166-331 1007

Record No. 1696

In the
Supreme Court of Appeals of Virginia
at Richmond

HOLLAND SUPPLY CORPORATION,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

FROM THE CIRCUIT COURT OF THE COUNTY OF NANSEMOND

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

166 Va 331

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1696

HOLLAND SUPPLY CORPORATION, Plaintiff in Error,

versus

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant in Error.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Appeals of Virginia:

Your petitioner, Holland Supply Corporation, respectfully represents:

That it is aggrieved by a judgment of the Circuit Court of Nansemond County rendered at its January, 1935, term, in the above-styled action at law, and respectfully petitions that a writ of error be awarded it from said judgment entered against your petitioner on the 31st day of January, 1935, in favor of defendant in error.

In this petition plaintiff, Holland Supply Corporation, and defendant, State Farm Mutual Automobile Insurance Company, below, will be referred to as plaintiff and defendant, respectively.

Upon the facts agreed the matter was submitted to the Court for its determination and the Court entered up judgment for defendant, to which action of the Court the plaintiff excepted (R., p. 8).

Defendant assigns the following error:

That the Court erred in entering up judgment for defendant.

BRIEF STATEMENT OF FACTS AGREED.

Holland Supply Corporation, the plaintiff, is engaged in farm supply business, at Holland, Virginia, and on May 8th, 1934, was the owner of a certain automobile truck used in and about its business, and, in the operation of which, it was insured by defendant "against the perils arising from the ownership, maintenance or use thereof, against legal liability imposed upon the assured resulting solely and directly from an accident by reason of the ownership, maintenance or use of" said truck on account of bodily injuries and/or suffered or alleged to have been suffered by any person, and on account of damage to property, and to defend in the name of the assured any suits which may be brought against the assured by reason of any accident even if such suit is groundless, false or fraudulent; and to pay all expense of litigation in connection therewith. There is incorporated in the policy also the following provision: "The Company shall not be liable and no liability or obligation of any kind shall attach to the Company (Defendant) for losses or damages; (D) Unless the said automobile is being operated by the assured, his paid driver, * * * or persons acting with the consent of the assured; and (E) caused while said automobile is being driven or operated by any person whatsoever, * * * violating any law or ordinance as to age or driving license * * * ."

On May 8th, 1934, the regular driver of the truck was sick and the plaintiff instructed one of its warehousemen, who was a thoroughly competent driver, to take the truck to Portsmouth for a load. While on its way back an accident occurred, in which, one, Edward Reid was injured, which was reported to and investigated by defendant. Edward Reid brought action in the Circuit Court of the City of Portsmouth against plaintiff, in the sum of $2,500.00, the notice of motion in which was turned over to the defendant which at once denied liability to plaintiff on the ground that the plaintiff's driver was violating the law as to driving licenses. The plaintiff thereupon defended the action brought by Edward Reid and a verdict was rendered in its favor by the Circuit Court of the City of Portsmouth, in which case the plaintiff's truck operator's competency as a driver was not questioned either in the pleadings or evidence, nor was his failure to have a chauffeur's permit questioned or asserted as an act of negligence. The plaintiff's expenses in and about its necessary defense in the action brought by Edward Reid amounted to $300.00, and to recover that of the defendant this action was brought.

THE QUESTION INVOLVED.

The question presented is: *Whether the operation of an automobile by a competent employee, without a chauffeur's permit, on a single trip, in an emergency, on which an accident occurs without the employee's fault or negligence and for which a suit is brought resulting in a verdict favorable to the assured and in which competency of the assured's driver, or his failure to have a chauffeur's permit, is questioned neither in the pleadings nor evidence, relieves the insurer of liability for the expense of defense of litigation incident thereto where the insurer in its policy provides against liability for loss or damage while the automobile is being driven in violation of law as to driving license, but such violation is neither the proximate nor the remote cause of the litigation.*

THE ARGUMENT.

(On Principle.)

The plaintiff contends that, even if it is expressed in the policy that there is no liability on the Company (Defendant) for loss or damage, this does not relieve the company (Defendant) of the duty to defend any suit brought against the assured, because the expense of litigation is neither "loss nor damage" within the meaning of the provisions of the policy; in fact the obligation of the policy is to defend suits of any nature, even though they be groundless or fraudulent, so that the necessity for defending litigation and paying the expenses incident thereto is not an exception of the policy. but is an express obligation thereof.

Aside from this, however, there is no reason why there should be an escape from liability, even if the expense of litigation is within the exceptions in the policy, where the failure to have a driver's license is neither the proximate nor the remote cause of the accident, nor the litigation. It is a violation of law for a chauffeur not to display his chauffeur's badge on his cap or lapel, and there is just as much reason for holding that this would be ground for denial of liability under the policy as there is for denial of liability in this case. Liability insurance is a matter of public concern and it has been so often decided that unreasonable provisions of the policy will not be upheld as valid and binding that no citation is needed to support the statement. Indeed the question of requirement of a chauffeur's permit is one for the State, and, while it may be possible to contract with reference

thereto, *where it is the cause of a liability under the policy,* which a number of the Courts have expressly denied, there is no reason for holding that the insurer should escape its liability in a case in which the ground on which it seeks to escape is not an issue and cannot be made so, as is admitted in this case. The defendant admits the competency of the plaintiff's driver. The verdict of the Circuit Court of the City of Portsmouth determines that he was not negligent. Where then can there be any reason for denial of the obligation of the defendant to defray the cost of litigation especially when neither "loss nor damage" is an issue, and there is no connection between the basis for the suit it is called upon to defend and the contract provision?

To sustain the defendant's contention in this case will amount to a legal fraud and write into its policy, which it sells to its assured with every argument as to its efficacy, many and various conditions and restriction which destroy the value of the policy sold and cause the assured to rest upon assurances which are non-existent. Such a construction will amount to this: that if the driver's permit expired at twelve o'clock and he were on a journey at the time and an accident took place at twelve fifteen o'clock his employer would be uninsured; or, if the rear license tag were lost and the automobile were driven without knowledge thereof and an accident occurred at an intersection the Insurance Company would not be liable under the policy.

Not only is plaintiff's contention impliedly upheld in *Maryland Casualty Company* v. *Hoge,* 153 Va. 204, but section 4326 (a) of the Code as amended by the Acts of Assembly of 1934 has expressly outlawed the policy in question since its making.

THE ARGUMENT, Continued.

(The Authorities.)

In *Maryland Casualty Company* v. *Hoge,* 153 Va. 204, it was held:

That the failure of the driver of an automobile to secure a driver's permit in compliance with an ordinance of the City of Roanoke did not relieve the insurer of liability where the failure to have the permit did not contribute to the accident and the requirement of the policy required the use and operation of the automobile to be lawful.

Said the Court:

"The authorities seem to be quite unanimous in holding that failure to observe traffic regulations is no defense unless such failure was the proximate cause of the injury. The following authorities sustain this proposition.

"In the case of *McMahon* v. *Pearlman,* 242 Mass. 367, 136 N. E. 154, 23 A. L. R. 1467, it was held that one operating an automobile on a public highway without a license, which act is a statutory crime, is not precluded by public policy from enforcing a policy indemnifying him against bodily injury inflicted by use of the automobile.

"The policy in the above case expressly exempted the insurer from liability for injury or death caused by the automobile while being operated by any person in violation of the law with reference to age, and if there was no legal age limit, by any one under the age of sixteen, or while engaged in any racing or competitive speed test. The accident happened while the insured was driving her car, she having no legal permit or authority to drive the same. The insurer claimed that while the act was not specifically forbidden in the policy, yet, the insured was violating the law, and, therefore, for reasons of public policy, the company should not be held liable in damages. The court held, after a full discussion of the authorities, that the unlawful act of Mrs. Pearlman did not constitute a defense unless it was a direct and proximate cause of the injury."

In *Messersmith* v. *American Fidelity Company,* 232 N. Y. 161, 133 N. E. 432, 19 A. L. R. 876, it was held:

"That defendant was liable under the policy even though the use of the automobile at the time of the accident was in violation of the highway law."

* * * * *

In *Rowe* v. *United Commercial Travelers of America,* 186 Ia. 454, 172 N. W. 454, 4 A. L. R. 1235, 1236, it was held:

"Under a provision of an accident insurance policy that it shall not extend to or cover any death, disability or loss resulting from the violation of any law, the mere fact that at the time of injury insured was driving an automobile at a

speed which the statute declares to be presumptively negligent, for which it provides punishment, does not prevent recovery, but it must in addition be established that the injury was caused by or resulted from such violation of law."

* * * * *

In *Hossley* v. *Union Indem. Co.* (1925), 137 Miss. 537, 102 So. 561, it was held: that for an exclusion clause providing that the policy does not cover while the car is "being driven in violation of law as to age, or if there be no age limit, under the age of sixteen years", to relieve insurer from liability for an injury to the car by collision with another car while being driven by a person under the age of sixteen years, there must have been some causal connection between the driving of the car and the injury to it.

The plaintiff in error does not contend that there is no authority to the contrary, but the better considered cases are in accord with the contention of the plaintiff in error that there must be causal connection between the violation of the law and the accident; indeed many cases go far enough to say that the violation of the law must be the proximate cause of the accident.

Terry v. *Nat'l Motor Underwriters* (*supra*), 244 Ill. App. 241.

Mannheimer Bros. v. *Kansas Casualty and Surety Co.*, 147 Minn. 350, 180 N. W. 229.

Powlicki v. *Hollenbeck, etc., Ins. Co.*, 22 N. W. 626.

McMahon v. *Pearlman, supra*, 242 Mass. 367.

Fireman's Fund Ins. Co. v. *Holey*, 129 Miss. 525, 92 So. 635, 23 A. L. R. 1470.

* * * * *

That this is unquestionably the trend of the cases as shown in the recently decided cases of *Washington Fidelity Nat. Ins. Co.* v. *Herbert* (Ohio), 195 N. E. 492, in which the Court said:

"It is next claimed that the court erred in refusing to give special charges before argument, requested by the insurance company. These charges were refused, and correctly so, for the reason that they failed to state any causal connection of intoxication or violation of the law with the accident which

caused the death of Herbert. The charges are based on the proposition that under the terms of the policy it is immaterial whether there is any causal connection between the intoxication, or violation of the law, and the accident, the cause of the death. This construction would amount to this, that if the insured had lost his rear license tag, and was driving his car without knowledge of that fact, and a collision occurred at an intersection, the insurance company would not be liable under the policy; or, if the insured was in an intoxicated condition and was struck by lightning the company would not be liable under the terms of the policy. We cannot accede to such a construction. If this construction sought by the company were sustained, it would amount to legal fraud. The courts will not construe a contract in a way that will produce such a result."

* * * * *

See also *Tennenbaum* v. *State Automobile Mutual Insurance Assn.* (Ohio), 183 N. E. 79.

The competency of the plaintiff's driver being admitted, the failure of the driver to have a chauffeur's permit having had no connection with the accident for which the plaintiff was sued, the plaintiff's driver being guilty of no negligence as a matter of law and his failure to have a chauffeur's permit not being called into question in the case of Edward Reid *v.* plaintiff, either in the pleadings or evidence, and the driver being used in an emergency, no just reason is perceived why the defendant should escape liability on an exclusion clause having to do with "losses or damage" and not with the expenses of or the duty to defend litigation *however fraudulent, false or groundless.*

(This petition is hereby adopted as the opening brief; and counsel for petitioner desires to state orally the reasons for reviewing the error and judgment complained of.)

(A copy of this petition has been mailed to Rixey & Rixey, Law Building, Norfolk, Virginia, counsel for plaintiff in the trial court, the date of mailing being July 30th, 1935.)

It is respectfully submitted that the court erred in entering up judgment for plaintiff for the reasons set forth in the assignment of error and as further stated in this petition. Your petitioner, therefore, prays that a writ of error be granted it; that the judgment complained of may be reviewed,

and that such judgment be entered as said court should have entered.

And your petitioner will ever pray, etc.

HOLLAND SUPPLY CORPORATION,
By Counsel.

THOMAS L. WOODWARD,
Counsel for Petitioner.

We, Hugh L. Holland and Thomas L. Woodward, counsel practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion the judgment complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

Given under our hands this 29th day of July, 1935.

HUGH L. HOLLAND,
THOS. L. WOODWARD.

Received July 30, 1935.

M. B. WATTS, Clerk.

Writ of error allowed. Bond $300.

EDW. W. HUDGINS.

Sept. 4, 1935.

Rec'd September 4, 1935.

M. B. WATTS.

RECORD

page 2 ⟩ VIRGINIA:

PLEAS before the Circuit Court of Nansemond County, at the Courthouse of said County on the 31st day of January, 1935.

BE IT REMEMBERED, That heretofore, to-wit: In the Clerk's Office of the Circuit Court of Nansemond County on the 7th day of August, 1934, came Holland Supply Corporation, by their attorney, and filed their Notice of Motion against

State Farm Mutual Automobile Insurance Company, in the words and figures following:

Virginia:

In the Circuit Court of Nansemond County.

Holland Supply Corporation, Plaintiff,
v.
State Farm Mutual Automobile Insurance Company, Defendant.

To State Farm Mutual Automobile Insurance Company:

You are hereby notified that the undersigned, Holland Supply Corporation, will move the Circuit Court of Nansemond County on the 20th day of August, 1934, at 10:00 o'clock, A. M., or as soon thereafter as the same may be heard, for judgment against you in the sum of $300.00, with legal interest thereon from July 23rd, 1934, until paid, the same being due from you to Holland Supply Corporation, for this, to-wit:

That heretofore, to-wit: On the 14th day of March, 1934, you did enter into a certain contract of indemnity
page 3 } with Holland Supply Corporation, the original of which contract is your #270218-Va, and is filed with the original notice of motion in this cause, wherein you agreed to defend all actions and pay, indemnify, save harmless, and bear all costs, expenses, and damages occasioned to Holland Supply Corporation by reason of its liability for personal injury and property damage occasioned to any other person by the operation of a certain Chevrolet light truck, serial #880114, for the period of one-half year from March 14th, 1934, thence ensuing, yet notwithstanding that while said contract was in full force and effect claim was made against Holland Supply Corporation by Edward Reid and subsequent action brought thereabout against Holland Supply Corporation in the Circuit Court of the City of Portsmouth, wherein Edward Reid claimed and alleged certain bodily injuries occasioned to him on, to-wit: May 8th, 1934, through the operation of said truck, of which due, timely and adequate notice was given you, you did fail and refuse to defend te said action or to furnish counsel therefor or to pay the cost of expenses necessary to the defense thereof, such that Holland Supply Corporation was compelled to employ counsel and expend divers sums of money, to-wit: $300.00,

in investigation, preparation and trial of the aforesaid case, which case was tried and ended in a manner favorable to Holland Supply Corporation, whereby, and by reason whereof, judgment will be asked in the sum notified, together with reasonable counsel fees required to enforce this indemnity.

page 4 } HOLLAND SUPPLY CORP.,
By Counsel.

THOMAS L. WOODWARD, p. q.

And afterwards, to-wit: Plea of General Issue filed in the Clerk's Office of the Circuit Court of Nansemond County on the 13th day of August, 1934.

Virginia:

In the Circuit Court of Nansemond County.

Holland Supply Corporation
v.
State Farm Mutual Automobile Insurance Company.

PLEA OF GENERAL ISSUE.

The defendant, State Farm Mutual Automobile Insurance Company, by its attorneys, comes and says that it did not undertake or promise in any manner and form as the plaintiff hath in this action complained. And of this the said defendants put himself upon the Country.

C. C. SHARP,
RIXEY & RIXEY,
p. d.

page 5 } And afterwards, to-wit: Agreed Statement of Facts filed the 31st day of January, 1935.

Virginia:

In the Circuit Court of Nansemond County.

Holland Supply Corporation
v.
State Farm Mutual Automobile Insurance Company.

AGREED STATEMENT OF FACTS.

Holland Supply Corporation, the plaintiff, and State Farm Mutual Automobile Insurance Company (herein called the insurance company), the defendant, through their attorneys, have agreed the facts in this case as follows:

At all times hereinafter mentioned plaintiff was the owner of a certain automobile truck which it used about its business. The plaintiff was likewise the owner of that certain poilcy of insurance which is hereto attached and made a part of this agreed statement of facts, covering the aforesaid truck, and in which the plaintiff was the insured and the defendant the insurer. On May 8th, 1934, while said policy was in force plaintiff caused said truck to be driven about its business on the public streets of the City of Portsmouth, Virginia, by one, Ruben Warren, who was then and there the servant of the plaintiff in so driving, and a resident and citizen of the State of Virginia. That on said last mentioned day while said truck was being so operated and
page 6 } driven by said Ruben Warren, one Edward Reid was injured in and about his person, which injury the said Edward Reid claimed was caused by the negligent operation of said truck by said Ruben Warren. Thereafter said Edward Reid brought an action in the Circuit Court of the City of Portsmouth against said Holland Supply Corporation to recover the sum of Twenty-five hundred dollars ($2,-500.00) for the aforesaid injury.

Due notice of the said accident and action were given to the insurance company by said Holland Supply Corporation, upon the reecipt of which said insurance company, promptly caused an investigation to be made, through which investigation it discovered the following facts, which are the facts; that the said Ruben Warren, at the time of the aforesaid injury to said Edward Reid, had not been licensed as an operator or chauffeur by the Division of Motor Vehicles of the State of Virginia, nor had he ever made application for such license. nor had any instruction permit or temporary driver's permit or any other kind of permit been issued to him by the Division of Motor Vehicles of the State of Virginia. The lack of permit on the part of Ruben Warren was known to said Holland Supply Corporation when the operation of said truck was entrusted to him.

Thereupon said insurance company promptly notified said Holland Supply Corporation that it denied coverage for the said accident because the said truck at the time of the accident was being driven in violation of law as to driving license,

and that the insurance company would not defend
page 7 } the said action.

Thereupon said Holland Supply Corporation employed its own counsel and defended the action, resulting in a verdict and judgment in favor of the said Holland Supply Corporation. The expenses incurred by Holland Supply Corporation in the defense of said action amount to $300.00.

Ruben Warren is 30 years old and at the time of the accident had worked for plaintiff, Holland Supply Corporation, off and on for about five years. His regular duties were to do labor around the plaintiff's warehouse. The plaintiff had another employee whose regular duties were to drive the truck, which was the only truck owned by the plaintiff. On occasions when the regular driver was sick or not available for any reason, Ruben Warren was entrusted by the plaintiff with the driving, which was the situation at the time of the accident. Ruben Warren had been driving automobiles and trucks for at least twelve years and was a competent driver. In the action of *Edward Reid* v. *Holland Supply Corporation,* Ruben Warren's competency as a driver was not questioned either in the pleadings or the evidence, nor was his failure to have a chauffeur's permit questioned or asserted as an act of negligence.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY.
By RIXEY AND RIXEY,
Its Attorneys.

HOLLAND SUPPLY CORPORATION.
By THOS. L. WOODWARD,
Its Attorney.

page 8 } And afterwards, to-wit: Order entered in the Circuit Court of Nansemond County on the 31st day of January, 1935.

Virginia:

In the Circuit Court of Nansemond County.

Holland Supply Corporation, Plaintiff,
v.
State Farm Mutual Automobile Insurance Company, Defendant.

This day came the parties, by counsel, and having agreed

upon the facts and neither party requiring a jury, but expressly waiving the same, the whole matter of law and fact was submitted to the Court for its consideration and determination.

It is therefore considered by the Court that the plaintiff is not entitled to recover of the defendant and doth award defendant its costs herein expended to which action of the Court the plaintiff excepted on the ground that the same is contrary to the law and the agreed facts, and having indicated its intention to present to the Supreme Court of Appeals a petition for a writ of error and *supersedeas* to this judgment it is ordered that when the plaintiff, or someone for it, shall give bond, with surety, before the Clerk of this Court in the penalty of $100.00, conditioned according to law, execution of this judgment shall be suspended for sixty days from the date of the entering of this order.

page 9 } CLERK'S CERTIFICATE.

I, John H. Powell, Clerk of the Circuit Court of Nansemond County, Virginia, do certify that the foregoing is a true transcript of the record in the case of Holland Supply Corporation, plaintiff, *v.* State Farm Mutual Automobile Insurance Company, defendant, lately pending in said Court.

I further certify that the same was not made up and completed and delivered until the defendant had received reasonable notice thereof and of the intention of the plaintiff to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment therein.

JOHN H. POWELL,
Clerk, Circuit Court of Nansemond County,
Virginia.

page 10 } I, James L. McLemore, Judge of the Circuit Court of Nansemond County, presided over the foregoing trial of Holland Supply Corporation *v.* State Farm Mutual Automobile Insurance Company and do certify that the foregoing is a true and correct copy or report of all the facts and other incidents of this cause tried in the Circuit Court of Nansemond County on the 21st day of January, 1935, except exhibit No. 1, the original of which is identified by my signature and it is agreed by counsel for plaintiff and defendant that in lieu of certifying a copy of this exhibit referred to as part of the foregoing copy of record the original

shall be transmitted by the Clerk of this Court to the Clerk of the Supreme Court of Appeals.

And I further certify that the defendant in this case had reasonable notice, in writing, of the time and place when the record, agreed facts, and other incidents of the trial would be tendered and presented to the undersigned for verification.

Given under my hand this 1st day of April, 1935, within 60 days of the time when judgment in this case was rendered.

JAMES L. McLEMORE,
Judge of the Circuit Court of Nansemond County.

A Copy—Teste:

M. B. WATTS, C. C.

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