GILBERT v. LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE.

Opinion delivered February 29, 1932.

1. INSURANCE—ACCIDENT POLICY.—Evidence held to establish that, when killed, insured was standing on a public highway within the meaning of an accident policy, although it was in process of construction.
2. INSURANCE—STRUCK BY VEHICLE.—Insured killed on a public highway by the lash of a cable when it slipped from a stump while being pulled by a tractor *held* struck by a "vehicle" within the terms of an accident policy.
3. INSURANCE—CONSTRUCTION OF POLICY.—Where a policy is ambiguous or of doubtful meaning, it must be most strongly construed against the company writing it and more favorably to the insured.

Appeal from Calhoun Circuit Court; *L. S. Britt*, Judge; reversed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment upon an instructed verdict denying recovery of benefits or indemnities to the beneficiary of an insurance policy issued by appellee upon the life of the husband of appellant.

It was agreed that the policy sued on was in full force and effect at the time of the death of the insured, but denied that the accident was covered by the terms of the policy.

"It is agreed by the respective attorneys herein that Euffies Gilbert was killed by being struck by a cable, one end of which was fastened to the tractor, and the other end of which was fastened around a stump, and that the end fastened around the stump slipped off and struck the deceased, thereby causing his death."

The facts are virtually undisputed. It appears from the testimony that insured was engaged in helping to

pull stumps out of the right-of-way of the new public road, properly laid out by order of the county court, along, near, and beside the side of the old public road, to straighten and shorten it for travel thereon. This was being done by a tractor to which a cable was attached, the cable being put around the stumps by insured. In attempting to pull one of the stumps the driver of the tractor, after receiving a signal from insured that the cable was fastened to the stump, started up, and the cable slipped and flipped around, striking insured on the arm and chest, injuring him so severely that he died where he fell.

A witness working in the field about 50 yards from where insured was killed "saw him when he was struck; standing on the highway and saw him fall, but didn't see what hit him." When he reached the scene a tractor was standing there which had been pulling at the stump with the cable attached to it. It did not pull the stump, the bark had slipped off near the top, and the cable was right on the ground, still attached to the tractor. The body of deceased was about 7 or 8 feet from the stump, and about the same distance from the tractor. The cable was between the body and the tractor with a large iron hook attached to the loose end, and the other end was attached to the tractor. The right-of-way had only been cleared; they were pulling the stumps, and the road had not been graded at that place. He seemed to be standing in the right-of-way where the stumps had been pulled when struck. He was not on the old road bed when struck, but on the new one. The place where this occurred was the place where they had just left the old highway in order to straighten it—the new road just straightened the old road at this end—and it happened about 4 or 5 feet from the old highway which had been used for a long time.

Some witnesses testified that there were tracks indicating that other cars had gone along the new highway, although the majority of the witnesses testified that the old highway was still generally used and the new one not graded.

A part of the insuring clause insures against the result of bodily injury received during the term of the policy and effected solely by accidental, violent and external means in the manner herein stated. The suit is based on the following paragraph therein:

"If the insured shall be struck by a vehicle which is being propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air or liquid power, while insured is walking or standing on a public highway, which term, public highway, as here used, shall not be construed to include any portion of railroad or interurban yards, station grounds, or right-of-way except where crossed by a thoroughfare dedicated to and used by the public for automobile or horse vehicle traffic."

The court refused appellant's requested instructions, and directed a verdict against her.

R. H. Peace, Alvin D. Stevens and *Joe Joiner,* for appellant.

Leonard C. Smead, for appellee.

KIRBY, J., (after stating the facts). The policy insures against accident resulting from insured's being struck by a vehicle "propelled by steam, cable, electricity, * * * gasoline, etc., while insured is walking or standing on a public highway, which term, public highway, as here used, shall not be construed to include any portion of railroad or interurban yards, station grounds, or right-of-way except where crossed by a thoroughfare dedicated to and used by the public for automobile or horse vehicle traffic."

The evidence shows that the place at which insured was standing when struck by the cable was laid out and made a public highway by order of the county court on the 20th day of January, 1930, insured being killed on the 5th day of May thereafter, and the stipulation shows that he was struck by a cable, one end of which was attached to a tractor pulling stumps out of this new roadway laid out. The Legislature, by act 666 of 1923, § 5, defined a public highway, and the policy limits the meaning public highway as prescribed in it, which in nowise

conflicts with the contention that the road, laid out and being improved, was a public highway within the meaning of the statute and our decisions. *Finney* v. *State,* 172 Ark. 115, 287 S. W. 744. See, also, 29 C. J. 363.

If a person coming alongside a public highway over which vehicles of the kind specified in the policy moved, and while there was injured by being struck by any such vehicle with a cable or board or something else attached to it, or by a car or piece of car or anything carried on such vehicle in a collision between two cars, it would hardly be contended that the accident was not within the provision of the policy insuring against risks of this nature; or if he had been struck and injured by any such vehicle on a short detour from the public highway, made necessary by its obstruction, or a washout, certainly it could not be claimed that the injury was not covered by the terms of the policy, and, in the first illustration, whether he negligently or foolishly stood or walked by the side of the road would make no difference.

Being struck by the cable attached to the tractor was as much being struck and injured by a vehicle within the meaning of the policy as if the insured had been run over by the wheels thereof, or had come in collision with any other part of it, and such an injury was covered by the terms of the policy and insured against. *Great American Casualty Co.* v. *Williams,* 177 Ark. 87, 7 S. W. (2d) 775.

It was there held that, when a policy provided indemnity for accidental injury to insured while actively engaged in farming by actual contact with and while operating a threshing, mowing, reaping or binding machine, such provision covered an injury to insured, who was operating a binding machine harvesting rice, while he was down under it making adjustment or repairs and injured by a sledge hammer falling off the seat of the machine and striking his foot.

If there is ambiguity in the policy, or if its provisions are of doubtful meaning, it must be most strongly construed against the company writing it, and more

favorably to the insured. *Great American Casualty Co.* v. *Williams, supra.*

The court therefore erred in directing a verdict against the appellant, and the judgment is reversed, and the cause will be remanded for a new trial. It is so ordered.