Civil Action No. 83-221, HEDRICK v. STATE FARM MUTUAL AUTO. INS. CO.

PRELIM CONF. 14 Dec 1983 at 3 PM

Plaintiff rented a backhoe and was driving it down a public road when it became involved in an accident which resulted in another motorist becoming severely injured.

The victim sued in state court, and plaintiff, who was insured with State Farm as to "cars", referred to his policy which guaranteed that the insurance company would provide him with a defense in cases of accidents.

He made a demand that the Ins. Co. defend him, but the Co. refused, takeing the position that a backhoe was not a car and that the policy did not pertain in this case.

Plaintiff provided his own counsel at a cost of some $14,000, won, and now seeks re-imbursement.

Plaintiff admits that the question of "car" vs. backhoe is one which the different courts have resolved in different ways. He has not found a Kentucky case directly on point, and the policy is not yet in evidence.

GLP

Should this be Certified
Do you have to license the equipment
as a motor vehicle
is "Car" a motor vehicle".

Shepardize 304.39-080(5)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-221

WILLIAM R. HEDRICK

PLAINTIFF,

VS:

SUMMARY JUDGMENT

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

DEFENDANT.

* * * * * * * * * * *

In accordance with the memorandum opinion entered herewith,

IT IS HEREBY ORDERED:

1. That the plaintiff's motion for summary judgment is DENIED;
2. That the defendant's motion for summary judgment is GRANTED;
3. That plaintiff's complaint is DISMISSED and STRICKEN from the docket.

This 14 day of September, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-221

WILLIAM R. HEDRICK

PLAINTIFF,

VS:

MEMORANDUM OPINION

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

DEFENDANT.

* * * * * * * * * * *

On the cross motions of the parties for summary judgment, the question is whether a backhoe is a car within the terms of the liability policy issued by the defendant to the plaintiff.

The Court finds the following undisputed relevant and determining facts:

1. The defendant had issued to the plaintiff and there was in effect a liability policy at the date of the accident in question covering a 1980 2-dr toyota car owned by the plaintiff.

2. The pertinent provisions of this policy provided:

(a) "Car -- means a four wheel land motor vehicle designed for use mainly on public road."

(b) "a non-owned car -- as used in Sections I and II, means a car including a six wheel truck that has one set of dual wheels, not:

(1) owned by,

(2) registered in the name of, or

(3) furnished or available for the regular or frequent use of you, your spouse or any relatives."

(c) Your car -- means the car or the vehicle described on the declaration page."

(d) "COVERAGE FOR THE USE OF OTHER CARS. The liability coverage extends to the use, by an inusred, of . . . a non-owned car.

(e) "We will . . . defend any suit against an insured for such damages with attorneys hired and paid by us. . ."

(f) ". . . . , we will pay. . . . court costs of any suit for damages."

3. On September 19, 1984, the plaintiff rented a backhoe. On the same day, while driving the backhoe in the right hand lane of the south bound lane of four lane U.S. Highway No. 23, with a warning vehicle following him, a following motorist went off the shoulder of the road receiving personal injuries. This motorist sued the plaintiff in the Floyd Circuit Cout, Action No. 81-CI-329, alleging negligence on the part of the plaintiff in the operation of the backhoe. The plaintiff notified the defendant of the action and demanded that the defendant defend him under the provisions of the liability policy. The defendant declined to do so, contending that the backhoe was not a car and thus not covered by the liability policy. The defendant engaged counsel, at his expense, and successfully defended the law suit. By this instant action the plaintiff seeks to recover the attorney fees and court costs he became obligated to pay, contending that at the time of the accident he was covered by the policy because he was operating the backhoe like a car, "that is, he was driving it on the highway, rather than operating it as construction machinery on a construction site."

CONCLUSIONS OF LAW

Here, the law of Kentucky will be applied to the facts of this action. While neither the parties nor the Court have found any specific authority involving a backhoe in the context of the issue herein, there are Kentucky authorities that by analogy furnish very definite guidelines for the final resolution of the issue before the Court.

> "In interpreting the terms of a policy of insurance, it has long been held that they should be construed in favor of the insured so as not to defeat the claim of indemnity which he intended to secure. . . .
>
> "In Kentucky the terms 'car' and 'automobile' have specifically been held to be interchangeable, the word 'car' being a substitute or synonym for 'automobile' . . . .
>
> "One of the rules of interpretation, which has been applied most requently . . . , is that 'words in an insurance policy are to be given their ordinary and

usual meaning.' Thus, the courts have said that the terms 'automobile' or 'car' should be interpreted as they are popularly understood. . ." Buckingham Life Insurance Company v. Winstead, 454 S.W. 2d 696 at 697 (Ky. 1970). See in addition Monroe's Adm'r v. Federal Union Life, Insurance Company, 65 S.W. 2d 680, (Ky. 1933) and Life and Casualty Insurance Company of Tennessee v. Metcalf, 42 S.W. 23d 909 (Ky. 1931).

In the case of Kentucky Farm Bureau Mutual Ins. Co. v. Vanover, 508 S.W. 2d 517 (Ky., 1974), the Kentucky Court of Appeals said: "We have said that the meaning of 'automobile' should be considered in its ordinary and popular sense rather than in its generic sense."

The case of Washington Nat. Ins. Co. v. Burke, 258 S.W. 2d 709 (KY. 1953) involved the question of coverage of a farm tractor being driven on a highway where the policy provided for coverage of "any automobile, or automobile truck or of any animal drawn vehicle in which the insured is riding as driver or passenger." The then Court of Appeals, now the Supreme Court of Kentucky, held that the farm tractor was not covered by the policy saying:

"As a generic word, 'automobile' is broad enough to include all forms of self-propelling vehicles. . .

"The manner in which a vehicle is used as well as its construction determines its character. A farm tractor is a machine designed and intended to be used as an agricultural implement. It is not intended or ordinarily used as a means of transportation on the highways although on occasion it may be temporarily operated on them.

". . . .

"If the present policy included the machine which was involved in this accident, it would likewise have included very other character of self-propelling vehicle, as such as a threshing machine, a road roller or a heavy caterpillar scraper or power shovel. The terms of the policy indicate there was no intention to include a farm tractor or any such machinery within the clause 'automobile or automobile truck.' Since a motor truck clearly is an automobile in common parlance, using both terms must have been to signify 'automobile' meant a passenger car as distingusihed from a truck or other gasoline driven vehicle. 'Farm tractor' is no synonym of 'automobile'." Id. 258 S.W. 2d at p. 711.

Also the Kentucky Court, in the case of Senn's Adm'x v. Michigan Mut. Liability Co., 267 S.W. 2d 526 (Ky. 1954) held that a policy providing for coverage of an insured

". . . while the insured is driving. . . any automobile of the private passenger type. . . " did not provide coverage of a sedan delivery vehicle, observing:

> ". . . . Although the vehicle might have been used occasionally to haul passengers, it was not primarily a passenger vehicle and such occasional use would not as a matter of law convert it ino a passenger vehicle. . . ." (emphasis added) Id. 267 S.W. 2d at 527-528.

The United States District Court, Eastern District of Kentucky, citing Senn, supra, in the case of Hartford Acc. & Indem. Co. v. Western Fire Ins. Co., 196 F. Supp. 419 (1961) held that coverage of a "private passenger automobile" as a substitute vehicle did not provide coverage of a Ford 1/2-ton pickup truck as a substitute vehicle for a Buick automobile. In so holding the Court said:

> "We recognize the rule that ambiguous provisions of insurance policies should be construed strictly against the insurer and liberally in favor of the insured so as not to defeat the intended purpose of the policy, 'But this does not mean that courts in giving a liberal construction to a policy can ascribe to it a meaning not coming within the limits of the language of the contract of insurance. Nor can courts read into it conditions and terms not incorporated therein.' United States Fidelity & Guaranty Co. v. Lairson, Ky., 271 S.W. 2d 897, 898. 'The court cannot disregard the plain unambiguous language of the contract.' United Insurance Company of America v. Gerstle, Ky., 339 S.W. 2d 945, 946." Id. 196 F. Supp. 423-424.

Here, there is coverage of a non-owned car which is a four-wheel land motor vehicle designed for use mainly on public road, including a six-wheel truck that has one set of dual tires; not owned by or registered to the plaintiff; and not furnished or available for regular or frequent use by the plaintiff. (It being assumed for the purpose of defendant's motion that the backhoe in question was not regularly or frequently used by the plaintiff).

This Court also, for the purpose of the defendant's motion, accepts as true, the plaintiff's description and the use of the backhoe at the time of the accident, that is, it has four rubber tires, a steering wheel, an automatic transmission, signal light, and on the highway it drives much like a car; that no special training is required to operate it; there is no law against operating it on the highway; and that at the time of the accident the plaintiff was operating it like a car in driving it on the highway, rather than operating

it as construction machinery on a construction site.

To paraphrase the language of the Kentucky Court in Washington Nat. Ins. Co. v. Burke, supra, while a backhoe is a four-wheel land motor vehicle, it was not designed or ordinarily "for use mainly on public road" as a means of transportation. It is a machine or equipment designed and intended to be used in construction work. "Backhoe" is no synonym of "car". The occasional or temporary use on the highway for its transportation to and from a job site would not as a matter of law convert it into a "car".

Considering the foregoing language of the United States District Court in the Hartford case, supra, and that this Court cannot disregard the plain language in this insurance contract, this Court concludes that this liability policy does not cover the backhoe operated by the plaintiff at the time of the accident.

Accordingly, the defendant's motion for a summary judgment shall be SUSTAINED and the complaint DISMISSED.

This 14 day of September, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

C. A. NO. 83-221

WILLIAM R. HEDRICK — PLAINTIFF

VS: ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — DEFENDANT

This cause was removed from the Floyd Circuit Court. The original complaint, as filed in the Floyd Circuit Court, refers to exhibits "A" through "G" attached to the complaint. When the record was removed to this court such exhibits were not included and so noted on the docket sheet.

THEREFORE IT IS ORDERED that the defendant within twenty days from the date hereof secure the transfer to this court a copy of each of such exhibits referred to in the complaint and filed with the Floyd Circuit Court.

It further appears from the record by a preliminary conference order entered December 14, 1983 the parties were directed to file their respective motions for summary judgment with supporting memoranda by June 1, 1984. Neither party complied. Upon issuance of a show cause order directed to the plaintiff, the plaintiff

filed a response to the order to show cause and also a motion for judgment on the record and adopted his preliminary memorandum in support of his motion. Such motion shall be treated as a motion for summary judgment on behalf of the plaintiff.

The defendant is given thirty days from the date of this order in which to respond to plaintiffs motion and memorandum and file its motion for summary judgment with supporting memorandum and the plaintiff shall have fifteen days thereafter to file a reply thereto if he elects to do so.

July 2, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 83-221

WILLIAM R. HEDRICK, PLAINTIFF,

VS. ORDER

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY, DEFENDANT.

* * * *

The record reflects that at the preliminary conference held herein on December 14, 1983, that the Court ordered the parties hereto to file their motion and cross-motion for summary judgment on or before May 16, 1984, with responsive memoranda being filed no later than June 1, 1984.

The record further indicates that neither party has moved the Court for summary judgment or filed any other pleading herein subsequent to the preliminary conference.

The Court being so advised,

IT IS HEREBY ORDERED that the plaintiff is given ten (10) days from the date of this Order to SHOW CAUSE why this action should not be dismissed for lack of prosecution.

This the 14th day of June, 1984.

G. WIX UNTHANK, JUDGE