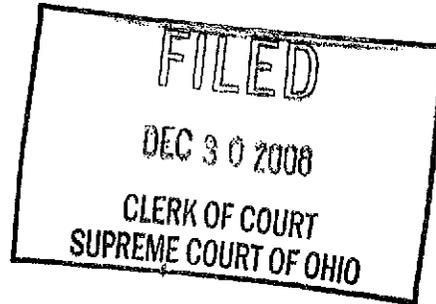


IN THE SUPREME COURT OF OHIO

United Farm Family Mutual) Case No.: 08-2318
Insurance Company,)
) On Appeal from Auglaize
Plaintiff-Appellee,) County Common Pleas Court,
) Third Appellate District
v.)
) Court of Appeals Case No.
Michael N. Pearce, Jr., et al.,) 02 2008 0007
)
Appellees,)
)
and)
)
Carol and Phillip Shaner,)
)
Intervenors-Appellants.)



**PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO THE
JURISDICTION OF INTERVENORS-APPELLANTS**

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TABLE OF CONTENTS

I. EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC AND GREAT GENERAL INTEREST.....1

FACTS.....2

 A. Introduction.....2

 B. Accident.....3

 C. Procedural History.....6

II. LAW & SUPPORTING ARGUMENT.....6

 A. Explanation of Why This Case Is Not One Of Public And Great General Interest.6

 B. The Dump Truck Meets The Definition Of An “Auto” Which Is Specifically Excluded Under The Policy.....8

 C. The Dump Truck Did Not Constitute “Mobile Equipment” Under The Policy.....9

 D. The Dump Truck Was Not Maintained To Provide Mobility To Permanently Mounted Equipment.....11

 E. Conclusion.....12

CERTIFICATE OF SERVICE.....13

I. EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC AND GREAT GENERAL INTEREST

The issue in this lawsuit is the interpretation of a commercial general liability insurance policy Plaintiff-Appellee, United Farm Family Mutual Insurance Company, issued to Michael Pearce, Jr. d/b/a Blacktop Services. Plaintiff-Appellant, Carol Shaner¹, was involved in an accident with a dump truck owned by Blacktop Services. The Shaners allege under the applicable commercial general liability (CGL) policy, there is coverage afforded to Blacktop Services for her claims. Besides the applicable policy not affording coverage for the Shaner's claims, this case is not one of public and great general interest because this case only affects the Shaners.

The Shaners contend any ambiguity in an insurance policy must be construed against the insurer². Yet there is no ambiguity in the insurance contract at issue. Contrary to the Shaner's assertion the subject dump truck met the definition of "mobile equipment" under the policy, the plain language of the policy and the facts of this case show it was an "auto" and is specifically excluded under the policy.

The Shaners correctly state United Farm issued a CGL policy designed to provide coverage for liabilities as a result of the paving business, and Mr. Pearce had a separate automobile liability policy. Although the Shaners argue their claims against Blacktop Services and Pearce are covered under both policies, this

¹ Intervening Plaintiff, Phillip Shaner, is also a party to this action. Mr. Shaner is asserting a consortium claim.

² *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211.

assertion is not supported by the language used in the policies. Under the automobile liability insurance policy United Farm issued Pearce, the Shaners previously received a settlement of \$100,000 which was policy limits. Now, the Shaners further seek to obtain coverage under the CGL policy.

Based on the facts in the instant matter, this coverage dispute is not one of great public interest. There are no unusual questions of law or procedure in this matter. The Third District Court of Appeals has correctly resolved the issues set forth by the Shaners.

I. FACTS:

A. Introduction

This lawsuit arises from a commercial general liability (CGL) policy Plaintiff-Appellee, United Farm Family Mutual Insurance Company, issued to Michael N. Pearce, Jr., bearing number CPP 8129097 00, which was in effect from October 4, 2006 through October 4, 2007³. The issue before the Court is whether the CGL policy affords coverage to Intervenor-Appellants, Carol and Phillip Shaner, for their personal injury claims. United Farm submits coverage is not afforded because the dump truck at issue meets the definition of an “auto” as opposed to “mobile equipment”. Coverage for an “auto” is expressly excluded under the policy.

³ The insurance contract is attached to the Appellate Brief as A1.

B. Accident – October 18, 2006

Pearce operated Blacktop Services which was a driveway paving business⁴. As part of the business, Pearce used a 1997 International dump truck⁵. In order to operate the dump truck on public roadways, the driver was required to have a commercial driver's license⁶. Todd, one of the workers who had a commercial driver's license, drove the dump truck⁷.

On October 18, 2006, at approximately 6:35 p.m., Blacktop Services was performing asphalt work on a private driveway for the Jamisons located on State Route 66 in or near St. Mary's, Ohio⁸. It was dusk. After completing the work on the driveway with the paver, Pearce realized there was two and a half feet of the driveway that was not done.

Pearce determined he needed to get the dump truck to lay more asphalt on the driveway so it could be finished. Pearce backed the dump truck into the end of the driveway where the asphalt needed to be dumped to complete the job. When the bed of the dump truck was lifted, the asphalt fell out of the bed. There were controls on the dump truck to raise and lower the bed. When Pearce attempted to get the bed of the dump truck to go down, it would not gage to go down. There was a malfunction of the dump truck.

⁴ Pearce Depo. p. 5 ll. 14-16

⁵ Pearce Depo. p. 32 ll. 9-22

⁶ Pearce Depo. p. 24 ll. 4-7

⁷ Pearce Depo. pgs. 23-24 ll. 22-3

⁸ Pearce Depo. p. 40 ll. 3-12

The dump truck was only in a portion of the northbound lane⁹. To warn oncoming motorists, Pearce testified the lights and headlights were on the dump truck¹⁰. Pearce thought the hazard lights were on as well¹¹. Pearce was also flagging cars to alert oncoming traffic¹². Greg, another laborer, was flagging traffic as well¹³. Additionally, Pearce had his personal pick-up truck alongside the road with its hazard lights on to warn approaching traffic¹⁴. The truck was parked across the street from the driveway so that cars proceeding towards the dump truck would see the hazard lights on the pick-up truck¹⁵.

Pearce testified the purpose of having his hazard lights on was that it was a three-mile flat area, and if someone saw the hazard lights, s/he would have slowed down¹⁶. Pearce testified several other cars proceeding north had passed the dump truck when it was extended onto the road¹⁷.

Shaner, who was sixty-eight years old and was driving a 2000 Buick Regal, was traveling north on State Route 66 and hit the dump truck¹⁸. She claims she was one car length from the dump truck when she first observed it¹⁹. Additionally, Shaner was not wearing her seatbelt²⁰.

⁹ Pearce Depo. p. 68 ll. 10-13

¹⁰ Pearce Depo. p. 64 ll. 6-9

¹¹ Pearce Depo. pgs. 64-65

¹² Pearce Depo. p. 68 ll. 14-17.

¹³ Pearce Depo. p. 81 ll. 15-21

¹⁴ Pearce Depo. p. 71 ll. 11-15

¹⁵ Pearce Depo. p. 72 ll. 14-19

¹⁶ Pearce Depo. p. 73 ll. 15-18

¹⁷ Pearce Depo. p. 80 ll. 15-23

¹⁸ See A2 – police report which was attached to the deposition of Pearce as Exhibit 3

¹⁹ See A2

²⁰ See A2

Belinda Hudson was a witness to the accident²¹. Hudson was traveling south on State Route 66 behind a semi-truck. She saw the semi-truck brake and slow down because there was a dump truck in the northbound lane unloading blacktop on a driveway. Hudson had slowed her vehicle approximately a minute before the accident. Hudson saw a yellow flashing light, and the dump truck's bucket was up. Despite Hudson and the semi-truck driver's observation of the dump truck in the road, Shaner did not see the dump truck in time to avoid it.

On or about November 15, 2006, Carol and Phillip Shaner filed a lawsuit against Pearce, Blacktop Services, and Motorists Mutual Insurance Company, the Shaner's uninsured/underinsured motorists carrier, in the Auglaize County Common Pleas Court, case number 2006 CV 0323. The Shaners alleged Pearce was negligent and negligent *per se* because the dump truck blocked the northbound lane of State Route 66 without any warning to approaching traffic. The Shaners further alleged they sustained injuries as a result of Pearce and Blacktop Services' negligence.

At the time of the subject accident, Pearce had an automobile liability insurance policy issued by United Farm Family Mutual Insurance Company, bearing policy number M-4850613, effective from September 20, 2006 through March 20, 2007²². The liability policy contained limits of \$100,000 per person and \$300,000 per accident. The dump truck was listed as a vehicle on the

²¹ All references to Belinda Hudson's statements are found in A2 – police report

²² See A4 attached to the Appellee Brief.

automobile liability policy. Previously, a settlement was reached between Pearce and the Shaners for policy limits of \$100,000.

C. Procedural History

Because an issue arose regarding whether there was insurance coverage afforded to the Shaners under the CGL policy, United Farm filed a declaratory judgment action on October 4, 2007. The Shaners intervened in the action. United Farm subsequently filed a motion for summary judgment which was granted on April 17, 2008. The Shaners appealed. On October 20, 2008, the Third District Court of Appeals affirmed the trial court's decision.

II. LAW AND SUPPORTING ARGUMENT:

A. Explanation Of Why This Case Is Not One Of Public And Great General Interest.

Despite the Shaner's argument that this Court should adopt the rule that any reasonable construction of an insurance policy that results in coverage must be adopted, it has previously come to this conclusion on numerous occasions. The former Ohio Supreme Court held when language in an insurance contract is ambiguous, it will be liberally construed in favor of the insured and strictly against the insurer who drafted the policy. *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537, 542. Although worded differently, the same conclusion can be reached.

It is well-settled insurance contracts are to be construed in accordance with the same rules as other written contracts. *Hybrid Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St. 657, 665. If the language of a policy's provision

is clear and unambiguous, a court may not attempt to adopt a construction that is inconsistent with the contract's clear intent. *Karabin v. State Auto Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 166-167.

The former Ohio Supreme Court also concluded when reviewing an insurance policy, words and phrases used therein must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance contract consistent with the apparent object and plain intent of the parties may be determined. *Tomlinson v. Skolnik* (1989), 44 Ohio St.3d 11, 12. Courts presume that the intent of the parties resides in the language of the contract. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130.

In the present matter, a reasonable interpretation of the insurance policy shows no coverage is afforded for the Shaner's claims because the subject dump truck constituted an "auto" and was specifically excluded from the policy. An insurance company has no obligation to its insured or to others harmed by the actions of the insured unless the conduct at issue falls within the scope of coverage as defined in the policy. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 36. The lower courts did not err because the policy unambiguously excluded coverage for "autos" such as the dump truck.

B. The Dump Truck Meets The Definition Of An “Auto” Which Is Specifically Excluded Under The Policy.

The policy provides,

2. Exclusions

This insurance does not apply to: . . .

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 watercraft owned or operated by or rented or loaned to any insured.

Use includes operation and “loading or unloading”
(See policy - pg. 3 of 13).

Auto is defined by the policy as:

“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”.

(See policy – pg. 10 of 13).

Here, the dump truck was designed for travel on public roads. Pearce testified the dump truck was used to haul asphalt from the plant to various job sites²³. It was Pearce’s understanding the driver of the dump truck was required to have a commercial driver’s license²⁴. The dump truck had a license plate and was registered with the Bureau of Motor Vehicles²⁵.

²³ Pearce Depo. p. 29 ll. 3-8

²⁴ Pearce Depo. p. 24 ll. 4-7

²⁵ Pearce Depo. p. 35 ll. 8-10

In the CGL policy, the dump truck is not indicated on the scheduled list of equipment²⁶. Pearce obtained a separate automobile liability policy to cover the dump truck²⁷. It was the parties' intention that the dump truck be covered under the automobile liability insurance policy, not the CGL policy.

All of the evidence shows the dump truck was an "auto". The CGL insurance agreement precluded coverage for "autos". As such, the trial court and the Third District Court of Appeals correctly found United Farm did not have a duty to indemnify Pearce for the Shaner's claims.

C. The Dump Truck Did Not Constitute "Mobile Equipment" Under The Policy.

A close review of the policy shows the Shaner's argument the dump truck at issue was "mobile equipment" as defined by the policy lacks merit. The insurance agreement addresses "mobile equipment" in V. 11d(1) and provides,

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

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills;. . . (See policy - pg. 12 of 13)

The Shaners contend the dump truck was "mobile equipment" because it contained a loader to load asphalt. Yet the facts do not support this claim. Pearce

²⁶ See A1 attached to the Appellate Brief – p. 8 – Contractors Equipment Coverage

²⁷ See A4 attached to the Appellate Brief – Declarations page of the automobile liability insurance policy.

stated the part of the dump truck where the asphalt was loaded and unloaded was the bed. Pearce testified,

Q. And is the dump portion of the truck, do you refer to that as a bed?

A. Yeah²⁸.

Because the dump truck had a bed, it does not qualify as a loader. Thus, the dump truck did not qualify as “mobile equipment”, and there is no coverage afforded under the insurance agreement at issue.

The Shaners further argue the Court of Appeals’ reliance on the Webster’s Dictionary definition of a loader as “a device or machine used for loading” was improper. Yet this Court has previously held when a term was not defined in the policy, it must be given its common, ordinary meaning. *Shear v. West Am. Ins. Co.* (1984), 11 Ohio St.3d 162, 166. In *Shear*, the former Ohio Supreme Court adopted the Webster’s dictionary definition of the term “household” to mean “those who dwell under the same roof and compose a family” and “a social unit comprised of those living together in the same dwelling place”. *Id.* The Court found the terms “your household” or “household” was not defined in the policy. *Id.* It relied on the common meaning found in Webster’s Dictionary.

Similarly, the Court of Appeals indicated the term “loader” was not defined in the policy. Therefore, the Court relied on the ordinary meaning of the term “loader” found in Webster’s Dictionary. The Court further found the dump truck had a “dump body” which was “a motor-truck or trailer body that can be

²⁸ Pearce Depo. p. 38 ll. 13-15

manipulated to discharge its contents by gravity”. In light of the decision in *Shear, supra*, the Court’s reliance on the dictionary definition was proper.

D. The Dump Truck Was Not Maintained To Provide Mobility To Permanently Mounted Equipment.

The Shaners further argue that coverage for their claims is afforded under V 11 d. 2. because of how the dump truck was maintained. Yet this argument fails because the dump truck was not maintained to provide mobility to permanently mounted equipment such as a roller. V.11.d.2 provides,

11. “Mobile equipment” means any of the following types of land vehicles, including any attached machinery or equipment:. . .
 - d. Vehicles, whether self-propelled or not maintained primarily to provide mobility to permanently mounted:. . .
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;. . .
(See policy - pg. 12 of 13)

Contrary to the Shaner’s assertions, Pearce stated the dump truck was not permanently mounted equipment. Pearce testified,

- A. And the dump truck also is what pulls the equipment, too.
- Q. What type of equipment?
- A. All on the Lowboy²⁹.
- Q. Okay.
- A. It takes it from job site to job site.
- Q. Okay. I got it. So how is the Lowboy then affixed to the dump truck?
- A. With a hitch³⁰.

²⁹ A flat-bed used to haul equipment (Pearce Depo. p. 37-38 ll. 17-12).

³⁰ Pearce Depo. p. 37 ll. 8-16

Pearce's testimony shows the equipment transported on the lowboy was not permanently affixed to the dump truck. Pearce stated once the dump truck arrived at the job site, the lowboy is unhitched from the dump truck³¹. There is no evidence any road construction equipment set forth in V.11.d.2. including a grader, scraper or roller were permanently affixed to the dump truck. Even if the Court examines how the dump truck was maintained, it did not provide mobility to permanently mounted equipment. Accordingly, under V.11.d.2, the lower courts correctly decided there was no coverage afforded to the Shaners for their claims.

E. Conclusion

This case is not one of public and great general interest because this Court has previously held any ambiguity in an insurance contract must be held against the insurer. Here, the trial court and the Third District Court of Appeals did not find any ambiguity in the applicable policy. The Shaners are merely seeking this Court to second guess the Appellate Court's decision which is not the role of this Court. The facts simply do not warrant review by this Court.

For the above-stated reasons, Appellee, United Farm Family Mutual Insurance Company, respectfully requests that this Court decline to exercise jurisdiction over this appeal which does not raise an issue of great public importance.

³¹ Pearce Depo. pgs. 37-38 ll. 17-12

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via ordinary U.S. Mail, postage pre-paid, this 29th day of December, 2008, upon: Michael N. Pearce, Jr., 31 North Bluegill Road, Silver Lake, Indiana 46982; and Rex H. Elliott, Esq. and Sheila P. Vitale, Esq., Attorneys for Intervenors, Carol and Phillip Shaner, Cooper & Elliott, LLC, 2175 Riverside Drive, Columbus, Ohio 43221.

Lorri J. Britsch

Lorri J. Britsch