-38, 2003-Ohio-6994.

{¶18} In their second assignment of error, the Shaners argue that the trial court erroneously relied upon *Brookman v. Estate of Gray*, 3d Dist. No. 1-03-38,

2003-Ohio-6994. Specifically, the Shaners contend that *Brookman* dealt with UM/UM coverage and a claim pursuant to *Scott-Ponzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116 wherein the court found that the policy at issue was not a “motor vehicle liability policy” as defined by R.C. 3937.18(L)(1). The Shaners argue that this policy is considered a “motor vehicle liability policy” “because it specifically provides insurance coverage for “mobile equipment,” including Mr. Pearce’s dump truck.” (Appellant’s Brief at 9).

{¶19} These arguments lack merit. This Court in *Brookman* held that the CGL policy in that case was not a “motor vehicle policy” under R.C. 3937.18(L)(1) for purposes of plaintiff’s UM/UM claim, because the policy failed to specifically identify any motor vehicles to be covered under it. 2003-Ohio-6994, at ¶8. The parties do not dispute that the facts in *Brookman* are distinguishable from the case at bar; however, United Farm argues, and we agree, that *Brookman*’s holding is, at least, persuasive here. The plaintiff in *Brookman* attempted to extend her employer’s CGL policy to motor-vehicles in order to assert her claims. *Id.* at ¶3. Likewise, the Shaners are arguing that “the CGL policy is considered a ‘motor vehicle liability policy’ because it specifically provides coverage for ‘mobile equipment,’ including Mr. Pearce’s dump truck.” (Appellant’s Brief at 9). Furthermore, like the CGL policy in *Brookman*, the United Farm policy does not specifically identify Pearce’s dump truck. Furthermore the CGL policy expressly excludes coverage for “autos,” and Pearce

obtained a separate automobile liability policy for the dump truck. (Doc. No. 20, Exs. C, D). Under these circumstances, the Shaners cannot extend the CGL policy's coverage to include Pearce's motor vehicle just as the plaintiffs in *Brookman* could not extend their employer's CGL policy to include motor vehicles. Therefore, the trial court did not err in relying upon our opinion in *Brookman*.

{¶20} Furthermore, even if this Court determined that the trial court erroneously relied upon *Brookman*, “[a] judgment by the trial court which is correct, but for a different reason, will be affirmed on appeal as there is no prejudice to the appellant.” *Bonner v. Bonner*, 3d Dist. No. 14-05-26, 2005-Ohio-6173, ¶18, citing *Lust v. Lust*, 3d Dist. No. 16-02-04, 2002-Ohio-3629, ¶32; *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110, 233 N.E.2d 137. This Court has reviewed the record and concluded that the trial court did not err in granting summary judgment in United Farm's favor based on the contract's language. Thus, the Shaners have not suffered prejudice because of the trial court's reliance upon *Brookman*, even if such reliance was erroneous.

{¶21} The Shaner's second assignment of error is, therefore, overruled.

IV. Conclusion

{¶22} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

SHAW, P.J., and ROGERS, J., concur.

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IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

AUGLAIZE COUNTY

UNITED FARM FAMILY MUTUAL
INSURANCE COMPANY,

PLAINTIFF-APPELLEE,

CASE NUMBER 2-08-07

v.

MICHAEL N. PEARCE, JR., ET AL.,

J U D G M E N T

DEFENDANTS-APPELLEES,

E N T R Y

and

CAROL SHANER, ET AL.,

INTERVENORS-APPELLANTS

For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellants for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any

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COURT OF APPEALS
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SUE ELLEN KOHLER
CLERK

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other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

Vernon Z. Guston

JUDGES

DATED: October 20, 2008

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