[Cite as *Jeremay v. Westfield Ins. Co.*, 2013-Ohio-837.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Samuel J. Jeremay, Jr., et al.	Court of Appeals No. E-12-039
Appellants	Trial Court No. 2011-CV-0490
v.	
Westfield Insurance Company	**DECISION AND JUDGMENT**
Appellee	Decided: March 8, 2013

* * * * *

James W. Hart and Carl J. Kamm, III, for appellants.

Richard M. Garner and Kurt D. Anderson, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellants, Samuel Jeremay, Jr. and Amy Jeremay, appeal the judgment of the Erie County Court of Common Pleas, granting appellee's, Westfield Insurance Company, motion for summary judgment. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On July 13, 2009, Samuel was severely injured while attempting to repair a power-generating windmill. Samuel was working as a pipe-fitter for Wilkes & Company at the time, and was on the job when he was injured. In order to access the area of the windmill that required repair, Samuel was using a Genie S-85 telescoping boom lift, which is sometimes referred to as a "cherry picker." The cherry picker was not owned by Wilkes & Company. Instead, Wilkes & Company rented the device from a Sandusky, Ohio equipment rental company, Construction Equipment & Supply, Inc. ("CES").

{¶ 3} The accident that caused Samuel's injuries occurred when the cherry picker was struck by an automobile on Sprowl Road near Huron, Ohio. In order to position the cherry picker near the windmill, Samuel decided to make a wide turn in the field where the windmill is located. As he did so, part of the cherry picker extended over the eastbound lane of Sprowl Road. At that time, a Ford Taurus driven by Rosemary Yeager struck the cherry picker, causing Samuel to be thrown out of the cherry picker's basket and onto the pavement. As a result, Samuel sustained numerous injuries, including a fractured skull, shattered vertebra, and a torn meniscus.

{¶ 4} At the time of the accident, CES carried insurance through Westfield, which included uninsured/underinsured motorists coverage and auto medical payments coverage. In order to receive coverage under the policy, the injured driver must occupy a "covered auto." Wishing to be reimbursed for his expenses stemming from the accident, Samuel filed a claim with Westfield. Westfield determined that Samuel was not covered

under the terms of the policy, and denied the claim. After the claim was denied, Samuel and his wife, Amy, filed suit against Westfield, seeking damages in excess of $25,000.

{¶ 5} After some preliminary discovery, Westfield moved for summary judgment, claiming that Samuel was not a covered insured because the cherry picker is not a "covered auto" as defined by the policy. The trial court agreed, and on June 7, 2012, granted Westfield's motion for summary judgment. Appellants' timely appeal followed.

B. Assignment of Error

{¶ 6} On appeal, appellants assign the following error for our review:

> The Erie County Common Pleas Court committed reversible error in granting Appellee's motion for summary judgment and finding that Appellants are not "insureds" under the applicable insurance policy definitions.

II. Analysis

{¶ 7} In their sole assignment of error, appellants argue that the trial court erred when it granted Westfield's motion for summary judgment based on its determination that Samuel was not a covered insured as defined by the insurance policy.

{¶ 8} We review summary judgment rulings de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue as to any material fact exists; (2) the moving party is entitled to judgment

as a matter of law; and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 9} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issue of material fact exists. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). In this case, there is no dispute over the material facts. Rather, appellants challenge the trial court's construction of an insurance contract, which is a question of law. *Leber v. Smith*, 70 Ohio St.3d 548, 553, 639 N.E.2d 1159 (1994).

{¶ 10} In interpreting insurance policies, the court looks to the terms of the policy to determine the intention of the parties concerning coverage, and gives those terms their plain and ordinary meaning. *Minor v. Allstate Ins. Co., Inc.*, 111 Ohio App.3d 16, 20, 675 N.E.2d 550 (2d Dist.1996). "Where the plain and ordinary meaning of the language used in an insurance policy is clear and unambiguous, a court cannot resort to construction of that language." *Hoff v. Agricultural Ins. Co.*, 6th Dist. No. L-03-1242, 2004-Ohio-3983, ¶ 15, citing *Tomlinson v. Skolnik*, 44 Ohio St.3d 11, 12, 540 N.E.2d 716 (1989), *overruled on other grounds by Schaefer v. Allstate Ins. Co.*, 76 Ohio St.3d 553, 668 N.E.2d 913 (1996).

{¶ 11} Here, the dispute centers on whether the cherry picker fits the policy's definition of an "auto." If so, Samuel would arguably be insured under the policy. If the

cherry picker does not fit the policy's definition of an "auto," Samuel would not be covered under the policy.

{¶ 12} The insurance policy defines "auto" as follows:

> 1. A land motor vehicle, "trailer" or semi-trailer designed for travel on public roads; or
>
> 2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.
>
> However, "auto" does not include "mobile equipment."

{¶ 13} Appellants do not argue that the cherry picker fits within this definition of "auto." Rather, they argue that the policy's definition of "mobile equipment" sets forth an additional group of vehicles that are considered autos. For support, appellants quote the following policy language:

> K. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
>
> * * *
>
> 6. Vehicles not described in Paragraph 1., 2., 3., or 4. 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:"*

a. Equipment designed primarily for:

(1) Snow removal;

(2) Road maintenance, but not construction or resurfacing; or

(3) Street cleaning;

b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well servicing equipment. (Emphasis added.)

{¶ 14} Appellants argue that the cherry picker Samuel used fits squarely within the definition of "auto" provided by section V(K)(6)(b). They admit that the cherry picker was not mounted on an automobile or truck chassis. Nevertheless, they contend that only "similar devices" need to be mounted on an automobile or truck chassis. They argue that the "and" placed between "cherry pickers" and "similar devices" separates the two categories of devices such that "mounted on automobile or truck chassis and used to raise or lower workers" only modifies the phrase "similar devices." We disagree.

{¶ 15} First, it is clear that the cherry picker fits the definition of "mobile equipment" from section V(K)(6) in that it is "maintained primarily for purposes other than the transportation of persons or cargo." Being "mobile equipment," it is expressly excluded from the definition of an "auto."

{¶ 16} Second, a reading of section V(K)(6)(b) leads us to conclude that that section requires both the cherry picker and any other similar device to be mounted on an automobile or truck chassis in order to qualify as an "auto." Appellants' construction ignores the context and purpose of section V(K)(6)(b) by concluding that all self-propelled cherry pickers are "autos." The purpose of section V(K) is to define "mobile equipment." The obvious distinction made between mobile equipment and autos in section V(K)(6)(b) concerns whether or not the device is attached to an automobile or truck. By itself, an automobile or a truck is maintained for the purpose of transporting persons or cargo and, thus, would not fit the definition of mobile equipment in section V(K)(6). A conflict in the policy could arise, however, if a cherry picker (i.e. "mobile equipment") were attached to the truck (i.e. an "auto"). In essence, section V(K)(6)(b) resolves this conflict by simply stating that the truck would remain an "auto" despite the fact that mobile equipment is attached to it.

{¶ 17} Here, the cherry picker is not mounted on an automobile or truck chassis. Therefore, it does not fit the policy's definition of an "auto." Since the cherry picker does not fit the policy's definition of "auto," the trial court properly concluded that Samuel was not insured under the policy and granted Westfield's motion for summary judgment.

{¶ 18} Accordingly, appellants' assignment of error is not well-taken.

III. Conclusion

{¶ 19} Based on the foregoing, the judgment of the Erie County Court of Common Pleas is hereby affirmed. Costs are hereby assessed to appellants in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE