

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

Clayton E. Bunting, Esquire
Wilson, Halbrook & Bayard
P.O. Box 690
Georgetown, Delaware 19947

David L. Baumberger, Esquire
Chrissinger & Baumberger
Three Mill Road, Suite 301
Wilmington, Delaware 19806

Robert B. Young, Esquire
Young and Young
P.O. Box 1191
Dover, Delaware 19903

Kenneth M. Doss, Esquire
Casarino Christman & Shalk
P.O. Box 1276
Wilmington, Delaware 19899

Benjamin C. Wetzel, III, Esquire
Bailey & Wetzel, p.A.
716 Tatnall Street
Wilmington, DE 19899

Submitted: March 10, 2004
Decided: June 10, 2004

RE: ***Reese v. Wheeler, et al.***
C.A. No. 99C-04-002-RFS

Dear Counsel:

This is my decision on Third-Party Defendant State Farm Mutual Automobile Insurance Company's ("State Farm") Motion for Summary Judgment and Third-Party Defendant Commercial Union Insurance Company's ("Commercial Union") request to join in the Motion. State Farm's Motion is granted, and Commercial Union's request for Summary Judgment through joinder in the Motion is denied for the reasons set forth herein.

STATEMENT OF THE CASE

On April 4, 1997, Wayne Reese (“Reese”), a truck driver for N.M. Corbin, Inc. was injured when a Yard Dog roll-off jockey truck (“Yard Dog”) driven by Roy Wheeler (“Wheeler”) ran into him on the loading docks of the Draper-King Cole (“Draper”) plant in Milton, Delaware. Plaintiffs Wayne and Ramona Reese brought suit against Wheeler, Kaye Trucking & Leasing Company (“Kaye Trucking”), Draper Canning Company and Draper-King Cole, Inc. in April, 1999. Default judgment was obtained against Wheeler and Kaye Trucking on April 7 and March 3 of 2000, respectively. Commercial Union, N.M. Corbin, Inc.’s insurer, and State Farm, Reese’s insurer, were joined as Third-Party Defendants on Draper’s motion for indemnification and contribution pursuant to their uninsured and underinsured motorist (“UM/UIM”) coverage. In a previous opinion, summary judgment was found on behalf of the plaintiffs on the basis that Reese was an insured pursuant to Commercial Union’s UM/UIM policy under the designation “any family member” and that he was also an insured under the policy as a “user” of the covered vehicle pursuant to Virginia law. *Reese v. Wheeler*, Del. Super. Ct., C.A. No. 99C-04-002, Stokes, J. (November 4, 2003).

In this instance, Third-Party Defendant, State Farm has brought its own motion for Summary Judgment. State Farm claims that pursuant to its policy, the Yard Dog does not qualify as an “uninsured motor vehicle” because it was equipment used only on the Draper property and on no public roads and it was not registered or licensed with the Delaware Department of Motor Vehicles. Commercial Union desires to join in the motion, incorporating State Farm’s arguments about the Yard Dog as to the language of its own policy.

State Farm also claims that the Yard Dog is not uninsured, however, this issue was previously decided in the November 4th decision, *Reese v. Wheeler*, Del. Super. Ct., C.A. No. 99C-04-002. Although the Yard Dog was the property of Draper, Wheeler was driving it without Draper’s

permission when it struck Reese. Wheeler is a driver for Kay Trucking & Leasing Company, which has since gone out of business. St. Paul Fire & Marine Insurance Company (“St. Paul”), the insurer for Wheeler and Kaye Trucking has refused to cover this incident. In a letter, dated December 23, 2002, Northbrook Property and Casualty Insurance Company denied coverage on behalf of St. Paul. Plaintiff’s Answering Brief, App. 1. Wheeler and Kaye Trucking are uninsured as to this matter and thus, so is the Yard Dog which Wheeler was driving without Draper’s permission. *See* Va. Code § 38.2-2206 (definition of “uninsured motor vehicle” (ii)). *See also* State Farm’s Uninsured Motorists Insurance, Third-Party Def. State Farm’s Mot. for Summary Judgment (“State Farm’s Mot.”), App. B at 5-6 (definition of “uninsured motor vehicle” (a)(ii)).

The single issue in this case is whether the Yard Dog qualifies as a “motor vehicle” under the language of State Farm’s UM/UIM policy and whether Commercial Union can profit from this effort.

DISCUSSION

A. Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the nonexistence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets its burden, the burden shifts to the nonmoving party to establish the existence of material issues of fact. *Id.* at 681. The court views the evidence in a light most favorable to the nonmoving party. *Id.* at 680.

Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the nonmoving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.

Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). If material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

B. Choice of Law

Delaware applies the “most significant relationship” test for choice of law issues in a contract case. *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1166 (Del. 1978). An action to ascertain the scope of uninsured motorist benefits in a policy is an action in contract, not in tort. *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1287 (Del. 1981). The relevant test is the “most significant relationship” test as laid out in the Restatement (Second) of Conflict of Laws § 188 (1971)¹. *Oliver B. Cannon & Son, Inc.*, 394 A.2d at 1166 (Del. 1978). See also *Travelers Indemnity Co. v. Lake*, 594 A.2d 38 (Del. 1991). The Court’s interpretation of an insurance policy is a matter of law. *Nat’l Union Fire Ins. Co. v. Fisher*, 692 A.2d 892 (Del. 1997); *Universal Underwriters Ins. Co. v. The Travelers Ins. Co.*, 669 A.2d 45, 47 (Del. 1995). This case involves a Virginia policy issued to a Virginia resident, Reese’s wife². Reese also lives in Virginia. The only connection this issue has to Delaware is that the accident occurred in Delaware.³ The Court will apply Virginia law in the interpretation of State Farm’s policy.⁴

C. State Farm’s Policy

State Farm’s UM/UIM policy provides:

Persons Insured

Each of the following is an insured under this insurance to the extent set forth below:

- (a) the named insured and, while residents of the same household, the spouse of the named insured and relatives, wards or foster children of either;
- (b) any other person while occupying an insured motor vehicle; and

- (c) any person, with respect to damage he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above.

State Farm's Mot. App. B at 2.

Reese is an insured as the spouse, residing in the same household, of the named insured. *See, supra*, n.2. State Farm's UM/UIM policy provides coverage pursuant to Va. Code § 38.2-2206 for bodily injury or property damages sustained by the insured "caused by accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle." State Farm's Mot. App. B at 1.

The UM/UIM policy further defines "motor vehicle" to mean:

- a land motor vehicle or trailer other than
 - (a) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads,
 - (b) a vehicle operated on rails or crawler-treads, or
 - (c) a vehicle while located for use as a residence or premises.

Id. at 5.

Despite the fact that § 38.2-2206 covers "uninsured motor vehicles" without mentioning or specifically permitting exclusions, insurers in Virginia are allowed to exclude "certain risks from coverage." *State Farm Mut. Automobile Ins. Co. v. Gandy*, 383 S.E.2d 717, 719 (Va. Supr. 1989) (interpreting medical payments coverage in motor vehicle insurance policy). "Reasonable exclusions not in conflict with statute in an insurance contract will be enforced, but it is incumbent upon the insurer to employ exclusionary language that is clear and unambiguous." *Id.*

It is clear from State Farm's policy that the Yard Dog is not excluded as a "farm type tractor,"⁵ a "vehicle operated on rails or crawler treads," or "a vehicle while located for use as a residence or premises." The single remaining question is whether the Yard Dog qualifies as "other equipment designed for use principally off public roads, while not upon public roads." None of the parties dispute that the Yard Dog was a vehicle designed not to be used on public roads and that

Reese was injured when it was being used “not upon a public road.” *See* Pl.’s Response to Mot. of State Farm Ins. for Summary Judgment (“Plaintiff’s Response”) at 2.

The State Farm policy does not define the term “equipment.” Since an insurance policy is a contract, Virginia law requires that words in the policy are “given their ordinary and customary meaning when they are susceptible of [sic] such construction.” *Hill v. State Farm Mut. Automobile Ins. Co.*, 375 S.E.2d 727, 729 (Va. Supr. 1989). Webster’s Third New Int’l Dict. (1968) defines “equipment” to mean “the implements (as machinery or tools) used in an operation or activity.” However, it goes on to distinguish the word from other, similar words such as “apparatus” and “machinery” by saying “equipment [usually] covers everything, except personnel needed for efficient operation or service. . . .” *Id.* A yard dog roll-off jockey truck is a vehicle used to move trailers around a loading dock. One website of trucker’s jargon defines a “jockey truck” as:

A tractor made especially for use within the confines of large yards. They have short wheel bases, fifth wheels that hydraulically raise and lower and deck plates that are accessed directly from the door. These are yard trucks and are not equipped to drive legally on public roads.

Available at, <http://www.surfnetinc.com/fredh/jargon.htm>

In addition, an OSHA website states:

A fifth wheel is a unique power unit designed primarily for moving and spotting trailers in truck, rail, and marine terminals. Other names for a fifth wheel are: yard hustler; jockey truck; yard goat; and UTR (utility tractor). Most fifth wheels are not designed or equipped for public highway or street use.

62 FR 40142 (1997), Preambles to Final Rules: Longshoring and Marine Terminals § 5 -V. Other

Issues, n. 9, *available at*,

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=977&p_table=PREAMBLES.

The term equipment is broad enough to include any motor vehicle that is used as part of an operation or service. *See, e.g.*, Va. Code § 46.2-700 (mobile equipment defined as “any self-

propelled vehicle manufactured for a specific purpose . . . which is used on a job site and whose movement on any highway is incidental to the purpose for which it was defined and manufactured.”) Defendant Draper describes the Yard Dog as “a truck cab designed to move trailers around an unloading and docking facility,” manufactured by Ford in the 1970's. Def. Draper’s Response to Mot. of State Farm Ins. for Summary Judgment (“Def.’s Response”) at 2. Thus, a yard dog roll-off jockey truck would be equipment, according to the ordinary meaning of the word. It is an implement used as part of the process of moving around the trailers and loading and unloading them at loading docks. Similarly, the Virginia Supreme Court has interpreted a forklift as being “equipment designed for use principally off public roads.” *State Farm Mut. Automobile Ins. Co. v. Gandy*, 383 S.E.2d 717 (Va. Supr. 1989). While the Court was concerned with the purposes for which a forklift is used and how one works, it also noted that the forklift was not registered with the Department of Motor Vehicles, “was not licensed with a vehicle tag,’ and ‘was used only in the private yard of the company which owned it.” *Id.* at 718.

In this case, the State Farm exclusion of equipment is limited to that equipment which is used principally off public roads and which is not being used upon public roads. The Yard Dog was neither designed to be used on public roads, nor was it used on public roads. *See* Def.’s Response, at 8. It was not registered with the Delaware Department of Motor Vehicles⁶, nor was it licensed. In addition, Reese was injured while the vehicle was being used on Draper’s property and not on a public road. The parties do not dispute these facts. The Court concludes that the Yard Dog is excluded from the UM/UIM portion of the State Farm Policy under the designation, “other equipment designed for use principally off public roads, while not upon public roads.”

Defendant Draper argues that the terms of State Farm’s policy are ambiguous because a Yard

Dog was not specifically excluded from coverage. Draper follows the reasoning in *Hill v. State Farm Mut. Automobile Ins. Co.*, 375 S.E.2d 727 (Va. Supr. 1989). In that case, the Virginia Supreme Court decided that since there was doubt as to whether a moped was included in the exclusions of the Uninsured Motorists Policy, the language was ambiguous. Therefore, the language was interpreted in favor of coverage and the moped was considered a “motor vehicle” pursuant to the definition in the policy. *Hill* was decided before *Gandy*, 383 S.E. 2d 717, however, a case in which the Virginia Supreme Court found the same language not to be ambiguous concerning whether a forklift was excluded under the definition of “motor vehicle” for medical benefits coverage. Notwithstanding that *Gandy* addressed different coverage, both cases considered the same language of the definition of “motor vehicle” as is present in this case.

After consideration, the Court finds that a Yard Dog is more like the forklift in *Gandy* than the moped in *Hill*. A moped is a vehicle used to get from one place to another and, at the time of *Hill*, it was separately defined in Va. Code § 46.1-1 (repealed in 1989). This section also provided, that when driven on a highway, a moped would be considered a “vehicle” for the purposes of traffic regulations. *See Hill*, 375 S.E.2d at 728. On the other hand, a Yard Dog, like a forklift, is not a vehicle whose purpose is to transport a person from place to place. Certainly, its purpose was to aid in the process of unloading goods at a loading dock. In other words, although it is unclear whether a moped would qualify as equipment, after the *Gandy* decision, the Yard Dog is equipment under the ordinary and customary meaning of the word.

D. Commercial Union’s Position

Commercial Union has also requested summary judgment based on the idea that the Yard Dog is excluded from its UM/UIM coverage, and it has incorporated State Farm’s arguments as its

own. Commercial Union's UM/UIM policy provides coverage to an insured for damages resulting in bodily injury sustained from an accident with an uninsured motor vehicle. Third-Party Def. Commercial Union's Joinder in Mot. ("Commercial Union's Joinder") App. 1 at 8. The policy defines "uninsured motor vehicle" to be a land motor vehicle or trailer. *Id.* This definition contains no exceptions as State Farm's UM/UIM policy does.

In comparison, the Medical Benefits and Liability sections contain a definition of "motor vehicle" and "auto," respectively, that include exceptions; however, these sections are separate and distinct from the UM/UIM section. For example, the Medical Benefits section provides coverage for *medical expenses* incurred as the result of an accident with a motor vehicle used as a motor vehicle, whereas the UM/UIM section provides coverage for *damages* incurred as a result of bodily injury from an accident with an uninsured motor vehicle. Each section provides for a different range of coverage and thus it is expected that each will have its own definition of which motor vehicles are contemplated for the purposes of that section. The Liability section defines the word "auto" to mean "a land motor vehicle, trailer or semitrailer designed for travel on public roads but does not include mobile equipment." Notice of Joinder, App. 1 at 16. "Mobile equipment" includes any of the following type of land vehicles:

1. Specialized equipment such as: Bulldozers; Power shovels, Rollers, graders or scrapers; Farm machinery, Cranes; Street sweepers or other cleaners; Diggers; Forklifts, Pumps, Generators; Air Compressors, Drills; Other similar equipment.
2. Vehicles designed for use principally off public roads.
3. Vehicles maintained solely to provide mobility for such specialized equipment when permanently attached.
4. Vehicles not required to be licensed.
5. Autos maintained for use solely on your premises or that part of roads or other accesses that adjoin your premises.

Id.

The Medical Expense Benefits section of the policy defines “motor vehicle” to mean:

a self-propelled land motor vehicle or trailer other than:

- a. A farm type tractor or other self-propelled equipment designed for use principally off public roads while not upon public roads;
- b. A vehicle operated on rails or crawler-treads; or
- c. A vehicle located for use as a residence or premises.

Id. at 6.

While a Yard Dog may have been considered equipment under the definitions included in either of the Liability or Medical Benefits sections, again the UM/UIM section contains no similar exclusion.

Furthermore, Va. Code § 46.2-100, provides:

“*Motor vehicle*” means every vehicle as defined in this section that is self-propelled or designed for self-propulsion except as otherwise provided in this title. Any structure designed, used, or maintained primarily to be loaded on or affixed to a motor vehicle to provide a mobile dwelling, sleeping place, office, or commercial space shall be considered a part of a motor vehicle. For the purposes of this title, any device herein defined as a bicycle, electric personal assistive mobility device, electric-assisted bicycle, or moped shall be deemed not to be a motor vehicle.

Nothing in this definition mandates the exclusion of a vehicle like a Yard Dog from Commercial Union’s UM/UIM policy as an “uninsured motor vehicle.” “Because insurance carriers select the language of the policies they write, any doubt concerning the meaning of the policy language is resolved against the insurer.” *Hill*, 375 S.E.2d at 730. As a result, according to the language of Commercial Union’s UM/UIM policy, the Yard Dog qualifies as an “uninsured motor vehicle.”

Moreover, Commercial Union did not make this argument in its previous summary judgment motion, which was decided by the Court on November 4, 2003. The point has been waived. Commercial Union cannot piggyback this claim through joinder with State Farm’s Motion. Litigants are not entitled to multiple bites of the apple.

CONCLUSION

Considering the foregoing, Third-Party Defendant State Farm's Motion for Summary Judgment is granted. The Yard Dog is an excluded motor vehicle for the purposes of State Farm's UM/UIM policy, pursuant to the language of the policy. Commercial Union's request for joinder in the Summary Judgment as to this issue is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place of contracting,
 - (b) the place of negotiation of the contract,
 - (c) the place of performance,
 - (d) the location of the subject matter of the contract, and
 - (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

- (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

2. The Named Insured on the State Farm Policy is actually Remonia Shores, who resides at 2025 W. Grace St., Richmond, Virginia. Neither side has disputed that Reese is an insured under the policy. He resides at the same address and is married to Ramona G. Reese. Presumably she is the same woman named on the policy and they were married and residents of the same household at the time of the accident. *See* State Farm's Mot., App. B at 2 (State Farm Policy, Persons Insured).

3. The Defendant Roy Wheeler is an Indiana resident, and the Defendants Draper Company and Draper-King Cole, Inc. are Delaware Corporations. Kaye Trucking, Inc. is an Ohio Corporation. The location of these defendants is inapposite to the issue of whether Reese is covered under State Farm or Commercial Union's UM/UIM policies, and it is not considered for the purposes of resolving the conflict of law issue.

4. The Court previously ruled on this choice of law issue regarding Commercial Union in its November 4, 2003 decision, *Reese v. Wheeler*, Del. Super. Ct., C.A. No. 99C-04-002. The Court will also apply Virginia Law to the interpretation of Commercial Union's policy.

5. Va. Code § 46.2-100 defines a "farm tractor" as:
every motor vehicle designed and used as a farm, agricultural, or horticultural implement for drawing plows, mowing machines, and other farm, agricultural, or horticultural machinery and implements including self-propelled mowers designed and used for mowing lawns.

A Yard Dog is not a farm tractor and would also not be a farm-type tractor. It is not used for farm, agricultural or horticultural purposes, but, rather, is used to move truck trailers around, in this case at a canning plant. If it is to be an excluded motor vehicle it must be excluded as

equipment and not as a farm-type tractor. *See State Farm Mut. Automobile Ins. Co. v. Gandy*, 383 S.E.2d 717 (Va. Supr. 1989) (finding under a policy with similar language that a forklift was not a “motor vehicle” because it was “equipment designed for use principally off public roads”).

6. 21 *Del. C.* § 2101 provides that no person shall drive or move any vehicle on any highway unless that vehicle is registered and has registration plates. 21 *Del. C.* § 2118 provides that all motor vehicles required to be registered in Delaware must also be insured.