No. 125441

IN THE SUPREME COURT OF ILLINOIS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff – Appellant

v.

KENT ELMORE and ARDITH SHELDON ELMORE,
Defendants – Appellees.

Appeal from the Appellate Court of Illinois
Fifth District No. 5-18-0038

Appeal from the Fourth Judicial Circuit
Effingham County, Illinois, Case No. 16-MR-137
Honorable Judge Allan Lolie

BRIEF OF APPELLEE KENT ELMORE

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POINTS AND AUTHORITIES

NATURE OF THE CASE

This is a declaratory judgment action in which Plaintiff, State Farm Mutual Automobile Insurance Company ("State Farm"), sought a finding that the auto insurance policy it issued to Defendant, Ardith Sheldon Elmore ("Sheldon Elmore"), does not provide coverage for the incident that resulted in the amputation of Defendant, Kent Elmore's ("Kent Elmore") leg while he was using a grain truck owned by Sheldon Elmore and insured under the policy. On cross motions for summary judgment, the trial court granted judgment in favor of State Farm. The Appellate Court for the Fifth District reversed and entered judgment in favor of Defendants. There is no question raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether the "mechanical device" exclusion that State Farm is relying upon to deny coverage for Kent Elmore's injury is ambiguous as held by the Appellate Court of the Fifth District.

II. Whether the "mechanical device" exclusion that State Farm is relying upon to deny coverage for Kent Elmore's injury is against public policy.

III. Whether the trial court erred when it granted summary judgment to State Farm and denied Kent Elmore's motion for summary judgment by finding that there is no coverage under the policy at issue for Kent Elmore's use of the insured vehicle due to the "mechanical device" exclusion.

STATEMENT OF FACTS

The facts relating to this matter are undisputed. On or about October 16, 2013, Sheldon Elmore occupied, possessed, and/or leased certain farm property located one

mile south of Eberle in Effingham County, Illinois. (C. 224). Sheldon Elmore conducted his grain farming operation on said property. (*Id.*). On this date, Kent Elmore went to this location to assist Sheldon Elmore with his grain farming operation, including the transfer of grain from the farm field to the grain elevator. (*Id.*).

Sheldon Elmore owned a grain auger which he used in connection with his farming operation. (C. 225). The shield and protective barrier on the auger had been removed by Sheldon Elmore thereby exposing users of the auger to moving parts, including the screw and the shaft. (*Id.*). Sheldon Elmore furnished this auger to Kent Elmore for use in Sheldon's grain farming operation on October 16, 2013. (*Id.*).

On and prior to October 16, 2013, Sheldon Elmore owned and possessed a 2002 Ford International 4900 grain truck (the "grain truck") which was insured by State Farm under policy number 613-9680-D14-13A (the "policy"). (C. 289). Sheldon Elmore furnished this grain truck to Kent Elmore for use on October 16, 2013. (*Id.*). Corn had been placed in this truck from the combine in the field, and the grain had to be transferred to a transport truck to be hauled into the grain elevator. (C. 216).

The auger mentioned above was being used to move the grain out of the insured's grain truck into the transport truck owned by Effingham Equity. (*Id.*). A tractor powered the auger by means of a PTO (or power take off) shaft. (*Id.*). As the auger turned, it would pull the grain up and dump it into the transport truck. (*Id.*). The auger featured a hopper which would receive the grain from the grain truck. (*Id.*).

To transfer the grain, Kent Elmore had to open the gate on the rear door of the grain truck to allow the corn inside the bed of the truck to spill into the hopper of the auger that was positioned immediately behind the truck so that it actually abutted the rear

of the grain truck. (C. 289). In order to open the gate, Kent Elmore needed extra leverage, so he stepped on the auger. (C. 216). During this unloading process, but before the unloading process was completed, Kent Elmore's right foot became entangled in the auger as he reached to open the gate on the grain truck insured by State Farm. (C. 289). Kent Elmore lost his right leg above the knee as a result of the traumatic amputation caused by the auger. (*Id.*).

The policy issued by State Farm to Sheldon Elmore that insured the grain truck provided liability limits for bodily injury in the amount per person of $250,000 per accident. (C. 294). The liability section of the policy at issue provided in pertinent part as follows:

LIABILITY COVERAGE

This policy provides liability coverage if 'A" is shown under the "SYMBOLS" of the Declarations Page.

Additional Definition

Insured means:

1. ***you*** and ***resident relatives*** for:
   a. the ownerhsip, maintenance, or use of:
      (1) ***your car***; . . .
3. Any other ***person*** for his or her use of:
      (1) ***your car*** . . .

(C. 299-300). * * *

Insuring Agreement

1. ***We*** will pay:
   a. damages an ***insured*** becomes legally liable to pay because of:
      (1) ***bodily injury*** to others; and
      (2) damage to property
      caused by an accident that involves a vehicle for which that ***insured*** is provided Liability Coverage by this policy . . .

(C. 300). * * *

The "Commercial Vehicle" endorsement contained the following exclusion:

> b. **Exclusions**
> The following are added:
>
> * * *
>
> (4) THERE IS NO COVERAGE FOR AN ***INSURED*** FOR DAMAGES RESULTING FROM:
>
> (a) THE HANDLING OF PROPERTY BEFORE IT IS MOVED FROM THE PLACE WHERE IT IS ACCEPTED BY THE ***INSURED*** FOR MOVEMENT INTO OR ONTO A VEHICLE FOR WHICH THE ***INSURED*** IS PROVIDED LIABILITY COVERAGE BY THIS POLICY; . . .
>
> (c) THE MOVEMENT OF PROPERTY BY MEANS OF A MECHANICAL DEVICE, OTHER THAN A HAND TRUCK, THAT IS NOT ATTACHED TO THE VEHICLE DESCRIBED IN (a) ABOVE.

(C. 336).

STANDARD OF REVIEW

Motions for summary judgment are governed by Section 2-1005 of the Code of Civil Procedure (the "Code"). 735 ILCS 5/2-1005. Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. *Id.*; *Schultz v. Illinois Farmers Ins. Co.*, 237 Ill.2d 391, 399 (2010). Construction of the terms of an insurance policy and whether the policy comports with statutory requirements are questions of law properly decided on a motion for summary judgment. *Schultz*, 237 Ill.2d at 399. Whether the entry of summary judgment was appropriate is a matter reviewed by an appellate court on a *de novo* basis. *Progressive Universal Ins. Co. of Illinois v. Liberty Mutual Fire Ins. Co.*, 215 Ill.2d 121, 128 (2005).

ARGUMENT

The only issue to be reviewed by this Court is whether the "mechanical device" exclusion contained in the policy applies with respect to Kent Elmore's use of the insured grain truck. State Farm conceded during oral argument in the trial court on the parties' cross Motions for Summary Judgment as well as in its Response to Kent Elmore's Motion for Summary Judgment that it is not contesting whether the grain truck was "in use" by Kent Elmore at the time of the incident or that there is a causal connection between Kent Elmore's use of the truck and his injury. (R. 10-11; C 368). State Farm's counsel during argument admitted that there would be coverage if the policy did not contain the allegedly applicable exclusion when he stated:

> MR. BEDESKY: In the middle of the memorandum. Strict proximal causal connection between use of vehicle and injury not required. And this is -- and just so we're clear on this, I'm not, you know, conceding that, you know, the point of -- that there is coverage. I'm just saying that if we didn't have the exclusion, yeah, there would be coverage here. That's all I'm saying.
>
> . . .
>
> So it doesn't really make any difference, frankly, Your Honor, about these cases about completed operations, use of vehicle. I mean, I understand what they're saying and that those are correct points of law; and again, if we didn't have the exclusion, yeah, I mean, it would be covered. I can see that.

(R. 11). In fact, State Farm and Kent Elmore stipulated that State Farm would pay the

policy limit of $250,000 if the court declared that coverage was afforded under the policy. (C. 362). The Appellate Court recognized that State Farm has stated that if not for the "mechanical device" exclusion, there would be coverage for this occurrence. *State Farm Mutual Automobile Ins. Co. v. Elmore*, 2019 IL App (5th) 180038 at ¶ 28. Thus, the sole issue before this Court is whether the "mechanical device" exclusion bars coverage for Kent Elmore's injury. For the reasons expressed by the Fifth District Appellate Court and discussed below, this exclusion does not apply because it is ambiguous and against public policy.

A. "Mechanical Device" Exclusion is Ambiguous

When determining whether an automobile liability insurance policy covers a particular accident, the courts will construe any coverage granting clauses broadly to afford the greatest possible protection to the insured. *Founders Ins. Co. v. Munoz*, 237 Ill.2d 424, 433 (2010). Provisions that attempt to limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer. *American States Ins. Co. v. Koloms*, 177 Ill.2d 473, 479 (1997). The burden is on the insurer to prove a limitation or exclusion applies. *Addison Insurance Co. v. Fay*, 232 Ill.2d 446, 454 (2009).

Where an exclusionary clause is relied upon to deny coverage, its applicability must be *clear and free from doubt* because any doubts as to coverage will be resolved in favor of the insured. *Sentry Insurance v. Continental Casualty Company*, 2017 IL App (1st) 161785, ¶ 38 (quotations omitted) (emphasis added). A policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific. *Country Mutual Ins. Co. v. Dahms*, 2016

IL App. (1st) 141392, ¶ 66 (quotations omitted). If the terms of the policy are susceptible to more than one meaning or interpretation, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. *Founders Ins. Co.*, 237 Ill.2d at 433; *American States Ins. Co.*, 177 Ill.2d at 479.

1. The Term "Mechanical Device" is Vague and Susceptible to More than One Reasonable Interpretation

The Appellate Court for the Fifth District held that the "mechanical device" exclusion at issue is overly broad and vague as it "does not permit the average policy holder to discern which devices used in the loading and unloading process would trigger the exclusion and result in the denial of coverage." *Elmore*, 2019 IL App (5th) 180038 at ¶ 28. The Court made this ruling after considering the policy as a whole and taking into consideration the type of insurance for which the parties contracted, and the subjects, risks, and purposes of the insurance. *Id.* State Farm is asking that the term "mechanical device" be viewed in a vacuum and be provided the broadest interpretation possible without considering the policy as a whole or the other factors reviewed by the Appellate Court. State Farm's attempt to ignore the purpose of the policy and exclude coverage for the main use of the insured vehicle by relying on an overly broad and ambiguous exclusion should be prohibited.

The policy does not provide a definition for the term "mechanical device" that is included in the exclusion at issue. (C. 336). State Farm, for whatever reason, chose not to define the term. Where a term in an insurance policy is not defined, courts look to its dictionary definition to afford that term its plain, ordinary, and popular meaning. *Founders Insurance Co.*, 237 Ill.2d at 436. Further, a term that is not defined by a policy is rendered ambiguous if the term is susceptible to more than one reasonable

interpretation. *Nicor v. Associated Electric and Gas Insurance Service Ltd.*, 223 Ill.2d 407, 417 (2006).

The Merriam-Webster dictionary defines "mechanical" as "of or relating to machinery" or "produced or operated by a machine or tool." *See* *https://merriam-webster.com/dictionary/mechanical*. "Machine" is defined by the Merriam-Webster dictionary as "a mechanically, electrically, or electronically operated device for performing a task." *See* *https://merriam-webster.com/dictionary/machines*. The grain auger at issue was powered by a tractor through a PTO shaft. (C. 216). Thus, it is unable to operate under its own power. (*See id.*). Does this meet the definition of a "mechanical device" that is "mechanically, electrically, or electronically operated?" The Appellate Court considered this question and concluded that the answer was unclear. *Elmore*, 2019 IL App (5th) 180038 at ¶ 24.

Because there are no reported decisions in which an Illinois court has construed the "mechanical device" exclusion, the Appellate Court reviewed the foreign cases cited by State Farm in support of its position that the "mechanical device" exclusion is clear and unambiguous. *Id.* at ¶ 22. The Court noted that the devices at issue in the foreign cases were all self-powered or motorized machines used in commercial settings. *Id.* at ¶ 24. In contrast, the Court found that the auger in this case is factually distinguishable from the cases cited by State Farm because it is not self-powered or motorized. The Court explained:

> Standing alone, the auger [is] simply a large cylindrical structure with metal helical blades. The auger had no ability to turn and move grain without an external power source, and its blades turned only if attached to the tractor's PTO shaft. Even then, the auger would not work effectively to pull the grain unless the RPMs of the tractor were increased, depending on the weight of the grain in the hopper.

Id. Consistent with the Appellate Court's analysis, a reasonable interpretation of "mechanical device" could lead to the conclusion that only a device that operates under its own power falls within the plain and ordinary meaning of "mechanical device" as defined in the dictionary.

This interpretation of "mechanical device" is consistent with the remainder of the language contained in the exclusion at issue as said provision specifically excludes a "hand truck" from the definition of a "mechanical device." (C. 336). Similar to the grain auger at issue, a hand truck (defined as a small hand-propelled truck or cart/barrow) cannot operate under its own power and is instead powered through an independent source. *See* https://www.merriam-webster.com/dictionary/handtruck. As the term "mechanical device" is susceptible to more than one reasonable interpretation, the language in the exclusion should be construed against State Farm and in favor of coverage. *See Founders Ins. Co.*, 237 Ill.2d at 433; *Nicor*, 223 Ill.2d at 417.

Interestingly, State Farm includes in its Brief the definition of "mechanical," but does not look at the definition of "machine." It asks this Court to apply the broadest interpretation of "mechanical" and conclude that the grain auger "relates to machinery" and is "operated by a machine or tool," without considering whether the auger is a device that is "mechanically, electrically, or electronically operated." The Appellate Court held that ascribing State Farm's overly broad interpretation to the term "mechanical device" would allow State Farm to unilaterally decide whether a particular device is, or is not, a "mechanical device" after the loss was incurred. *Elmore*, 2019 IL App (5th) 180038 at ¶ 27. The Court found that the parties could not have contemplated that the "mechanical device" exclusion would be given such a broad effect. *Id.*

2. Purpose of Policy Supports Conclusion that the Term "Mechanical Device" is Ambiguous and Does Not Transform Policy Into a Farm Liability Policy

The broad interpretation of "mechanical device" suggested by State Farm is not supported by the purpose of the policy at issue. A court's primary objective in construing the language of an insurance policy is to ascertain and enforce the intentions of the parties as expressed in the policy. *Schultz*, 237 Ill.2d at 400. "To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract." *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill.2d 384, 391 (1993). An insurance contract is not to be interpreted in a factual vacuum. *Glidden v. Farmers Automobile Insurance Assoc.*, 57 Ill.2d 330, 336 (1974). A term that appears unambiguous at first blush might not be so when viewed in the context of the particular factual setting in which the policy was issued. *Id.*

In attempting to rescind its prior admissions concerning Kent Elmore's use of the insured vehicle when he was injured, State Farm argues in its Brief that the accident here was caused by a farm implement that is intended to be covered by a farm liability policy. State Farm asks this Court to broadly construe the "mechanical device" to exclude coverage under the auto policy because Kent Elmore received a settlement as a result of coverage under Sheldon Elmore's other liability policies.[1] State Farm argues that the

[1] Even though it was admonished by the Appellate Court for doing so, State Farm is once again trying to improperly influence the outcome of this matter by referencing in its Statement of Facts and Argument that Kent Elmore has already received $1.9 million dollars from other insurance policies issued to Sheldon Elmore concerning the injuries suffered by Kent as a result of the

intent of the parties under the auto policy is somehow narrowed because there may have been coverage for the injury caused by the auger under a separate farm liability policy.

State Farm's arguments are absurd and completely ignore the language of the policy concerning its purpose as well as applicable law regarding the use of the insured vehicle, which was previously admitted and recognized by State Farm. The insured vehicle being used by Kent Elmore was a 2002 International grain truck. (C. 294). This truck was the only vehicle insured under the policy. (*Id.*). The Declarations Page for the policy specifically recognizes that coverage regarding the grain truck was for the "use" of "farming." (*Id.*). Based on this designation, the Appellate Court found that the International grain truck insured by State Farm was intended to be used for farming purposes as the intent was "plainly identified on the Declarations Page of the policy." *Elmore*, 2019 IL App (5th) 180038 at ¶ 26.

Further, even though State Farm is now attempting for the first time to limit the occurrence to a farm accident, there is no question that Kent Elmore was *using* the grain truck when he was injured. This Court has recognized that the "use of an automobile has been held to denote its employment for some purpose of the user." *Schultz*, 237 Ill.2d at 401. A vehicle is being used "whenever such use is rationally connected to the vehicle for the purpose of providing transportation or satisfying some other related need of the user."

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occurrence at issue. The information relating to the prior settlement is wholly irrelevant to the determination of whether there is coverage under the auto policy at issue. State Farm is only providing the information regarding the amount of the settlement in an attempt to persuade this Court that coverage should be denied under the auto policy because Kent Elmore has already been fully compensated for his injuries. Despite its unsuccessful attempt to influence the Appellate Court, State Farm apparently believes that this Court can be persuaded by improper and irrelevant information. In reality, the actual damages incurred by Kent Elmore for the loss of his leg far exceeds $3 million dollars, as the lost wages alone were $2.6 million. The references by State Farm to the amount of the prior settlement should be stricken and disregarded by this Court in its analysis of the "mechanical device" exclusion.

Id. at 401-02 (quotations omitted). Relying on the *Schultz* decision, the Appellate Court for the First District recently held that the use of a vehicle does include the loading and unloading of the vehicle. *First Chicago Ins. Co. v. My Personal Taxi and Livery, Inc.*, 2019 IL App (1st) 190164 at ¶ 25. State Farm conceded this point when in its Response to Kent Elmore's Motion for Summary Judgment, it specifically stated, "Whether the truck may have been 'in use' during the unloading of the grain is not the issue being contested." (C. 368). Indeed, the primary and intended use of the grain truck is for hauling grain, which necessarily includes the unloading of grain. Kent Elmore was certainly using the truck when he was unloading the grain and became entangled with the auger. (C. 289-90).

The Appellate Court considered the use of the grain truck and purpose of the policy when reviewing whether the "mechanical device" exclusion is ambiguous. The Court noted that an insurance policy "must be interpreted to give effect to the mutual intention of the parties," and that the policy is "not interpreted in a vacuum." *Elmore*, 2019 IL App (5th) 180038 at ¶ 26. The Appellate Court also recognized that this Court "has long held that when determining whether an ambiguity exists, courts should consider the subject matter of the contract, the situation of the parties and the predominate purpose of the contract." *Id.* (citing *Dora Township v. Indiana Insurance Co.*, 78 Ill.2d 376, 378 (1980); *Glidden*, 57 Ill.2d at 336).

Under State Farm's proffered definition of "mechanical device," it argues that any tool that is used with, or that has a relationship to machinery, may be deemed a "mechanical device." *Id.* at ¶ 25. The Appellate Court concluded that if State Farm's expansive definition of the term "mechanical device" is applied, liability coverage would

be afforded under the policy only for injuries arising when grain is unloaded from the insured truck by hand or by a hand truck." *Id.* As with the other terms in the exclusion at issue, the term "hand truck" is not defined. (C. 336). Relying on definitions from Merriam Webster's Collegiate Dictionary and Webster's Third International Dictionary, the Appellate Court defined "hand truck" as a "small hand-propelled truck or wheelbarrow." *Elmore*, 2019 IL App (5th) 180038 at ¶ 25.

Considering that the insured truck would be used for farming purposes, along with the other provisions of the "mechanical device" exclusion, the Appellate Court correctly found that the parties could not have contemplated that a wheelbarrow "device" would be a reasonably feasible or effective method for unloading grain from the large grain truck identified in the Declaration Page of the policy. *Id.* at ¶ 26; (C.336). The Court explained that under State Farm's interpretation of the policy exclusion, there is no coverage at all for the unloading of the grain from the grain truck, except for injuries arising while unloading the grain with a hand truck. *Elmore*, 2019 IL App (5th) 180038 at ¶ 26. The Appellate Court appropriately held that this interpretation would lead to an absurd result. *Id.* Essentially, there would be no coverage for the main use of the grain truck. *See id.*

State Farm argues in its Brief that the Appellate Court's ruling regarding the lack of coverage resulting from its suggested expansive interpretation of "mechanical device" represents a fundamental misunderstanding of what coverages should apply to Kent Elmore's injuries in that the Court fails to recognize that there may be other policies that provide coverage. This argument is a red herring and constitutes an attempt to improperly advise this Court of the existence of other policies and the prior settlement

thereunder. It wholly ignores the purpose of the policy at issue, which specifically identifies that the use of the grain truck is for farming. (C. 294). Further, the fact that there may be more than one policy that provides coverage for Kent Elmore's injuries in no way impacts the analysis of whether there is coverage under the policy at issue concerning Kent's use of the grain truck.

State Farm glibly indicates in its Brief that every Illinois farmer who has used an auger would agree that it is a "mechanical device." These same Illinois farmers would likely also agree that the broad definition State Farm is ascribing to this term is ambiguous when considering that it is being relied upon to exclude coverage for the main use of the insured vehicle. These farmers would certainly expect that coverage for a grain truck would include the loading and unloading of grain from the truck using more than just a wheelbarrow.

Along those lines, the Appellate Court took into consideration the knowledge and expectations of farmers such as Sheldon Elmore in making its ruling. The Court noted that even if ascribing the expansive definition of the "mechanical device" suggested by State Farm within a commercial endorsement was a customary use or practice within the insurance industry, there was no evidence or argument that the customary exclusion was commonly known to purchasers of auto insurance for farm vehicles, such as Sheldon Elmore. *Elmore*, 2019 IL App (5th) 180038 at ¶ 26. With this in mind, the Appellate Court recognized that the language of an insurance policy should be viewed from the standpoint of an average lay person who is untrained in the complexities of the commercial insurance industry. *Id.*

Consistent with the Appellate Court's analysis in *Elmore*, this Court has found

that courts will neither strain to find an ambiguity where none exists nor adopt an interpretation which rests on tenuous distinctions that the average person, for whom the policy is written, cannot be expected to understand. *Founders Ins. Co.*, 237 Ill.2d at 433. Applying this reasoning, the Appellate Court properly found that the "mechanical device" exclusion is ambiguous as it is overly broad, vague, and does not permit the average policyholder to discern which devices used in the loading and unloading process would trigger the exclusion and result in a denial of coverage. *Elmore*, 2019 IL App (5th) 180038 at ¶ 28. The Appellate Court's ruling that the "mechanical device" exclusion is ambiguous and overly broad should be affirmed, and the exclusion should be construed against State Farm and in favor of coverage.

3. The Appellate Court's Ruling Does Not Unfairly Restrict Freedom of Contract

The ruling of the Appellate Court does not fundamentally change the nature of the coverage agreed to by the parties or restrict the parties' freedom to contract. Instead, the Appellate Court's ruling upholds the freedom to contract by prohibiting the enforcement of an overly broad and ambiguous exclusion that would improperly restrict the main use of the insured vehicle. Based on the purpose of the policy, the Appellate Court correctly held that "[w]e cannot conclude that the parties contemplated that the 'mechanical device' exclusion would be given such a broad effect." *Id.* at ¶ 27.

State Farm once again argues in its Brief that the Appellate Court's ruling is incorrect because the policy at issue is an auto policy and not a farm liability policy. This is merely an attempt by State Farm to mislead this Court and avoid its prior admission that Kent Elmore was unquestionably using the grain truck when his injury occurred. (R. 10-11; C 368). Sheldon Elmore certainly paid premiums to State Farm with the

expectation that liability coverage would apply under the auto policy for an injury received when the grain truck was being used for its primary purpose. State Farm is requesting this Court to ignore the purpose of the policy and adopt its suggested overly broad definition of "mechanical device" that would essentially allow State Farm to unilaterally decide whether a particular device is a "mechanical device" after a loss has occurred. The Appellate Court properly refused to apply this interpretation of the exclusion that would be given such a broad effect. *Elmore*, 2019 IL App (5th) 180038 at ¶ 27.

The freedom to contract does not allow State Farm to enforce an overly broad and ambiguous exclusion which contravenes the intended purpose of the policy. The analysis of whether the Appellate Court's refusal to apply the exclusion unfairly alters the policy must take into consideration more than just State Farm's desire to avoid providing coverage for the use of the insured vehicle. It must also include the primary purpose of the policy as well as the knowledge and expectation of the insured. *See Dora Township*, 78 Ill.2d at 378; *Glidden,* 57 Ill.2d at 336. The analysis also must recognize that ambiguous terms are construed strictly against the drafter of the policy and in favor of coverage. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 119 (1992). This is especially true with respect to exclusionary clauses "because there is little or no bargaining involved in the insurance contracting process, the insurer has control in the drafting process, and the policy's overall purpose is to provide coverage to the insured." *Id.* (citations omitted). When viewing all of the factors, the only reasonable conclusion is that the Appellate Court was correct in finding that the "mechanical device" exclusion is ambiguous and overly broad as it does not permit the average policyholder to

discern which devices used in the loading and unloading process would trigger the exclusion and result in a denial of coverage. *Elmore*, 2019 IL App (5th) 180038 at ¶ 28. The holding by the Appellate Court should be affirmed.

4. The "Mechanical Device" Exclusion is Susceptible to More than One Reasonable Interpretation

Further, even if the grain auger could be considered a "mechanical device," the exclusion is also ambiguous because it is susceptible to more than one interpretation, one of which would clearly not apply to Kent Elmore's use of the grain truck. As indicated above, the exclusion at issue provides as follows:

> b. **Exclusions**
> The following are added:
>
> * * *
>
> (4) THERE IS NO COVERAGE FOR AN ***INSURED*** FOR DAMAGES RESULTING FROM:
>
> (a) THE HANDLING OF PROPERTY BEFORE IT IS MOVED FROM THE PLACE WHERE IT IS ACCEPTED BY THE ***INSURED*** FOR MOVEMENT INTO OR ONTO A VEHICLE FOR WHICH THE ***INSURED*** IS PROVIDED LIABILITY COVERAGE BY THIS POLICY;
>
> (b) THE HANDLING OF PROPERTY AFTER IT IS MOVED FROM THE VEHICLE DESCRIBED IN (a) ABOVE TO THE PLACE WHERE IT IS FINALLY DELIVERED BY THE ***INSURED***; OR
>
> (c) THE MOVEMENT OF PROPERTY BY MEANS OF A MECHANICAL DEVICE, OTHER THAN A HAND TRUCK, THAT IS NOT ATTACHED TO THE VEHICLE DESCRIBED IN (a) ABOVE.

(C. 336). The "mechanical device" exclusion contained in Section b(4)(c) specficially relates the exclusion to the vehicle described in (b)(4)(a). (*Id.*). The vehicle described in Section (b)(4)(a) concerns an insured vehicle which is receiving property into or onto it. (*Id.*). Section b(4)(b) also refers to the vehicle referenced in Section b(4)(a) and clearly contemplates that said vehicle had property loaded *onto* it. (*Id.*). As such, in referring to

the vehicle in Section (b)(4)(a), the "mechanical device" exclusion would only apply when property is being moved by means of said device onto an insured vehicle. (*See id.*).

Since the grain truck at issue was being used by Kent Elmore to unload grain out of it, the "mechanical device" exclusion does not apply. (C. 289). Because the "mechanical device" exclusion is susceptible to more than one reasonable interpretation, it should be construed liberally in favor of Kent Elmore and against State Farm. *See Founders Ins. Co.*, 237 Ill.2d at 433. Kent Elmore requests that the Court adopt the interpretation of the "mechanical device" exclusion set forth above and determine that it does not apply to Kent Elmore's use of the insured vehicle.

B. "Mechanical Device" Exclusion is Against Public Policy

Courts will apply terms in an insurance policy as written unless those terms contravene public policy. *Illinois Farmers Insurance Co. v. Cisco,* 178 Ill.2d 386, 392 (1997). Statutes are an expression of public policy. *Cates v. Cates,* 156 Ill.2d 76, 110 (1993). Statutes in force at the time an insurance policy was issued are controlling, and a statute's underlying purpose cannot be circumvented by a restriction or exclusion written into an insurance policy. *Cummins v. Country Mutual Insurance Co.,* 178 Ill.2d 474, 482-83 (1997). Accordingly, insurance policy provisions that conflict with a statute are void. *Illinois Farmers Insurance,* 178 Ill.2d at 392.

Section 7-601(a) of the mandatory insurance act in the Illinois Vehicle Code requires that vehicles be insured through a liability insurance policy. 625 ILCS 5/7-601(a). Section 7-317(b)(2) of the Safety and Family Financial Responsibility Law in the Illinois Vehicle Code states that a motor vehicle liability policy "[s]hall insure the person named therein and any other person using or responsible for the use of such motor

vehicle or vehicles with the express or implied permission of the insured." 625 ILCS 5/7-317(b)(2). In *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group,* this Court concluded that section 7-601(a), together with section 7-317(b)(2), mandates that "a liability insurance policy issued to the owner of a vehicle must cover the named insured and any other person using the vehicle with the named insured's permission." *Universal Underwriters,* 182 Ill.2d 240, 244 (1998).

As mentioned above, Section 7–317(b)(2) provides that a motor vehicle owner's policy of liability insurance "[s]hall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." 625 ILCS 5/7–317(b)(2). Provisions such as this, which extend liability coverage to persons who use the named insured's vehicle with his or her permission, are commonly referred to as "omnibus clauses." Where, as in Illinois, an omnibus clause is required by statute to be included in motor vehicle liability policies, Illinois courts have held that such a clause must be read into every such policy. *Universal Underwriters*, 182 Ill.2d at 243–44.

The principal purpose of this state's mandatory liability insurance requirement is to protect the public by securing payment of their damages. *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d 369, 376 (2001). It is axiomatic that a statute that exists for protection of the public cannot be rewritten through a private limiting agreement. *Progressive Universal Ins. Co. of Illinois,* 215 Ill.2d at 129. One reason for that rule is that "the members of the public to be protected are not and, of course, could not be made parties to any such contract." *American Country Insurance Co. v. Wilcoxon,* 127 Ill.2d 230, 241 (1989). In accordance with these principles, a statute's

requirements cannot be avoided through contractual provisions. *Progressive Universal Ins. Co. of Illinois*, 215 Ill.2d at 129. Where liability coverage is mandated by the state's financial responsibility law, a provision in an insurance policy that conflicts with the law will be deemed void. *American Country Insurance Co.*, 127 Ill.2d at 241. The statute will continue to control. *Id*.

The "mechanical device" exclusion at issue is void against public policy because it excludes coverage for damages relating to bodily injury suffered by a permissive user of the insured vehicle. This specifically runs afoul of the requirements of the omnibus clause found in Section 7–317(b)(2) of the Vehicle Code. 625 ILCS 5/7–317(b)(2). As noted by this Court in *State Farm Mutual Auto. Ins. Co. v. Smith*, "The Illinois legislature has decided the public policy of Illinois requires that an insurance company that issues a liability insurance policy or motor vehicle policy to an insured must cover the insured and any person who has received the insured's express or implied permission to use the vehicle." *Smith*, 197 Ill.2d at 375-76. Since the "mechanical device" exclusion prohibits coverage for a permissive user, it should be held void as against public policy.

As referenced above, there does not appear to be any Illinois appellate court which has specifically ruled upon this particular "mechanical device" exclusion. However, other states have specifically determined whether a similar mechanical device exclusion can prevail over the mandatory omnibus coverage statutes applicable in those states. In each of those cases, the mechanical device exclusion failed and the courts held that the insured did have coverage under the policies. In all of those cases where the state mandatory provision statutes were in effect, the mechanical device exclusions were deemed to be contrary to the state statute requiring insurance and were considered void as

against public policy. *See Parkway Iron & Metal Co. v. New Jersey Manufacturers Ins. Co.*, 266 N.J.Super.386, 390-91 (App.Div.1993); *Truck Ins. Exchange v. Home Ins. Co.*, 841 P.2d 354, 358 (Col.Ct.App. 1992); *Gulf Underwriters Ins. Co. v. Great West Co.*, 278 Fed.Appx. 454, 459 (5th Cir. 2008).

State Farm has previously argued that these foreign cases are not controlling or persuasive because this Court has squarely decided the issue of exclusions and omnibus coverage in *Progressive Universal Ins. Co. of Illinois v. Liberty Mutual Fire Ins. Co.*, 215 Ill.2d 121, 137-38. A review of the *Progressive* case actually supports Kent Elmore's position that the "mechanical device" exclusion is void against public policy because there is disparate treatment between insureds and permissive users for purposes of liability coverage relating to damages incurred for bodily injury.

The Illinois Supreme Court in *Progressive* held that an exclusion to a policy will not be void against the public policy of the omnibus clauses if there is not disparate treatment between the insured and permissive user of the insured vehicle for purposes of coverage. *Id.* at 134. The *Progressive* Court explained its reasoning as follows:

> A more reasonable interpretation of section 7-317(b)(2), and the one we adopt, is that the legislature merely intended to insure that common and often unavoidable practice of entrusting one's vehicle to someone else does not foreclose an injured party from obtaining payment for otherwise covered losses resulting from operation of a vehicle. The scope of the coverage is unaffected by law. The statute simply eliminates from coverage determinations the happenstance that a vehicle was operated by a permissive user rather than the actual owner. If a loss is covered by the policy, the fact that the vehicle is operated by a permissive user will not excuse the insurer from its obligation to pay. The loss will continue to be covered. Conversely, if a loss is excluded from coverage by the policy, the fact that the vehicle was operated by a permissive user will not trigger an obligation to pay that would not have existed had the vehicle been operated by its actual owner. The loss will continue to be excluded.

Id. at 137.

The "mechanical device" exclusion at issue here, in effect, is designed to result in disparate treatment between an insured and permissive user under the policy. For purposes of Liability Coverage, the policy at issue defines ***Insured*** to include:

> 3. any other ***person*** for his or her use of:
>   a. ***your car***;
>   b. a ***newly acquired car***;
>   c. a ***temporary substitute car***; or
>   d. a ***trailer*** while attached to a ***car*** described in a, b, or c. above.
>
> Such vehicle must be used within the scope of ***your*** consent; . . .

(C. 300). Thus, a permissive user is included within the definition of an ***Insured*** for purposes of the Liability Coverage. However, a review of the exclusions to the Liability Coverage reveals that the actual intent of the "mechanical device" exclusion is to prohibit coverage for injuries sustained by a permissive user when using an insured vehicle to load or unload said vehicle.

When construing the language of an insurance policy, a court must assume that every provision was intended to serve a purpose. *Founders Ins. Co.*, 237 Ill.2d at 433. Thus, an insurance policy must be construed as a whole. *Id.* Under the Exclusions for the Liability Coverage, the policy at issue excludes coverage:

> 2. FOR ***BODILY INJURY*** TO:
>   a. ***YOU***;
>   b. ***RESIDENT RELATIVES***; AND
>   c. ANY OTHER ***PERSON*** WHO BOTH RESIDES PREIMARILY WITH AN ***INSURED*** AND WHO:
>   (1) IS RELATED TO THAT ***INSURED*** BY BLOOD, MARRIAGE, OR ADOPTION; OR
>   (2) IS A WARD OR FOSTER CHILD OF THAT ***INSURED***.

(C. 301). As such, there is no liability coverage for bodily injury suffered by the insured. (*Id.*). However, this exclusion does not include or pertain to bodily injuries sustained by permissive users in their use of the insured's vehicle.

In light of the above, it is reasonable to conclude that the import of the "mechanical device" exclusion is to actually prohibit liability coverage for injuries sustained by a permissive user in the loading or unloading process of an insured vehicle. Any injuries suffered by an insured are excluded from coverage regardless of how the insured is using the vehicle. While the language of the "mechanical device" exclusion refers broadly to an "Insured," the goal of this exclusion is to deny coverage to permissive users, which is contrary to the reasoning in *Progressive* as well as *Smith*. *See Progressive Universal Ins. Co. of Illinois*, 215 Ill.2d at 137; *Smith*, 197 Ill.2d at 375-76.

In fact, the "mechanical device" exclusion targets permissive users as any person, other than the insured, who would be operating any such device would be assisting in the loading and unloading of an insured vehicle and as such, would be a permissive user. Thus, the main (and most likely only) class of individuals denied coverage for injuries sustained during the loading and unloading process would be permissive users. In accordance with the principle set forth in *Smith* that a liability insurance policy must cover a permissive user, the "mechanical device" exclusion should be declared void. *Smith*, 197 Ill.2d at 375-76.

Despite State Farm's argument to the contrary, the above interpretation of the "mechanical device" exclusion and its treatment under *Progressive* and *Smith* is supported by the guidance provided by the Superior Court of New Jersey in *Parkway Iron & Metal Co. v. New Jersey Manufacturers Insurance Company*, 266 N.J. Super. at 389-90. In finding that an identical "mechanical device" exclusion was invalid and against the public policy of the omnibus clause in New Jersey, the *Parkway* Court held that while the exclusion was structured to expressly eliminate coverage for a particular

type of activity, the net effect is to deprive certain persons or entities from omnibus coverage in certain situations. *Id.* at 389. The Court concluded that the exclusion "refers to mechanical equipment but effectively serves to eliminate coverage for certain additional insureds during the unloading operation." *Id.* at 391.

The "mechanical device" exclusion is void against the omnibus clause in Section 7–317(b)(2) of the Vehicle Code, 625 ILCS 5/7–317(b)(2), because it attempts to preclude coverage when an insured vehicle is used by a permissive user. Further, as noted above, the actual intent behind the "mechanical device" exclusion is the disparate treatment of permissive users relating to liability coverage for bodily injuries they suffer in the loading or unloading of the insured vehicle. Therefore, the exclusion should not be applied, and State Farm should be required to provide coverage for Kent Elmore's injuries sustained during his use of the insured vehicle.

CONCLUSION

The Appellate Court was correct in its finding that the "mechanical device" exclusion is ambiguous, overly broad, and vague. As a result, the ruling by the Appellate Court should be affirmed and the "mechanical device" exclusion must be construed against State Farm and in favor of coverage. Further, the "mechanical device" exclusion is also not applicable to Kent Elmore's use of the insured vehicle because it only concerns loading of the insured vehicle and is against public policy. As such, as held by the Appellate Court, the trial court's erroneous entry of summary judgment for State Farm should be reversed, and an order entered granting Kent Elmore's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Christopher Koester, certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 25 pages.

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APPENDIX

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FILED
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EFFINGHAM COUNTY, ILLINOIS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Plaintiff,	)	
vs.	)	NO: 16-MR-137
KENT ELMORE AND ARDITH SHELDON ELMORE,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' SUMMARY JUDGMENT MOTION

Now comes the plaintiff, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (State Farm), through its attorneys, REED, ARMSTRONG, MUDGE & MORRISSEY, P.C. and for its memorandum in response to Defendants' summary judgment motion states as follows:

I. A MECHANICAL DEVICE CAUSED THE INJURY AT ISSUE.

Both parties have stipulated that there is no issue of material fact as to how the accident occurred. Defendant has not contested any of the facts as set forth in Plaintiff's memorandum in support of its own summary judgment motion. There is no dispute that when Kent Elmore was injured, the grain auger was operating and moving grain. Corn was pouring into the auger, and the grain was in turn being moved up and dumped into the transport truck.

It is undisputed that the grain auger was not "attached" to Sheldon Elmore's State Farm insured International truck. As shown in the photograph utilized during oral argument, the grain auger was located underneath and behind the truck, but was not attached to it.

B. THE STATE FARM EXCLUSION IS NOT AMBIGUOUS

The State Farm exclusion at issue provides in pertinent part as follows:

(4) THERE IS NO COVERAGE FOR AN **INSURED** FOR DAMAGES RESULTING FROM:

(a) THE HANDLING OF PROPERTY BEFORE IT IS MOVED FROM THE PLACE WHERE IT IS ACCEPTED BY THE **INSURED** FOR MOVEMENT INTO OR ONTO A VEHICLE FOR WHICH THE **INSURED** IS PROVIDED LIABILITY COVERAGE BY THIS POLICY;

* * *

(c) THE MOVEMENT OF PROPERTY BY MEANS OF A MECHANICAL DEVICE, OTHER THAN AN HAND TRUCK, THAT IS NOT ATTACHED TO THE VEHICLE DESCRIBED IN (a) ABOVE. . . (Endorsement 6018 GG.1, pg. 2)

Defendants' counsel claimed a "presumption of coverage" at the hearing. But after a diligent Westlaw search, Plaintiff's counsel could find *no case* in Illinois which has ever utilized such terminology in the context of insurance coverage. To the contrary, the Illinois Supreme Court has repeatedly held that a Court's primary objective in interpreting an insurance policy is to ascertain and give effect to the intention of the parties, as expressed in the policy language. Hobbs v. Hartford Insurance Company of the Midwest, 214 Ill.2d 11, 291 Ill.Dec. 269, 823 N.E.2d 561 (2005).

When asked whether Defendant would concede the auger was a "mechanical device," Defendant's counsel suggested the exclusion was ambiguous. Whether an ambiguity exists turns on whether the policy language is subject to more than one reasonable interpretation. Hobbs, 214 Ill.2d at 17, 291 Ill. Dec. at 272. Again, it is undisputed the auger was powered by a PTO shaft from a tractor. The auger contains a screw mechanism to move the grain (here corn) from the "hopper" and up a long shaft to deposit the grain into the semitrailer transport truck. Webster's dictionary defines "mechanical" as having to do with or having skill and use of

machinery or tools in a device as a "mechanical invention or contrivance for some specific purpose." As one Court held, a mechanical device is generally understood to be an invention or contrivance having to do with machinery or tools. Dauthier v. Pointe Coupee Wood Treating, Inc., 560 S.2d 556 (La. App. 1st 1990). Therefore is it "reasonable" to claim the grain auger is *not* a mechanical device? As the Illinois Supreme Court has held, when construing an insurance policy although "creative possibilities" may be suggested, only reasonable interpretations will be considered. Bruder v. County Mutual Ins. Co., 156 Ill.2d 179, 189 Ill.Dec. 387, 620 N.E.2d 355 (1993). Further, a Court will not strain to find an ambiguity where none exists. McKinney v. Allstate Ins. Co., 188 Ill.2d 493, 243 Ill.Dec. 56, 722 N.E.2d 1125 (1999).

Clearly, it would be *unreasonable* to suggest the grain auger did not represent a "mechanical device." The grain auger is an implement of farming and is specifically designed to move grain from one place to another. To claim the auger was not a mechanical device represents an unreasonable interpretation of the policy. Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, this rule of construction only comes into play when the policy is ambiguous. Menke v. Country Mutual Ins. Co., 78 Ill.2d 420, 36 Ill.Dec. 698, 401 N.E.2d 539 (1980).

II. THE "COMPLETED OPERATIONS DOCTRINE" AND THE "CAUSAL CONNECTION" CASE LAW DO NOT OVERCOME THE EXCLUSION AT ISSUE.

Defendant's counsel discussed at length the Illinois Completed Operations Doctrine and the issue of causal connection between an insured vehicle and the accident. While certainly accurate recitations of the law in Illinois, none of the cases cited by Defendant discuss any exclusion to coverage. The cases only discusses the scope of coverage provided under a motor

vehicle policy when an accident occurs. The question her is whether or not an exclusion applies to remove coverage that otherwise may have existed for the accident at hand. An exclusion in an insurance policy serves the purpose of taking out persons or events otherwise included within the defined scope of coverage. Rich v. Principle Life Ins. Co., 226 Ill.2d 359, 314 Ill.Dec. 795, 875 N.E.2d 1082 (2007).

In Toler v. Country Mutual Ins. Co., 123 Ill.App.3d 386, 78 Ill.Dec. 790, 462 N.E.2d 909 (5th Dist. 1984) Country Mutual argued that the accidental discharge of a rifle did not arise from the "use" of a truck. Country also argued that there was not a "causal relation" between the accident and use of the truck to give rise to liability coverage under the policy. 78 Ill.Dec. at 792, 462 N.E.2d at 911. The Toler Court discussed how Illinois had adopted the "complete operations" view in construing "loading and unloading" clauses. The Court distinguished the case from those cases in which the vehicle involved was the emeritus or location of the injury. 78 Ill.Dec. at 795, 462 N.E.2d at 914. The Court found that it was not necessary that the use of the vehicle be the "sole cause" of the accident so long as there is some causal connection between the two. 78 Ill.Dec. at 796, 462 N.E.2d at 915. Toler featured no exclusionary clause whatsoever. The case merely discussed loading and unloading and causation issues under the policy language.

Likewise, in Menard, Inc. v. Country Preferred Insurance Co., 213 IL App.(3d) 120340, 372 Ill.Dec. 801, 992 N.E.2d 643 (3rd Dist. 2013) the Court considered whether a Menards employee loading bricks into a customer's car would be insured for liability coverage when the customer tripped and fell. The Court found that Illinois does not equate "use" of the vehicle with only operating or driving the vehicle. The policy language suggested that the parties considered loading to be a use of the vehicle. Therefore the Menard employee was "using" the customer's

vehicle when he was loading the vehicle with bricks. 372 Ill.Dec. at 806, 992 N.E.2d at 648. The Menard Court then discussed the "complete operations" doctrine as it applied to the loading process and causal connection between the injury and use of a vehicle. 372 Ill.Dec. at 807, 992 N.E.2d at 649. Once again no exclusionary clause was at issue in Menard. The Court did not determine whether any exclusion would preclude coverage.

Finally Defendant relied on Woodside v. Gerken Food Co., 130 Ill.App.3d 501, 85 Ill.Dec. 811, 474 N.E.2d 771 (5th Dist. 1985). This is the "potato case" where a delivery driver dropped off two sacks of potatoes at the restaurant in Belleville. The Appellate Court considered the "complete operations" doctrine in causation. The Court found what was determinative was whether the accident arose out of the defective delivery or would not have occurred but for that defective delivery. 85 Ill.Dec. at 815, 474 N.E.2d at 775. This case again only considered the scope of coverage under the policy's liability provision. Woodside did not feature any exclusionary clause whatsoever.

Here, the fact that the truck may have been "in use" under the Completed Operations Doctrine is not at issue. The only issue is whether or not the exclusion applies to remove coverage. State Farm is not taking the position that there is no coverage because of an interpretation regarding proximate cause or a reading of the Completed Operations Doctrine. Whether the truck may have been "in use" during the unloading of the grain is not the issue being contested. The issue is whether or not coverage which may have otherwise existed is removed because of the exclusion. None of the cases cited by Defendants address this issue.

III. THE STATE FARM EXCLUSION DOES NOT VIOLATE PUBLIC POLICY AND PRECLUDES COVERAGE HERE.

As conceded by the parties, no Illinois case has yet to construe the "mechanical device" exclusion. Defendant has cited several foreign cases for the proposition that the exclusion is not

enforceable because it violated a State's statutorily required omnibus auto coverage. Gulf Underwriters Ins. Co. v. Great West Casualty Co., 278 Fed.Appx. 454 (5th Cir. found that mechanical device exclusion unenforceable as in violation of Wisconsin statute which requires auto liability coverage to a third party who was loading or unloading an insured vehicle). Performance Ins. Co. v. Jones, 185 N.J. 406, 887 A.2d 146 (2005) (business exclusion invalid under New Jersey omnibus liability coverage statute). Parkway Iron & Metal Co. v. New Jersey Manufacturers Ins. Co., 266 N.J. Super. 386, 629 A.2d 1352 (1983) (mechanical device exclusion invalid under New Jersey mandatory omnibus coverage statute).

None of the cases cited by Defendants provide any guidance here. This is true because the Illinois Supreme Court has squarely decided the issue of exclusions and omnibus coverage in Progressive Universal Ins. Co. of Illinois v. Liberty Mutual Fire Ins. Co., 215 Ill.2d 121, 293 Ill. Dec. 677, 828 N.E.2d 1175 (2005). In this case Shirley Appinante owned a minivan insured by Progressive. She allowed her son Ronald to use the van to deliver pizzas for his employer. While operating his mother's van to deliver Pizza Ronald struck a pedestrian and was sued for personal injuries. 215 Ill.2d at 124, 293 Ill.Dec. at 679. Progressive filed a declaratory judgment action raising an exclusion that precluded liability coverage while the vehicle was being used to carry persons or property for compensation or a fee including the delivery of food or any other products. The trial Court granted summary judgment in Progressive's favor. The Appellate Court reversed, claiming that the "food delivery exclusion" violated public policy under the motor vehicle code's omnibus clause. 215 Ill.2d at 127, 293 Ill. Dec. at 681.

Justice Karmeier wrote the opinion for the Illinois Supreme Court. In reversing the Appellate Court, the Supreme Court found an important distinction in the exclusion at issue. In a previous case State Farm Mutual Automobile Insurance Co. v. Smith, 197 Ill.2d 369, 259

Ill.Dec. 18, 757 N.E.2d 881 (2001) the Court invalidated an exclusion because it applied differently to permissive users versus a named insured or their spouse. In Smith the named insured, his spouse and others were expressly exempted from the exclusion. This meant that conduct which would be covered if undertaken by the insured would not be covered if undertaking by someone who was using the vehicle with the insured's permission. 215 Ill.2d at 133, 293 Ill.Dec. at 684. However, the Progressive food delivery exclusion was different. This exclusion did not differentiate between the insured and those using the vehicle with the insured's permission. Therefore, unlike the case in Smith, the exclusion operated to preclude coverage to both the named insured and permissive users. As a result the omnibus clause in the motor vehicle code was not violated. Therefore the food delivery exclusion was not void as against public policy. 215 Ill.2d at 134, 293 Ill.Dec. at 685, 828 N.E.2d at 1183.

Liberty Mutual argued that because of Illinois' mandatory liability insurance requirements, only those exclusions authorized by the legislature could be enforceable. The Supreme Court found this contention "untenable." The Court held that insurance carriers are not required to cover every loss operators and owners sustained. 215 Ill.2d at 136, 293 Ill.Dec. at 686, 828 N.E.2d at 1184. The Progressive Court found that the omnibus statute, 625 ILCS 5/7-317 (b)(3) does not expressly forbid parties to an insurance contract from excluding certain risks from liability coverage. Said the Court:

> "Had the general assembly wished to bar insurers from excluding certain risks from motor vehicle liability policies, it could easily have so provided in the pertinent statutes. It did not do so. To the contrary, the Illinois Safety and Family Financial Responsibly Law clearly contemplates that exclusions may be included in policies and that those exclusions will be upheld. That is why section 7-602 of the statute (625 ILCS 5/7-602) requires insurance cards to contain a disclaimer admonishing policyholders to "examine policy exclusions carefully." 215 Ill.2d at 138, 293 Ill.Dec. at 687, 828 N.E.2d at 1185.

Finally the Supreme Court distinguished foreign cases which invalidated food delivery exclusions which were in violation of compulsory insurance laws. Said the Court:

> ". . . Our Court has never required that insurance exclusions be deemed invalid if those exclusions have not been authorized explicitly by our general assembly. Rather, our policy is to enforce exclusions not explicitly provided for by law based on principles of contract interpretation." 215 Ill.2d at 139, 293 Ill.Dec. at 687, 828 N.E.2d at 1185.

As a result the Appellate Court was reversed. No coverage was owed by Progressive pursuant to the food delivery exclusion. 215 Ill.2d at 140, 293 Ill.Dec. at 688, 828 N.E.2d at 1186.

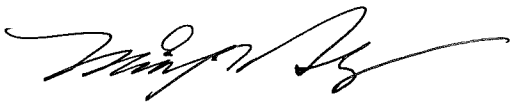
Here, this Court should likewise uphold the mechanical device exclusion at issue. Unlike the foreign authorities cited by Defendants, the Illinois Supreme Court does not automatically invalidate an auto liability policy exclusion merely because it is not provided for by statute. Under Progressive the Illinois Supreme Court looks to see whether the exclusion applies equally to both a permissive user and a named insured. Here, the mechanical device exclusion does provide equal application to both the named insured, Sheldon Elmore and any permissive user of his truck. The exclusion provides that there is no coverage for an **insured** resulting from the movement of property by means of a mechanical device . . . The term "insured" is specifically defined in the liability section of the policy. "Insured" means you (the named insured) and **relative residents** . . . (p. 5) as well as (3) any other **person** for his or her use of (a) Your car . . . (p. 6)

Therefore the State Farm policy makes *no distinction* between named insured and permissive user for purposes of the "mechanical device." There would be no coverage under the mechanical device exclusion whether a named insured or a permissive user was sued here. Under Progressive the mechanical device exclusion does not violate public policy. Unlike the

foreign authority cited by Defendants Courts in Illinois do not automatically invalidate exclusions merely because they are not expressly provided for by statute. Accordingly the exclusion here is enforceable and State Farm should be entitled to summary judgment in its favor as a matter of law.

WHEREFORE, Plaintiff State Farm prays that this Court grant its motion for summary judgment, and deny Defendants' summary judgment motion and for an order entering judgment in favor of State Farm and against Defendants.

REED, ARMSTRONG, MUDGE & MORRISSEY, P.C.

By: 

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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned hereby certifies that a copy of the foregoing document was served upon each party, or attorney of record identified below, by email, from the office of Reed, Armstrong, Mudge & Morrissey, P.C. in Edwardsville, Illinois prior to 5:00 p.m. on the 12 day of December, 2017:

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Palp, Inc. v. Williamsburg Nat. Ins. Co., Cal.App. 4 Dist., October 27, 2011

560 So.2d 556
Court of Appeal of Louisiana,
First Circuit.

Helen DAUTHIER
v.
POINTE COUPEE WOOD TREATING INC., Ronnie Pourciau, Dr. Harry J. Kellerman and Pettiebone Corporation.

No. CA 89 1848.
|
April 10, 1990.

Wrongful death action was brought by widow of worker who fell from forklift while unloading insured vehicle. The Eighteenth Judicial District Court, Pointe Coupee Parish, Jack T. Marionneaux, J., granted summary judgment for insurer, and appeal was taken. The Court of Appeal, LeBlanc, J., held that automobile policy exclusion for bodily injury resulting from movement of property by "mechanical device" not attached to covered auto barred coverage for death of worker who fell from forklift while unloading covered auto.

Affirmed.

West Headnotes (4)

[1] **Insurance**
⚖Contracts or Policies as Law Between Parties

217Insurance
217XIIIContracts and Policies
217XIII(A)In General
217k1711Nature of Contracts or Policies
217k1714Contracts or Policies as Law Between Parties
(Formerly 217k124(1), 217k124)

Insurance policy is contract between insured and insurer and as such constitutes law between parties.

Cases that cite this headnote

[2] **Insurance**
⚖Construction or Enforcement as Written

217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1809Construction or Enforcement as Written
(Formerly 217k146.5(1))

When policy wording in dispute is clear and does not lead to absurd consequences, agreement must be enforced as written. LSA-C.C. art. 2046.

3 Cases that cite this headnote

[3] **Insurance**
⚖Favoring Coverage or Indemnity; Disfavoring Forfeiture

217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1836Favoring Coverage or Indemnity; Disfavoring Forfeiture
(Formerly 217k146.8)

Any ambiguities in interpretation of insurance contract must be construed in favor of coverage for insured.

Cases that cite this headnote

[4] **Insurance**
⚖Loading or Unloading

217Insurance
217XXIICoverage--Automobile Insurance
217XXII(A)In General
217k2681Loading or Unloading
(Formerly 217k2653, 217k435.17)

Automobile policy exclusion for bodily injury resulting from movement of property by "mechanical device" not attached to covered auto barred coverage for death of worker who fell from forklift while unloading covered auto; fact that policy also defined "mobile equipment" as including forklifts did not warrant inference that forklifts were excluded from class of "mechanical devices.".

5 Cases that cite this headnote

Attorneys and Law Firms

***556** Robert W. Stratton, Baton Rouge, for plaintiff-appellant.

A. Clay Pierce, Jr., Baton Rouge, for defendant-appellee.

Samuel C. Cashio, Maringouin, for defendant-appellee, Pointe Coupee Wood Treating, et al.

Before LOTTINGER, CRAIN and LEBLANC, JJ.

Opinion

***557** LEBLANC, Judge.

This appeal involves a wrongful death action brought by the widow of the deceased, Joseph W. Dauthier. The sole issue raised on appeal is whether insurance coverage is provided to Mr. Dauthier under the terms of a business auto policy issued by National Indemnity Company, such that summary judgment would be inappropriate.

On March 26, 1986, Ray Branch, an employee of Julian Lumber Company, Inc. (Julian), drove a truck loaded with pilings to the premises of Pointe Coupee Wood Treating, Inc. There, Mr. Ronnie Pourciau operated a forklift to unload pilings from the truck owned by Julian. During the process of unloading the truck, the forklift became unbalanced. Three men, one of whom was Mr. Dauthier, attempted to balance the forklift by climbing onto its rear. Soon after, the forklift tilted forward, throwing the men to the ground. Mr. Dauthier died as a result of the injuries sustained in the fall.

Mr. Dauthier's wife, Helen Dauthier, filed suit against National Indemnity Company, the vehicle liability insurer of Julian[1], claiming that Julian was liable for the negligence of Branch and Pourciau arising out of the use of the Julian truck (a covered auto under the policy).

Subsequently, National filed a motion for summary judgment. National argued that coverage for liability resulting from the activity involved is expressly excluded under the terms of the policy even if it is assumed that Julian, Pourciau and Branch are "insureds" under the policy and were negligent in causing Mr. Dauthier's death. The trial court granted the summary judgment and plaintiff appeals.

The National policy provides:
We will pay all sums the *insured* legally must pay as damages because of *bodily injury* or *property damage* to which this insurance applies, caused by an *accident* and resulting from the ownership, maintenance or use of a covered *auto.*

The National policy also specifically excludes from coverage *"[b]odily injury* or *property damage* resulting from the movement of property by a mechanical device (other than a hand truck) not attached to the covered *auto."* National maintains coverage was excluded under the provision since decedent's death resulted from the unloading of property with a mechanical device, i.e. a forklift, not attached to the covered auto.

Appellant contends that this exclusionary language is ambiguous. Specifically, appellant argues that the policy does not clearly establish what constitutes a "mechanical device". The insurance policy does not provide a definition for "mechanical device". However, appellant contends that the policy's definition of "mobile equipment" is significant. "Mobile equipment" is defined to include forklifts as well as numerous other types of equipment. Appellant suggests that if the exclusionary language in question was intended to exclude the loading and unloading of a truck using a forklift or any other type of "mobile equipment", the term "mobile equipment" would have been used instead of the term "mechanical device". Based on these arguments, appellant contends that the trial court erred in granting National's motion for summary judgment.

[1] [2] [3] An insurance policy is a contract between the insured and insurer and as such constitutes the law between the parties. *Pareti v. Sentry Indem. Co.,* 536 So.2d 417 (La.1988). In determining the common intent of the parties, the words of a contract must be given their generally prevailing meaning. La.C.C. art. 2047; *Thomas v. Kilgore,* 537 So.2d 828 (La.App. 5th Cir.1989). When the policy wording in dispute is clear and does not lead to absurd consequences, the agreement must be enforced as

written. La.C.C. art. 2046; *Pareti,* 536 at 420. However, any ambiguities in the interpretation of the insurance contract ***558** must be construed in favor of coverage for the insured. *Id.*

Webster's New World Dictionary (3d College ed. 1988) defines "mechanical" as "having to do with, or having skill in the use of, machinery or tools" and device as "a mechanical invention or contrivance for some specific purpose." Thus, a "mechanical device" is generally understood to be an invention or contrivance having to do with machinery or tools.

[4] Although "mechanical device" is a very broad term the terms of the contract give no indication that the parties did not intend that this exclusionary provision would be given very broad effect. Clearly, a forklift fits within the generally prevailing meaning of the term "mechanical device". *See,* W. McKenzie & H. Alston Johnson, III, 15 Louisiana Civil Law Treatise, *Insurance Law and Practice,* § 66, p. 175 (1986). The fact that a forklift is also classified as "mobile equipment" under the terms of the policy is of no consequence when interpreting the exclusionary clause in question. A forklift can be classified as both a "mechanical device" and "mobile equipment" without producing absurd or inconsistent results.

Exclusionary clauses must be interpreted strictly in the insured's favor. *Borden Inc. v. Howard Trucking Co., Inc.,* 454 So.2d 1081 (La.1983). However, when there is no ambiguity, "tortured constructions which seize on every word as a possible source of confusion will be dismissed as mere sophistry." *Leonard, Tutrix of Bland v. Continental Assur.,* 457 So.2d 751, 754 (La.App. 1st Cir.), *writ denied* 460 So.2d 1047 (1984).

Clearly, in this case, the decedent's injuries occurred as a result of the movement of property (the pilings) by a mechanical device (the forklift) that was not attached to the covered auto (Julian truck). The policy language clearly and unambiguously sets forth that no coverage is afforded for bodily injury resulting from the activity which caused the decedent's death. Summary judgment in favor of National was appropriate.

The judgment of the trial court is affirmed at appellant's cost.

AFFIRMED.

All Citations

560 So.2d 556

Footnotes

1 Numerous other parties were also named as defendants. The other defendants are not relevant to this appeal.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by State Farm Mut. Auto. Ins. Co. v. Illinois Farmers Ins. Co., Ill., September 20, 2007

215 Ill.2d 121
Supreme Court of Illinois.

PROGRESSIVE UNIVERSAL INSURANCE COMPANY OF ILLINOIS, Appellant,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, Appellee.

No. 98329.
|
April 21, 2005.
|
As Modified on Denial of Rehearing June 9, 2005.

Synopsis

Background: Automobile liability insurer sought a declaratory judgment that policy did not cover pizza delivery driver's liability for injuring a pedestrian while the driver used his mother's car. The Circuit Court, Du Page County, Thomas J. Riggs, J., entered summary judgment in favor of insurer. Pedestrian's uninsured motorist (UM) carrier appealed. The Appellate Court, Bowman, J., 347 Ill.App.3d 411, 282 Ill.Dec. 636, 806 N.E.2d 1224, voided food delivery exclusion and reversed. Insurer's petition for leave to appeal was granted.

[Holding:] The Supreme Court, Karmeier, J., held that the food delivery exclusion was valid.

Appellate Court affirmed; Circuit Court reversed.

Justice Kilbride, J., dissented and filed opinion.

West Headnotes (16)

[1] **Judgment**
Existence or non-existence of fact issue

228Judgment
228VOn Motion or Summary Proceeding
228k182Motion or Other Application
228k185Evidence in General
228k185(6)Existence or non-existence of fact issue

Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

17 Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

30Appeal and Error
30XVIReview
30XVI(F)Trial De Novo
30k892Trial De Novo
30k893Cases Triable in Appellate Court
30k893(1)In general

Whether the entry of summary judgment was appropriate is a matter reviewed de novo.

12 Cases that cite this headnote

[3] **Appeal and Error**
Cases Triable in Appellate Court

30Appeal and Error
30XVIReview
30XVI(F)Trial De Novo
30k892Trial De Novo
30k893Cases Triable in Appellate Court
30k893(1)In general

De novo review is appropriate for questions of statutory interpretation.

6 Cases that cite this headnote

[4] **Automobiles**
⇦Bond or other security
Insurance
⇦Financial responsibility requirements

48AAutomobiles
48AIILicense and Registration of Private Vehicles
48Ak43Bond or other security
217Insurance
217XXIICoverage—Automobile Insurance
217XXII(C)Liability Coverage
217k2735Mandatory Coverage
217k2737Financial responsibility requirements

The principal purpose of Safety and Family Financial Responsibility Law's mandatory liability insurance requirement is to protect the public by securing payment of their damages. S.H.A. 625 ILCS 5/7–601(a).

12 Cases that cite this headnote

[5] **Contracts**
⇦Violation of Statute

95Contracts
95IRequisites and Validity
95I(F)Legality of Object and of Consideration
95k104Violation of Statute
95k105In general

A statute that exists for protection of the public cannot be rewritten through a private limiting agreement.

1 Cases that cite this headnote

[6] **Contracts**
⇦Violation of Statute

95Contracts
95IRequisites and Validity
95I(F)Legality of Object and of Consideration
95k104Violation of Statute
95k105In general

A statute's requirements cannot be avoided through contractual provisions.

1 Cases that cite this headnote

[7] **Insurance**
⇦Financial responsibility requirements

217Insurance
217XXIICoverage—Automobile Insurance
217XXII(C)Liability Coverage
217k2735Mandatory Coverage
217k2737Financial responsibility requirements

Where liability coverage is mandated by the financial responsibility law, a provision in an insurance policy that conflicts with the law will be deemed void; the statute will continue to control.

9 Cases that cite this headnote

[8] **Contracts**
⇦Freedom of contract
Contracts
⇦Violation of Statute

95Contracts
95IRequisites and Validity
95I(A)Nature and Essentials in General
95k1.3Freedom of contract
95Contracts
95IRequisites and Validity
95I(F)Legality of Object and of Consideration
95k104Violation of Statute
95k105In general

In evaluating whether statutory provisions override contractual terms, courts must remain mindful of principles of freedom of contract.

Cases that cite this headnote

[9] **Contracts**
⇦Public Policy in General

95Contracts
95IRequisites and Validity
95I(F)Legality of Object and of Consideration
95k108Public Policy in General
95k108(1)In general

An agreement will not be invalidated on public policy grounds unless it is clearly contrary to what the constitution, the statutes, or the decisions of the courts have declared to be the public policy or unless it is manifestly injurious to the public welfare.

17 Cases that cite this headnote

[10] **Contracts**
⌲Public Policy in General

95Contracts
95IRequisites and Validity
95I(F)Legality of Object and of Consideration
95k108Public Policy in General
95k108(1)In general

Whether an agreement is contrary to public policy depends on the particular facts and circumstances of the case.

9 Cases that cite this headnote

[11] **Insurance**
⌲Permission
Insurance
⌲Business use in general

217Insurance
217XXIICoverage—Automobile Insurance
217XXII(A)In General
217k2662Permission
217k2663In general
217Insurance
217XXIICoverage—Automobile Insurance
217XXII(A)In General
217k2682Purpose and Manner of Use
217k2684Business use in general

Food delivery exclusion of liability coverage in automobile policy did not conflict with statutory requirement of omnibus clause providing coverage for permissive users and was valid as to pizza delivery driver using his mother's van; the policy would not cover the mother as named insured if she used the van to deliver pizza. S.H.A. 625 ILCS 5/7–317(b), par. 2.

12 Cases that cite this headnote

[12] **Statutes**
⌲Intent

361Statutes
361IIIConstruction
361III(A)In General
361k1071Intent
361k1072In general
(Formerly 361k181(1), 361k188)

The cardinal rule of statutory construction, and the one to which all other canons and rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature.

6 Cases that cite this headnote

[13] **Statutes**
⌲Presumptions, inferences, and burden of proof

361Statutes
361IVOperation and Effect
361k1402Construction in View of Effects, Consequences, or Results
361k1406Presumptions, inferences, and burden of proof
(Formerly 361k212.3)

In undertaking the responsibility to ascertain and give effect to the true intent and meaning of the legislature, courts must presume that, when the legislature enacted a law, it did not intend to produce absurd, inconvenient or unjust results.

14 Cases that cite this headnote

[14] **Insurance**
⌲Risks and exclusions in general

217Insurance
217XXIICoverage—Automobile Insurance
217XXII(A)In General
217k2649Risks and exclusions in general

Valid exclusions in automobile insurance policies are not limited to those authorized by the legislature.

Cases that cite this headnote

[15] **Insurance**
⚖Financial responsibility requirements

217Insurance
217XXIICoverage—Automobile Insurance
217XXII(C)Liability Coverage
217k2735Mandatory Coverage
217k2737Financial responsibility requirements

The statutory prohibition against persons operating or owning vehicles without automobile liability insurance does not mean that insurance carriers are required to cover, without exclusion, every loss operators and owners sustain. S.H.A. 625 ILCS 5/7–601(a).

8 Cases that cite this headnote

[16] **Insurance**
⚖Permission

217Insurance
217XXIICoverage—Automobile Insurance
217XXII(A)In General
217k2662Permission
217k2663In general

Mandatory liability coverage for permissive users in no way compels the conclusion that automobile policy exclusions are never permissible; the inclusion of permissive users goes to the issue of who must be covered, but says nothing of what risks must be covered. S.H.A. 625 ILCS 5/7–317(b), par. 2.

5 Cases that cite this headnote

Attorneys and Law Firms

**1177 *123 ***679 Williams Montgomery & John, Ltd., Chicago (Alyssa M. Campbell, Barry L. Kroll, Richard Hodyl, Lloyd E. Williams, Jr., of counsel), for appellant.

Joseph P. Postel, of Meachum, Spahr, Cozzi, Postel & Zenz, Chicago, for appellee.

Opinion

Justice KARMEIER delivered the opinion of the court:

Ronald Abbinante delivered pizzas for Casale Pizza, Inc. While using his mother's minivan to make a delivery, Abbinante struck and injured a pedestrian. The issue in this case is whether Progressive Universal Insurance Company of Illinois (Progressive), which issued the motor vehicle liability insurance policy on Abbinante's mother's van, had a duty to defend and indemnify him in a personal injury action subsequently filed by the injured pedestrian and the pedestrian's wife. In a declaratory judgment action filed by Progressive, the circuit court of *124 Du Page County held that because of a provision in the policy excluding coverage for bodily injury or property damage arising out of the use of the vehicle to carry persons or property for compensation or a fee, including food delivery, the company owed no such duty. The appellate court reversed, finding the exclusion to be void and unenforceable under this state's law mandating liability coverage for permissive users of a vehicle. 347 Ill.App.3d 411, 282 Ill.Dec. 636, 806 N.E.2d 1224. We granted Progressive's petition for leave to appeal. 177 Ill.2d R. 315. For the reasons that follow, we now reverse the judgment of the appellate court.

The facts are undisputed. Shirley Abbinante owned a minivan which she insured through Progressive. On August 25, 2000, Mrs. Abbinante allowed her son Ronald to use the van to deliver pizzas for Casale Pizza, Inc. The company gave Ronald money for gas and paid him $1.25 for each pizza he delivered. While driving his mother's van in the course of delivering a pizza for the company, Ronald struck a pedestrian named Mikhail Lavit. Lavit and his wife sued Ronald and Casale Pizza to obtain damages for personal injuries, including brain and spinal cord injuries, sustained as a result of the accident.

Progressive began defending Ronald in the personal injury action under a reservation of rights. While that action was underway, the Lavits sought and obtained a payment of $100,000 from their own insurer, Liberty Mutual Fire Insurance Company (Liberty Mutual). That payment represented the limits of the uninsured-motorist coverage provided by their Liberty Mutual motor vehicle policy.

After paying the policy limits to the Lavits, Liberty Mutual demanded reimbursement of that sum from Progressive. Progressive responded by bringing this action in the circuit court of Du Page County to obtain a declaratory judgment that it had no duty to defend or indemnify Ronald in the Lavits' personal injury action. ***125** Liberty Mutual, in turn, asserted a counterclaim against Progressive seeking reimbursement of the sums it had paid to the Lavits under the uninsured-motorist provisions of their policy.

****1178 ***680** Progressive moved for summary judgment pursuant to section 2–1005 of the Code of Civil Procedure (735 ILCS 5/2–1005 (West 2000)) arguing that it owed no duty to defend or indemnify Ronald because his conduct fell within the terms of an exclusion set forth in the policy it issued to Ronald's mother. That exclusion stated that coverage under the policy, including Progressive's duty to defend, did not apply to bodily injury or property damage arising out of

> "the ownership, maintenance, or use of a vehicle while being used to carry persons or property for compensation or a fee, including, but not limited to, delivery of * * * food, or any other products."

Liberty Mutual countered with a cross-motion for summary judgment, arguing that Progressive could not avoid its contractual obligations based on this exclusion because the exclusion was not only ambiguous, but contrary to public policy.

Following a hearing, the circuit court granted the motion for summary judgment filed by Progressive and denied the cross-motion for summary judgment filed by Liberty Mutual. In the court's view, the food delivery exclusion in the policy was both unambiguous and valid. Progressive therefore had no duty, as a matter of law, to defend or indemnify Ronald. Absent such a duty, Liberty Mutual had no basis for obtaining reimbursement from Progressive.

The circuit court's summary judgment order contained an express written finding pursuant to Supreme Court Rule 304(a) (155 Ill.2d R. 304(a)) that there was no just reason for delaying enforcement or appeal or ***126** both.[1] Liberty Mutual appealed. Ronald, his mother, Casale Pizza, and the Lavits, who were also named as defendants in the case, did not contest the circuit court's judgment and are no longer involved in these proceedings.

In its appeal, Liberty Mutual argued, as it had in the circuit court, that the food delivery exclusion in the policy issued to Ronald's mother was ambiguous and contrary to public policy. The appellate court agreed with the circuit court that the claim of ambiguity was meritless. Viewing the exclusion with reference to the particular facts of this case, the appellate court held that the exclusion was completely unambiguous and that Ronald's conduct fell squarely within its terms. The policy excluded coverage where the vehicle was being used to deliver food for a fee or compensation, and, the appellate court observed, that was precisely what Ronald was doing at the time he hit Mr. Lavit. He was using the van to deliver food, namely, pizza, and was being paid compensation or a fee, $1.25 per delivery plus gas money, to do so. 347 Ill.App.3d at 415, 282 Ill.Dec. 636, 806 N.E.2d 1224.

While the appellate court found no ambiguity in the policy's food delivery exclusion as applied to this case, it agreed with Liberty Mutual's additional claim that the exclusion violated public policy. Relying on this court's recent decision in ****1179 ***681** *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d 369, 259 Ill.Dec. 18, 757 N.E.2d 881 (2001), the appellate ***127** court held that the exclusion was void and unenforceable because it conflicted with section 7–317(b)(2) of the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7–317(b)(2) (West 2000)), which provides that a motor vehicle owner's policy of liability insurance

> "[s]hall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured[.]"

Because Ronald was using the vehicle with his mother's express permission at the time he struck and injured Lavit, the court held that section 7–317(b)(2) required Progressive to defend and indemnify Ronald in the personal injury action brought against him by the Lavits. In the appellate court's view, giving effect to the food delivery exclusion in the mother's policy would conflict with this statutory requirement and contravene the goal of Illinois' mandatory motor vehicle liability insurance law.

Accordingly, the appellate court reversed the circuit court's entry of summary judgment in favor of Progressive and entered summary judgment in favor of Liberty Mutual. 347 Ill.App.3d at 416–18, 282 Ill.Dec. 636, 806 N.E.2d 1224. This appeal by Progressive followed.

In the proceedings before our court, no issue is raised as to the clarity of the food delivery exclusion in the mother's insurance policy. It is conceded to be unambiguous. The sole question presented for our review is whether the appellate court erred in holding that Liberty Mutual was entitled to summary judgment on the grounds that the policy exclusion was void and unenforceable.

[1] [2] [3] The standards applicable to this inquiry are well established. Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to ***128** judgment as a matter of law. Whether the entry of summary judgment was appropriate is a matter we review *de novo*. *General Casualty Insurance Co. v. Lacey,* 199 Ill.2d 281, 284, 263 Ill.Dec. 816, 769 N.E.2d 18 (2002). *De novo* review is also appropriate because resolution of this appeal turns on questions of statutory interpretation. *Midstate Siding & Window Co. v. Rogers,* 204 Ill.2d 314, 319, 273 Ill.Dec. 816, 789 N.E.2d 1248 (2003).

Section 7–601(a) of the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7–601(a) (West 2000)) mandates liability insurance coverage for automobiles and other motor vehicles designed to be used on a public highway. Under the statute, no person is permitted to operate, register or maintain registration of such a motor vehicle unless the vehicle is covered by a liability insurance policy. *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d at 373, 259 Ill.Dec. 18, 757 N.E.2d 881. Certain types of vehicles are exempt from this requirement. See 625 ILCS 5/7–601(b) (West 2000). None of those exemptions, however, is applicable here.

The liability insurance mandated by section 7–601(a) must meet certain requirements. One of those requirements is set forth in section 7–317(b)(2) of the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7–317(b)(2) (West 2000)). As indicated earlier in this opinion, section 7–317(b)(2) provides that a motor vehicle owner's policy of liability insurance

> "[s]hall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or ****1180 ***682** implied permission of the insured[.]" 625 ILCS 5/7–317(b) (2) (West 2000).

Provisions such as this, which extend liability coverage to persons who use the named insured's vehicle with his or her permission, are commonly referred to as "omnibus clauses." Where, as in Illinois, an omnibus clause is required by statute to be included in motor vehicle liability policies, our court has held that such a clause must be read into every such policy. *State Farm Mutual* ***129** *Automobile Insurance Co. v. Universal Underwriters Group,* 182 Ill.2d 240, 243–44, 231 Ill.Dec. 75, 695 N.E.2d 848 (1998).

[4] [5] [6] [7] The principal purpose of this state's mandatory liability insurance requirement is to protect the public by securing payment of their damages. *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d at 376, 259 Ill.Dec. 18, 757 N.E.2d 881. It is axiomatic that a statute that exists for protection of the public cannot be rewritten through a private limiting agreement. One reason for that rule is that "the members of the public to be protected are not and, of course, could not be made parties to any such contract." *American Country Insurance Co. v. Wilcoxon,* 127 Ill.2d 230, 241, 130 Ill.Dec. 217, 537 N.E.2d 284 (1989). In accordance with these principles, a statute's requirements cannot be avoided through contractual provisions. Where liability coverage is mandated by the state's financial responsibility law, a provision in an insurance policy that conflicts with the law will be deemed void. The statute will continue to control. *American Country Insurance Co. v. Wilcoxon,* 127 Ill.2d at 241, 130 Ill.Dec. 217, 537 N.E.2d 284.

[8] [9] [10] In evaluating whether statutory provisions override contractual terms, courts must remain mindful of principles of freedom of contract. The freedom of parties to make their own agreements, on the one hand, and their obligation to honor statutory requirements, on the other, may sometimes conflict. These values, however, are not antithetical. Both serve the interests of the public. Just as public policy demands adherence to statutory requirements, it is in the public's interest that persons not be unnecessarily restricted in their freedom to make their own contracts. The power to declare a private contract void as against public policy is therefore exercised sparingly. *First National Bank of Springfield v. Malpractice Research, Inc.,* 179 Ill.2d 353, 359, 228 Ill.Dec. 202, 688 N.E.2d 1179 (1997). An agreement will not be invalidated on public policy grounds unless it is clearly contrary to what the constitution, the statutes or the decisions of the courts have ***130** declared to be the public policy or unless it is manifestly injurious to the public welfare. Whether an agreement is contrary to public policy depends on the particular facts and

circumstances of the case. *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.,* 209 Ill.2d 52, 57, 282 Ill.Dec. 160, 805 N.E.2d 1177 (2004).

Liberty Mutual's public policy challenge to the food delivery exclusion at issue in this case relies primarily on our decision in *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d 369, 259 Ill.Dec. 18, 757 N.E.2d 881 (2001). In that case, a man named Maurice Barnes drove to a casino with a companion, Ruby Smith, in a car owned by Barnes and insured by State Farm. Barnes left the subject vehicle with a parking valet employed by the casino while he and Smith went in to gamble. When the two were ready to leave, the valet retrieved the vehicle. As Smith attempted to enter the car on the passenger's side, the vehicle rolled backwards, striking her and knocking her to the ground.

1181 ***683 Smith subsequently filed a negligence action against Barnes, the parking valet, and the casino. The valet and the casino tendered their defense to State Farm. State Farm refused the tender and brought an action to obtain a declaratory judgment that it owed no duty to defend or indemnify the valet and the casino. As grounds for its claim, State Farm relied on an exclusion in the vehicle's insurance policy which specified that no coverage would be provided when the subject vehicle was " 'BEING REPAIRED, SERVICED OR USED BY ANY *PERSON* EMPLOYED OR ENGAGED IN ANY WAY IN A *CAR BUSINESS*.' " (Emphases in original.) *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d at 372–73, 259 Ill.Dec. 18, 757 N.E.2d 881.

On cross-motions for summary judgment, the circuit court ruled in favor of State Farm and against the valet and casino, holding that the policy exclusion was applicable and that State Farm therefore had no duty to ***131** provide a defense or indemnification. The appellate court reversed, concluding that State Farm could not avail itself of the car business exclusion to avoid its obligations under the policy. *State Farm Mutual Automobile Insurance Co. v. Fisher,* 315 Ill.App.3d 1159, 249 Ill.Dec. 143, 735 N.E.2d 747 (2000). We granted State Farm's petition for leave to appeal and affirmed the appellate court.

The appellate court advanced two basic grounds in support of its decision. First, it held that the exclusion was unenforceable because it conflicted with the mandatory language of the omnibus clause provision set forth in section 7–317(b)(2) of the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7–317(b)(2) (West 2000)) and the policy of this state's mandatory automobile insurance legislation. *State Farm Mutual Automobile Insurance Co. v. Fisher,* 315 Ill.App.3d at 1163–65, 249 Ill.Dec. 143, 735 N.E.2d 747. Second, it ruled that the exclusion was inapplicable because the valet parking service furnished by the casino did not constitute a "car business" within the meaning of the policy. *State Farm Mutual Automobile Insurance Co. v. Fisher,* 315 Ill.App.3d at 1166, 249 Ill.Dec. 143, 735 N.E.2d 747.

Our opinion affirming the appellate court's judgment relied on only the first of these grounds. We noted that when a vehicle owner gives his vehicle to a person engaged in a car business,

> "the owner is also giving that person the express or implied permission to use the vehicle. Therefore, a provision written into an insurance policy that excludes coverage for persons engaged in an automobile business necessarily excludes coverage for persons who are using an insured's vehicle with the insured's express or implied permission." *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d at 374, 259 Ill.Dec. 18, 757 N.E.2d 881.

Citing our opinion in *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group,* 182 Ill.2d 240, 231 Ill.Dec. 75, 695 N.E.2d 848 (1998), and the clear language of section 7–317(b)(2) of the Illinois Safety and Family Financial ***132** Responsibility Law, we wrote that the statute mandates liability coverage for permissive users of motor vehicles. We therefore concluded, as the appellate court had, that the because the policy excluded from coverage persons using the vehicle with the insured's permission, it violated section 7–317(b)(2) and was void. As a result, the exclusion could not be relied upon by State Farm to deny the request by the valet and the casino to defend and indemnify them. *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d at 374, 259 Ill.Dec. 18, 757 N.E.2d 881.

1182 ***684 State Farm opposed this conclusion, arguing that if the exclusion here were unenforceable, virtually every other possible exclusion that an insurer might include in a liability policy would likewise be prohibited. Without addressing the merits of State Farm's argument, we held simply that our decision was limited to the particular exclusion at issue in the case. "The permissibility of other possible policy exclusions is not before us today," we wrote, "and we express no opinion as to any other exclusion." *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d at 379, 259 Ill.Dec. 18, 757 N.E.2d 881.

Although we expressly limited the reach of our decision in *State Farm Mutual Automobile Insurance Co. v. Smith,*

197 Ill.2d 369, 259 Ill.Dec. 18, 757 N.E.2d 881 (2001), Liberty Mutual argued to the appellate court in this case that the reasoning of *Smith* applied with equal force to the food delivery exclusion at issue here. The appellate court found Liberty Mutual's argument to be meritorious and concluded that the food delivery exclusion was void and unenforceable for the same reason we found the car business exclusion in *Smith* to be void and unenforceable, namely, that it conflicted with section 7–317(b)(2). 347 Ill.App.3d at 417, 282 Ill.Dec. 636, 806 N.E.2d 1224.

The appellate court's reliance on *Smith* is understandable. That case is similar, in many respects, to the matter before us here. As suggested earlier in this ***133** opinion, however, whether a contractual agreement is void as against public policy ultimately depends on the particular facts and circumstances of each case. Our examination of *Smith* discloses a significant factual distinction between the car business exclusion at issue there and the food delivery exclusion in Ronald's mother's policy.

The car business exclusion in *Smith* applied only to permissive users. Unlike the exclusion in this case, it was inapplicable to the named insured or his spouse, or any agent, employee or partner of the insured, his spouse and certain others. The named insured, his spouse, and the others were expressly exempted from the exclusion. Admittedly, we did not specifically discuss that fact in our opinion. As we have just indicated, however, we took care to limit our opinion to the particular provision at issue in the case (*State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d at 379, 259 Ill.Dec. 18, 757 N.E.2d 881), and the exemption from the exclusion was clearly described in the appellate court's opinion (see *State Farm Mutual Automobile Insurance Co. v. Fisher,* 315 Ill.App.3d 1159, 1161, 249 Ill.Dec. 143, 735 N.E.2d 747 (2000)).

The exemption from the exclusion in *Smith* meant that conduct which would be covered if undertaken by the insured would not be covered if undertaken by someone who was using the vehicle with the insured's permission. Barnes, the insured, was free to engage in a "car business" without compromising his liability coverage. It was only others to whom Barnes entrusted the vehicle who were not covered for "car business" activities. This disparity was plainly inconsistent with section 7–317(b)(2)'s requirement that liability insurance policies cover not only the insured but also "any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." 625 ILCS 5/7–317(b)(2) (West 2000).

[11] No similar disparity is present in the policy issued by ***134** Progressive to Ronald's mother in the present case. Under the clear and unambiguous terms of that policy, no one is exempt from the food delivery exclusion. The exclusion applies with equal force to Ronald's mother, who is the named insured, and to anyone using ****1183 ***685** her van with her permission. Accordingly, if Ronald's mother used the van to deliver pizzas, she would have no more right to insist that Progressive defend and indemnify her than Ronald has. The policy would provide no coverage.

Because the exclusion in Progressive's policy does not differentiate between the insured and those using the vehicle with the insured's permission, there is no possibility, as there was in *Smith,* that liability insurance coverage afforded the insured would also not be extended to permissive users of the vehicle. Section 7–317(b)(2)'s requirement that liability insurance policies cover not only the insured but also "any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured" (625 ILCS 5/7–317(b)(2) (West 2000)) is therefore not imperiled. As a result, the food delivery exclusion does not conflict with the statute and cannot be said to be void as against public policy.

[12] [13] This conclusion is supported by basic rules of statutory interpretation. The cardinal rule of statutory construction, and the one to which all other canons and rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature. *Country Mutual Insurance Co. v. Teachers Insurance Co.,* 195 Ill.2d 322, 330, 253 Ill.Dec. 904, 746 N.E.2d 725 (2001). In undertaking that responsibility, we must presume that when the legislature enacted a law, it did not intend to produce absurd, inconvenient or unjust results. *Sun Choi v. Industrial Comm'n,* 182 Ill.2d 387, 396, 231 Ill.Dec. 89, 695 N.E.2d 862 (1998). Such results, however, would be an inevitable consequence of the interpretation of section 7–317(b)(2) urged by Liberty Mutual in this case.

***135** If section 7–317(b)(2) operated to invalidate the food delivery exclusion with respect to permissive users such as Ronald, as Liberty Mutual argues it does, Progressive would be obliged to defend and indemnify permissive users for conduct that would clearly not be covered if undertaken by the actual named insured. Recognizing that obligation, named insureds could readily evade the policy's restrictions merely by lending their vehicles to one another. After making the temporary swap, the insureds would be mere permissive users of one another's vehicles and, as such, would enjoy liability coverage for conduct where no coverage would lie if the insureds drove their own vehicles.

Insurance companies make underwriting decisions and calculate policy premiums based on the characteristics of a policyholder, the risks the policyholder presents, and the contractual terms and limitations by which the policyholder agrees to be bound. If policyholders were allowed to avoid the limitations in their policies and obligate the insurance companies to pay damages by swapping vehicles whenever they wanted to engage in conduct that would otherwise be excluded from coverage, the criteria employed by insurance companies in issuing policies would be fundamentally eroded. Through the simple act of loaning his or her vehicle to others, a policyholder could subject an insurer to risks the insurance company had no way to foresee and which the parties to the insurance contract had expressly agreed to exclude. The insurance company would be denied the benefit of its bargain, and the insured would receive a windfall in the form of coverage for which it did not pay.

[14] Liberty Mutual responds to the problems that would flow from disparate application of the food delivery exclusion by arguing that under the law, the exclusion is not only void and unenforceable as to permissive users, it is also void and unenforceable as to the named insured. **1184 *136 ***686 Indeed, Liberty Mutual contends that Illinois' mandatory liability insurance requirement nullifies virtually any exclusion that would allow an insurer to avoid providing less than the minimum liability coverage required by law.[2] The only valid exclusions, in Liberty Mutual's view, are those authorized by the legislature.

[15] We find this contention untenable. Illinois law prohibits persons from operating, registering or maintaining registration of a motor vehicle designed to be used on a public highway unless the vehicle is covered by a liability insurance policy. 625 ILCS 5/7–601(a) (West 2000). By its terms, this prohibition runs to the operators and owners of motor vehicles, not their insurance carriers. Merely because persons cannot operate or own vehicles without the required insurance does not mean that insurance carriers are required to cover, without exclusion, every loss operators and owners sustain.

Because the requirement to maintain liability insurance is statutory in origin, any restrictions on the insurance required to comply with the law must also emanate from our statutes. The pertinent statutes here specify minimum coverage amounts (625 ILCS 5/7–203, 7–601(a), 7–317(b)(3) (West 2000)) and impose various other requirements, including a requirement that a policy's liability coverage apply to losses that occur in Canada as well as the continental limits of the United States. 625 ILCS 5/7–317(b)(3) (West 2000). Nowhere, however, does the law expressly forbid parties to an insurance contract from excluding certain risks from liability coverage.

*137 Contrary to Liberty Mutual's view, section 7–317(b)(2) of the Illinois Safety and Family Financial Responsibility Law contains no such prohibition. As discussed earlier in this opinion, it simply requires that a motor vehicle liability policy insure not only the person named therein, but also "any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." 625 ILCS 5/7–317(b)(2) (West 2000).

[16] That permissive users must be covered along with the named insured in no way compels the conclusion that exclusions are never permissible. Inclusion of permissive users goes to the issue of *who* must be covered. It says nothing of *what risks* must be covered. To hold that requiring coverage for permissive users means that insurers are forbidden from excluding certain types of risks from coverage requires a leap in reasoning that neither the language of the statute nor the rules of statutory construction will support. It is a *non sequitur*.

A more reasonable interpretation of section 7–317(b)(2), and the one we adopt, is that the legislature merely intended to insure that the common and often unavoidable practice of entrusting one's vehicle to someone else does not foreclose an injured party from obtaining payment for otherwise covered losses resulting from operation of the vehicle. The scope of coverage is unaffected by the law. The statute simply eliminates from coverage determinations the happenstance that a vehicle was operated by a permissive user rather than the actual owner. If a loss is covered by the policy, the fact that the vehicle was **1185 ***687 operated by a permissive user will not excuse the insurer from its obligation to pay. The loss will continue to be covered. Conversely, if a loss is excluded from coverage by the policy, the fact that the vehicle was operated by a permissive user will not trigger an obligation to pay that would not have existed had the vehicle *138 been operated by its actual owner. The loss will continue to be excluded.

Had the General Assembly wished to bar insurers from excluding certain risks from motor vehicle liability policies, it could easily have so provided in the pertinent statutes. It did not do so. To the contrary, the Illinois Safety and Family Financial Responsibility Law clearly contemplates that exclusions may be included in policies and that those exclusions will be upheld. That is why section 7–602 of the statute (625 ILCS 5/7–602 (West

2000)) requires insurance cards to contain a disclaimer admonishing policyholders to "[e]xamine policy exclusions carefully."

In urging us to adopt the view that section 7–317(b)(2) forbids exclusions such as the food delivery exclusion involved in this case, Liberty Mutual directs our attention to decisions from various foreign jurisdictions, including *Salamon v. Progressive Classic Insurance Co.,* 379 Md. 301, 841 A.2d 858 (2004). In that case, the Court of Appeals of Maryland held that the same exclusion at issue here was unenforceable. In so holding, the court noted that it "consistently has declared invalid insurance policy exclusions that excuse or reduce the insured parties' coverage below the statutory minimum level where exclusions are not authorized explicitly by the General Assembly." *Salamon,* 379 Md. at 311, 841 A.2d at 865. The court chronicled its long history of nullifying insurance provisions in cases where the provisions were not authorized by statute. *Salamon,* 379 Md. at 311–16, 841 A.2d at 865–68. Because the Maryland General Assembly had neither explicitly nor implicitly authorized insurers to add an exclusion such as the "pizza exclusion" to insurance contracts, the court held that Maryland's compulsory insurance law rendered the exclusion void and against public policy.

The litigation before us today is governed by the law ***139** of Illinois, not Maryland. Unlike Maryland courts, our court has never required that insurance exclusions be deemed invalid if those exclusions have not been authorized explicitly by our General Assembly. Rather, our policy is to enforce exclusions not explicitly provided for by law based on principles of contract interpretation. Due to this difference, we are not persuaded by the rationale utilized in *Salamon.* We are likewise unpersuaded by *Stanfel v. Shelton,* 563 So.2d 410 (La.App.1990), and *St. Paul Fire and Marine Ins. Co. v. Mid–Century Insurance Co.,* 18 P.3d 854 (Colo.App.2001). Those decisions, which Liberty Mutual also cites, fail to address the dichotomy, explained in this opinion, between exclusions based on the acts involved and those based on status of the persons who performed the acts.

In further support of its view that section 7–317(b)(2) prohibits insurers from excluding risks from liability coverage, Liberty Mutual contends that allowing such exclusions would be inherently inconsistent with the public policy of protecting the public by securing the payment of its damages. This argument must also fail. Although exclusions, where applicable, will shield the particular company which issued the policy from financial responsibility, that does not mean that no insurer will be liable.

Under the mandatory insurance law enacted by our General Assembly, the effects of policy exclusions are substantially offset by the requirement of uninsured-motorist coverage. See 625 ILCS 5/7–601(a) (West ****1186** *****688** 2000); 215 ILCS 5/143a, 143a–2 (West 2000). If a driver causes an accident which inflicts bodily injury on someone else and the injury is not covered by the driver's motor vehicle liability policy because of an exclusion in the policy, the driver will be not be considered an insured motorist and his automobile will not be regarded as an insured vehicle. The injured party will therefore not be able to avail ***140** himself of the driver's liability coverage. He will, however, be entitled to seek payment under the uninsured-motorist provisions of his own motor vehicle policy. See *Smiley v. Estate of Toney,* 44 Ill.2d 127, 130–31, 254 N.E.2d 440 (1969); *Barnes v. Powell,* 49 Ill.2d 449, 454, 275 N.E.2d 377 (1971). That is precisely what occurred in this case. For the purposes of the motor vehicle policy it issued to the Lavits, Liberty Mutual conceded that Progressive's decision to disclaim liability under the food delivery exclusion in Ronald's mother's policy made Ronald an uninsured motorist. Ronald's status as an uninsured motorist, in turn, entitled the Lavits to obtain payment under the uninsured-motorist provisions of their policy with Liberty Mutual. In this way, the goal of protecting the public by securing the payment of its damages was fully achieved.[3]

For the foregoing reasons, the food delivery exclusion in the policy issued by Progressive to Ronald's mother was not void and unenforceable under this state's mandatory insurance law. The circuit court's entry of summary judgment in favor of Progressive and against Liberty Mutual was therefore correct and should not have been disturbed by the appellate court. Accordingly, the judgment of the appellate court is reversed and the judgment of the circuit court is affirmed.

Appellate court judgment reversed; circuit court judgment affirmed.

***141** Justice KILBRIDE, dissenting:

The majority concludes the food delivery ("pizza") exclusion in Progressive's policy was not void and does not violate this state's mandatory liability insurance law. 215 Ill.2d at 140, 293 Ill.Dec. at 688, 828 N.E.2d at 1186. Accordingly, Progressive may enforce its exclusion even

as applied to the mandatory minimum $20,000/40,000 coverage required by section 7–203 of the Vehicle Code. 625 ILCS 5/7–601 (West 2000). I believe this holding contravenes the clear public policy underlying the mandatory insurance law and, therefore, I respectfully dissent.

Section 7–601 of the Vehicle Code provides, in pertinent part: "No person shall operate * * * a motor vehicle designed to be used on a public highway unless the motor vehicle is *covered* by a liability insurance policy." (Emphasis added.) The statute further provides: "The insurance policy shall be issued in amounts no less than the minimum amounts set for bodily injury or death and for destruction of property under Section 7–203 of this Code * * *." 625 ILCS 5/7–601(a) (West 2000).

The majority acknowledges our holding in *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d 369, 376, 259 Ill.Dec. 18, 757 N.E.2d 881 (2001), that the "principal purpose of this state's mandatory liability insurance requirement is to **1187 ***689 protect the public by securing payment of their damages." 215 Ill.2d at 129, 293 Ill.Dec. at 682, 828 N.E.2d at 1180. Yet the majority's holding subverts this purpose by allowing mandatory minimum coverage to be defeated by a contractual exclusion not explicitly authorized by the legislature. Although section 7–601 exempts certain categories of vehicles such as government vehicles and implements of husbandry from its application, no statutory language authorizes any contractual exclusion from coverage, including the so-called "pizza exclusion." The majority contends the Illinois Safety and Family Financial Responsibility Law clearly contemplates policies may contain enforceable *142 exclusions because section 7–602 of the statute (625 ILCS 5/7–602 (West 2000)) requires insurance cards to contain a disclaimer admonishing policy holders to "[e]xamine policy exclusions carefully." 215 Ill.2d at 138, 293 Ill.Dec. at 687, 828 N.E.2d at 1185. It is not disputed that coverage exclusions may be enforced *above* the statutorily required minimum limits. Hence, the warning in section 7–602 is appropriate and is not in conflict with the express requirement that all vehicles shall be covered for bodily injury and property damage in minimum amounts.

The result reached by the majority increases the likelihood tortiously caused vehicular accidents will go uncompensated because no insurance coverage will be available from the tortfeasor. Although the majority recognizes this possibility, it holds this result is offset by the statutory requirement of uninsured-motorist coverage. 215 Ill.2d at 139, 293 Ill.Dec. at 687, 828 N.E.2d at 1185. The unfortunate possibility remains, however, that innocent injured parties, such as pedestrians, entitled to recovery may not have their own uninsured-motorist coverage and may, thus, be totally unprotected. The majority asserts in a footnote that such gaps in coverage present questions for the legislature, rather than this tribunal. 215 Ill.2d at 140 n. 3, 293 Ill.Dec. at 688 n. 3, 828 N.E.2d at 1187 n. 3. I disagree. A plain reading of section 7–601 compels the conclusion that the legislature intended to mandate liability coverage for all automobiles operated in Illinois with statutory minimum limits of liability. Contractual coverage exclusions are simply incompatible with that intention. With the validation of the "pizza exclusion" in this case, the vehicle driven by Robin Abbinante was not "covered" as expressly required by the statute.

Other jurisdictions considering this issue have concluded mandatory insurance statutes render policy exclusions unenforceable to the extent of required minimum limits as a matter of public policy. In *143 *Salamon v. Progressive Classic Insurance Co.,* 379 Md. 301, 841 A.2d 858 (2004), the Court of Appeals of Maryland, that state's highest tribunal, considered whether a commercial use exclusion, identical to the exclusion in the case before us, could be applied to defeat coverage. Progressive moved for summary judgment, arguing the policy unambiguously excused it from both coverage and the duty to defend. Salamon countered that Progressive's exclusion contravenes Maryland public policy and, as a result, is invalid and unenforceable. *Salamon,* 379 Md. at 305, 841 A.2d at 861. The trial court granted Progressive's motion, Salamon appealed, and the reviewing court reversed. The court noted the Maryland General Assembly had enacted a " 'comprehensive law that, among other things, inaugurated compulsory insurance or other required security, established [the Maryland Automobile Insurance Fund] as an insurer of last resort, prohibited the arbitrary cancellation and non-renewal of motor vehicle insurance policies, and required policies to contain collision and [personal injury protection] coverage.' " **1188 ***690 *Salamon,* 379 Md. at 310, 841 A.2d at 864, quoting *Maryland Automobile Insurance Fund v. Perry,* 356 Md. 668, 674, 741 A.2d 1114, 1117 (1999).

Thus, the Maryland statutory scheme, while not identical, is substantially similar to our own. As in *State Farm,* the Maryland court had earlier held Maryland's statute was intended to "make certain that those who own and operate motor vehicles in this State are financially responsible." *Pennsylvania National Mutual Casualty Insurance Co. v. Gartelman,* 288 Md. 151, 154, 416 A.2d 734, 736 (1980). The *Gartelman* court further noted that "[t]his legislative policy has the overall remedial purpose of protecting the public by assuring that operators and owners of motor

vehicles are financially able to pay compensation for damages resulting from motor vehicle accidents." *Gartelman,* 288 Md. at 154, 416 A.2d at 736. The *Salamon* court reviewed a ***144** series of cases over a 30–year period consistently declaring invalid insurance policy exclusions excusing or reducing the insured's coverage below the statutory minimum when such exclusions were not explicitly authorized by the General Assembly. *Salamon,* 379 Md. at 311–14, 841 A.2d at 864–67. The court concluded the "pizza exclusion" was not expressly authorized by the legislature and was, therefore, invalid. *Salamon,* 379 Md. at 316–17, 841 A.2d at 868. The court rejected Progressive's argument, also made in the case before us, that a distinction should be drawn between policy exclusions " 'pertaining to *classes* of insureds, as opposed to exclusions pertaining to *acts* of individual insureds.' " (Emphases in original.) *Salamon,* 379 Md. at 314, 841 A.2d at 866.

New York's highest reviewing court reached a similar conclusion in *Matter of Liberty Mutual Insurance Co. v. Hogan,* 82 N.Y.2d 57, 623 N.E.2d 536, 603 N.Y.S.2d 409 (1993). In that case, Liberty Mutual sought to enforce its "livery exclusion" in an uninsured-motorist endorsement to a personal automobile liability policy. The exclusion applied if the insured vehicle was used to carry persons or property for a fee. Passengers in the insured's car demanded arbitration, and Liberty Mutual petitioned for a stay. The trial court denied the stay, and the intermediate appellate court affirmed. The Court of Appeals affirmed, noting New York's mandatory uninsured-motorist statute did not provide for exclusions. The court reasoned that "[t]he exclusion is inconsistent with the sound public policy of this State of ensuring that innocent victims of motor vehicle accidents are compensated for their injuries and losses." *Liberty Mutual,* 82 N.Y.2d at 61, 623 N.E.2d at 539, 603 N.Y.S.2d at 412. Intermediate appellate courts in Louisiana and Colorado have also reached similar results. See *Stanfel v. Shelton,* 563 So.2d 410 (La.App.1990); *St. Paul Fire & Marine Insurance Co. v. Mid–Century Insurance Co.,* 18 P.3d 854 (Colo.App.2001).

***145** The majority acknowledges other jurisdictions, including the Maryland court in *Salamon,* have found policy coverage exclusions incompatible with mandatory minimum coverage laws. The majority declines to rely on the reasoning of those cases because "[t]he litigation is before us today governed by the law of Illinois, not Maryland." 215 Ill.2d at 138–39, 293 Ill.Dec. at 687, 828 N.E.2d at 1185. Under Illinois law, however, a court must give an unambiguous statute effect as written, without reading into it exceptions, limitations or conditions that the legislature did not express. *In re D.L.,* 191 Ill.2d 1, 9, 245 Ill.Dec. 256, 727 N.E.2d 990 (2000). The majority's holding ignores this rule by construing the statute to allow operation of a vehicle on a public highway when the vehicle is not "covered" by a policy of liability insurance. Thus, according to the ****1189** ***691** majority, "covered" does not necessarily mean covered. This is the *non sequitur.*

The reasoning of the Maryland and New York courts is persuasive, and our appellate court used a similar rationale. I agree with the appellate court that the "impetus behind mandatory automobile liability insurance is to protect the public by assuring that its damages will be paid [citation], and Progressive's food delivery exclusion contravenes that goal." 347 Ill.App.3d at 416–18, 282 Ill.Dec. 636, 806 N.E.2d 1224. Like the appellate court, I find no indication the legislature intended to permit such an exclusion. I would, therefore, affirm the judgment of the appellate court. Accordingly, I respectfully dissent.

All Citations

215 Ill.2d 121, 828 N.E.2d 1175, 293 Ill.Dec. 677

Footnotes

1 The circuit court included that finding because its summary judgment order did not fully resolve all of the claims of all of the parties. A third-party claim by Liberty Mutual against Badger Mutual Insurance Company, Casale Pizza's insurer, remained pending, as did a claim for declaratory relief filed by Badger against Liberty Mutual and others. All matters regarding Badger were resolved through cross-motions for summary judgment in a separate order entered by the circuit court on the same date summary judgment was entered in favor of Progressive. No appeal was taken from that separate order by any party.

2 Under Liberty Mutual's theory, the mandatory liability law has no effect on the viability of policy exclusions with respect to (1) losses in excess of the minimum liability coverage required by statute or (2) any form of coverage other than liability coverage. As to those matters, Liberty Mutual does not dispute that the food delivery exclusion in Progressive's policy would remain fully operative.

3 Illinois' present insurance scheme does not eliminate the possibility that drivers will take to the road without liability insurance, nor does it guarantee that injured parties will have their own policies to draw from, as Mr. Lavits did. As a result, there may be circumstances under which injured parties will be left without coverage of any kind. Whether such "gaps" in coverage should be addressed by the legislature and, if so, how they should be remedied, present important questions of public policy. Such questions, however, are for the General Assembly, not this tribunal, to consider.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Palp, Inc. v. Williamsburg Nat. Ins. Co., Cal.App. 4 Dist., October 27, 2011

247 Ga.App. 331
Court of Appeals of Georgia.

CONTINENTAL INSURANCE COMPANY
v.
AMERICAN MOTORIST INSURANCE COMPANY.

No. A00A1267.
|
Nov. 21, 2000.
|
Reconsideration Denied Dec. 14, 2000.

Commercial general liability (CGL) insurer brought action against business automobile insurer to recover reimbursement for settling a claim for an injury caused by a pallet jack while unloading a truck. The Superior Court, Fulton County, Downs, J., entered summary judgment in favor of the automobile insurer. CGL insurer appealed. The Court of Appeals, Ruffin, J., held that: (1) the jack was not a "hand truck," and (2) coverage was thus provided by the CGL policy, not the automobile policy.

Affirmed.

West Headnotes (5)

[1] **Insurance**
⇐Exceptions, Exclusions or Limitations
Insurance
⇐Exclusions, Exceptions or Limitations

217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1823Exceptions, Exclusions or Limitations
217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1830Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1835Particular Portions or Provisions of Policies
217k1835(2)Exclusions, Exceptions or Limitations

Although an exclusion must be construed strictly against the insurer, the construction must be reasonable.

1 Cases that cite this headnote

[2] **Insurance**
⇐Vehicles and Related Equipment
Insurance
⇐Loading or Unloading

217Insurance
217XVIICoverage--Liability Insurance
217XVII(A)In General
217k2273Risks and Losses
217k2278Common Exclusions
217k2278(13)Vehicles and Related Equipment
217Insurance
217XXIICoverage--Automobile Insurance
217XXII(A)In General
217k2681Loading or Unloading

Hydraulic pallet jack was not a "hand truck," and, thus, liability coverage for an injury while unloading a truck with the jack was provided by a commercial general liability (CGL) insurance policy, not a business automobile policy; since the jack was not attached to the truck, it was a "mechanical device, other than a hand truck" within an exception to the motor vehicle exclusion of the CGL policy.

2 Cases that cite this headnote

[3] **Insurance**
⇐Language of Policies
Insurance
⇐Reasonable Persons

217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1811Intention
217k1813Language of Policies
217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1815Reasonableness
217k1818Reasonable Persons

In construing an insurance policy, the test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured would understand them to mean.

3 Cases that cite this headnote

[4] **Insurance**
⊂=Laypersons or Experts

217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1819Understanding of Ordinary or Average Persons
217k1821Laypersons or Experts

A policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney.

4 Cases that cite this headnote

[5] **Insurance**
⊂=Exclusions and Limitations in General

217Insurance
217XVCoverage--in General
217k2096Risks Covered and Exclusions
217k2098Exclusions and Limitations in General

It is the insurer's duty to define clearly and explicitly limitations on coverage.

1 Cases that cite this headnote

Attorneys and Law Firms

**608 *337 Drew, Eckl & Farnham, James M. Poe, Atlanta, for appellant.

Orr & Orr, E. Wycliffe Orr, Gainesville, Kristine E. Orr, Atlanta, for appellee.

Opinion

*331 RUFFIN, Judge.

This appeal arose from a dispute as to which of two insurance companies, Continental Insurance Company ("Continental") or American Motorist Insurance Company ("American"), bore responsibility for a personal injury claim arising from the use of a certain piece of equipment known as a "pallet jack." The trial court granted summary judgment to American and denied the same to Continental. After examining the language of the two insurance policies, we find that the Continental policy provided coverage while the American policy did not. Thus, we affirm.

Neither American nor Continental disputes the facts underlying the personal injury claim which occurred when Nora Wilkes, an employee in the warehouse department of Market Office Products, sustained injuries while providing assistance to Andrew Sheahan, a deliveryman. At Sheahan's request, Wilkes had agreed to help Sheahan push a pallet loaded with copier paper up the ramp outside the warehouse. When Sheahan suddenly lost control of the pallet while he was pulling it up the ramp, Wilkes was injured. Sheahan had been moving the load using a hand-powered device known as a "pallet jack."

*332 At the time of these events, Sheahan was driving a delivery truck leased by United Stationers Supply Company ("United Stationers") and was employed by TLI, Inc., a company which provided delivery drivers to United Stationers. A contract between United Stationers and TLI required United Stationers to maintain a business automobile liability insurance policy that named TLI as an additional insured for the operation of United Stationers' vehicles by TLI employees. United Stationers purchased such a policy from American. This policy protected against liability for bodily injury claims caused by anyone using a United Stationers' vehicle who had permission to use a covered vehicle unless an exclusion otherwise removed such injury from coverage.

United Stationers had also purchased a comprehensive business policy from Continental which included commercial general liability ("CGL") protection. United Stationers' CGL policy provided liability coverage for bodily injuries but excluded those bodily injuries arising out of the use of any "auto" including loading or unloading. The policy defined "loading and unloading" as the handling of property while it is being moved from an automobile to the place where it is finally delivered. However, the exclusion had an exception-in that

unloading "does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or 'auto.' "

Although Wilkes brought her personal injury suit against Sheahan and United Stationers, **609 she later dismissed United Stationers without prejudice and obtained a default judgment for $750,000 against Sheahan, who had failed to answer her complaint. United Stationers supplied a copy of Wilkes' complaint to Arnold Pritsker, a senior vice president at Mesirow Insurance Services, an insurance brokerage firm. Pritsker had procured both the American and Continental policies for United Stationers. He forwarded the complaint to Continental because he "had no reason to believe it was anything other than general liability." In Pritsker's view, the claim fit within general liability coverage since the product had been delivered to the customer, in the sense that it was no longer on the delivery truck.

Continental undertook the defense of United Stationers without a reservation of rights and did not file a declaratory judgment action to ascertain its liability.[1] Although Continental provided a defense to United Stationers, it failed to do so for Sheahan, thereby precipitating the default judgment.[2] American did not receive actual notice of *333 the incident until May 1994-nearly three years after it occurred and after the default judgment.[3]

After Wilkes obtained the $750,000 default judgment in state court against Sheahan, she then filed an action in federal court directly against Continental to collect that judgment. In the federal suit, Wilkes claimed to be a third-party beneficiary of the insurance policy issued to United Stationers by Continental. Continental settled the federal case with Wilkes for $450,000, then sued American in the Superior Court of Fulton County to seek reimbursement for the settlement. Both companies moved for summary judgment on the issue of liability, and American prevailed. Continental appeals the trial court's order denying its motion for summary judgment and granting summary judgment to American.

1. Continental contends that the trial court erred in denying its motion for summary judgment. Continental claims that the exclusion in United Stationers' policy with American is ambiguous. Continental argues that American, as the drafter of the exclusion, has the burden of proving that it applies. According to Continental, the pallet jack that Sheahan was using to unload the delivery truck could be considered a "hand truck," and would therefore be covered by the business automobile policy issued by American.

[1] In deciding this issue, we must try to ascertain the intention of the parties by looking to the insurance contract as a whole.[4] In so doing, we consider the ordinary and legal meaning of the words employed in the contract.[5] Although it is certainly true that an exclusionary provision must be construed strictly against the insurer, it is equally true that the construction must be a reasonable one.[6] We find that the construction urged by Continental is not reasonable in the context of this case.

The business automobile policy that United Stationers had with American stated in pertinent part:

> B. Exclusions[:] This insurance does not apply to any of the following: 7. HANDLING OF PROPERTY[:] "Bodily injury" or "property damage" resulting from the handling of property: ... [a]fter it is moved from the covered "auto" to the place where it is finally delivered by the "insured." [and] 8. MOVEMENT OF PROPERTY BY MECHANICAL *334 DEVICE[:] "Bodily injury" or "property damage" resulting from the movement of property by a mechanical device (other than a **610 hand truck) unless the device is attached to the covered " auto."

The Continental policy, on the other hand, excluded coverage for bodily injuries arising out of the use of any "auto" and specifically provided that "use" included "loading and unloading." The policy defined "loading and unloading" as the handling of property "[w]hile it is being moved from an ... 'auto' to the place where it is finally delivered." But an exception to the exclusion applied to personal injuries resulting from "unloading" that involved the movement of property by means of a mechanical device that is not attached to the "auto."

[2] In sum, United Stationers' business automobile policy with American provided coverage for personal injuries involving a hand truck or a mechanical device attached to a covered "auto"; while the Continental comprehensive business policy covered "unloading" by means of a mechanical device, other than a hand truck, not attached to an insured vehicle. Since the bodily injury to Wilkes occurred while Sheahan was handling or delivering or unloading property while using a "pallet jack," the dispositive issue is whether that device can be considered

a hand truck. If the object that rolled into Wilkes falls within the ambit of "a mechanical device other than a hand truck," only the policy with Continental would apply. But if the pallet jack falls within the meaning of "hand truck," then only the policy with American would apply.

The pallet jacking device that Sheahan was using is a piece of equipment which uses a hydraulic cylinder to lift a pallet.[7] It has four wheels, two large wheels at the rear and two smaller wheels at the front which support two forks or prongs. This implement is designed so that the two forks can be inserted directly into a pallet and the pallet can then be raised off the floor by hydraulically pumping a handle. This apparatus is capable of lifting loads as heavy as 5,000 pounds. It is undisputed that it was not attached to the delivery truck at the time of the incident and is not intended to attach to a vehicle. Therefore, unless, this "pallet jack" could be considered to be a "hand truck," the exception to the exclusion would not apply.

[3] [4] [5] In construing an insurance policy, the test is not what the insurer intended its words to mean, but what a reasonable person in ***335** the position of the insured would understand them to mean.[8] "The policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney."[9] And, it is the insurer's duty to define clearly and explicitly limitations on coverage.[10]

Here, the ordinary meaning of a "hand truck," is a hand-operated piece of equipment for moving objects. The Random House Webster's Unabridged Dictionary (2nd ed. 1997), a source a layman might consult, defines a hand truck to mean:

> 2. any of various wheeled frames used for transporting heavy objects. 3. Also called *hand truck,* a barrowlike frame with low wheels, a ledge at the bottom, and handles at the top, used to move heavy luggage, packages, cartons, etc. 4. a low, rectangular frame on which heavy boxes, crates, trunks, etc., are moved; a dolly.

(Emphasis in original.)

United Stationers considered a pallet jack to be a separate piece of equipment from hand trucks, and, in fact, United Stationers routinely equipped its delivery drivers with both hand trucks and pallet jacks. Each device was intended to serve distinctly different functions.[11] "The only occasion the drivers had to use the device they were supplied which was actually called a 'hand truck' was to accomplish deliveries 'on very small orders.' "[12] Unlike an ordinary hand truck, ****611** the pallet jack's hydraulic pumping mechanism could lift substantially heavier loads.

In the federal litigation between Wilkes and Continental, the district court found that this particular implement is not a hand truck. Although we are not bound by the federal court's finding, we find it illuminating.[13] In the district court's view, the fact that "a pallet jack is designed to carry much larger loads than a dolly or wheelbarrow, and in fact must utilize a hydraulic cylinder so that the loads may be lifted from the ground, suggests that the pallet jack is 'a mechanical device other than a hand truck.' " That court decided that the pallet jack at issue did not fit naturally within the dictionary definition ***336** or the ordinary understanding of the term "hand truck" as a small dolly or wheelbarrow used to manually lift and move small loads. We see no compelling reason to find otherwise. Accordingly, since a reasonable interpretation of the Continental policy compels the conclusion that the policy provided coverage for the unloading incident, the trial court properly denied Continental's motion for summary judgment.[14]

2. Continental contends that the trial court erred in granting summary judgment to American. Continental claims that the CGL policy and the business automobile policy afforded overlapping coverage and the issue as to which policy provided primary coverage must still be resolved. We do not agree.

In the federal litigation, Continental urged a contrary position. In its brief filed in the district court, Continental argued:

> [t]he insuring provisions and exclusions of the CGL and Business Auto Forms are designed to provide seamless, but not overlapping coverage for different aspects of "unloading." The risks associated with the unloading of commercial vehicles have been deliberately segregated into two coverages. If the unloading was performed by a "hand truck" then the business auto form provides coverage. If, some mechanical device other than a hand truck not attached to the truck was used in the unloading, then the CGL Form

provides coverage.

Despite previously arguing that the two policies were not overlapping, Continental now asserts that the loss was covered by both policies. Continental argues that since the exclusionary language in both policies is "identical" and since the federal court found such language "ambiguous," then "the respective exclusions in both policies simultaneously fail, leaving the loss in question covered by both policies." We find Continental's earlier position-that the two insurance policies were intended to provide distinctly different coverage-to be more persuasive. Continental offered no evidence that United Stationers intended to purchase duplicative coverage, and industry practice suggests otherwise.[15] Although the trial court did not explain its decision, a judgment right for any reason will be affirmed.[16]

Judgment affirmed.

ANDREWS, P.J., and ELLINGTON, J., concur.

All Citations

247 Ga.App. 331, 542 S.E.2d 607, 00 FCDR 97

Footnotes

1 See *Nat. Union Fire Ins. Co. &c. v. American Motorists Ins. Co.,* 269 Ga. 768, 769(1)(b), 504 S.E.2d 673 (1998) (excess insurer's assumption of defense for insured even without issuing a reservation of rights did not foreclose subsequent recovery from primary insurer).

2 *Jefferson Ins. Co. &c. v. Dunn,* 224 Ga.App. 732, 736(2), 482 S.E.2d 383 (1997), overruled on other grounds, 269 Ga. 213, 216, 496 S.E.2d 696 (1998).

3 See *Leventhal v. American Bankers Ins. Co. &c.,* 159 Ga.App. 104, 108, 283 S.E.2d 3 (1980) (determination of timeliness should include consideration of prejudice to insurer caused by delay).

4 *James v. Pa. Gen. Ins. Co.,* 167 Ga.App. 427, 431(2), 306 S.E.2d 422 (1983).

5 *Ryan v. State Farm &c. Ins. Co.,* 261 Ga. 869, 872, 413 S.E.2d 705 (1992).

6 *Cobb County v. Hunt,* 166 Ga.App. 409, 410, 304 S.E.2d 403 (1983).

7 By jacking or pumping its handle, the user can lift a heavy pallet or other property onto the blades or forks of the pallet jack, then roll the load to a new location where it can be lowered back to the floor or other surface.

8 *Jefferson Ins. Co.,* 224 Ga.App. at 736(2), 482 S.E.2d 383.

9 Id.

10 *St. Paul Fire &c. Ins. Co. v. Snitzer,* 183 Ga.App. 395, 397(1), 358 S.E.2d 925 (1987).

11 See *Little Rapids Corp. v. McCamy,* 218 Ga.App. 111-112, 460 S.E.2d 800 (1995) (pallet jacking device appears to have been referred to as a "hand-operated forklift" and as a "forklift").

12 Page 10 of the federal order entered in *Wilkes v. Continental Ins. Co.,* Civil No. 1:96-CV-1392-JEC, quoting from the deposition of Thomas Markowski, the General Operations Manager for United Stationers.

13 *Wilkes v. Continental Ins. Co.,* supra.

14 See *Matjoulis v. Integon Gen. Ins. Corp.,* 226 Ga.App. 459, 461(4), 486 S.E.2d 684 (1997).

15 See *Grain Dealers Mut. Ins. Co. v. Pat's Rentals,* 228 Ga.App. 854, 855-856(a), 492 S.E.2d 702 (1997) (business automobile policy and CGL policy may cover different risks to avoid overlapping coverage and reduce premiums).

16 *Precise v. City of Rossville,* 261 Ga. 210, 212(3), 403 S.E.2d 47 (1991).

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235 W.Va. 513
Supreme Court of Appeals of West Virginia.

ELK RUN COAL COMPANY, INC. d/b/a Republic Energy, Defendant and Third–Party Plaintiff, Petitioner
v.
CANOPIUS U.S. INSURANCE, INC. (f/k/a Omega U.S. Insurance, Inc.); RSUI Indemnity Company; National Casualty Company; and Scottsdale Insurance Company, Third–Party Defendants, Respondents.

No. 14–0723.
|
Submitted April 22, 2015.
|
Decided June 9, 2015.

Synopsis
Background: In injured truck driver's suit against coal shipper, shipper filed third-party action against motor carrier's primary and excess automobile and commercial general liability (CGL) insurers for declaratory judgment of coverage for its settlement with driver. The Circuit Court, Kanawha County, Charles E. King, J., entered summary judgment in favor of insurers. Shipper appealed.

Holdings: The Supreme Court of Appeals, Davis, J., held that:

[1] carrier's agreement to indemnify shipper was "insured contract";

[2] shipper was acting on carrier's behalf and was "additional insured" under CGL policy;

[3] carrier's agreement to indemnify shipper for its sole negligence did not violate public policy;

[4] automobile exclusion did not apply; and

[5] employer's liability exclusion did not apply.

Affirmed in part, reversed in part, and remanded.

West Headnotes (16)

[1] **Appeal and Error**
⇐Cases Triable in Appellate Court

30Appeal and Error
30XVIReview
30XVI(F)Trial De Novo
30k892Trial De Novo
30k893Cases Triable in Appellate Court
30k893(1)In general

A circuit court's entry of summary judgment is reviewed de novo.

Cases that cite this headnote

[2] **Appeal and Error**
⇐Cases Triable in Appellate Court

30Appeal and Error
30XVIReview
30XVI(F)Trial De Novo
30k892Trial De Novo
30k893Cases Triable in Appellate Court
30k893(1)In general

Supreme Court of Appeals reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by Court.

Cases that cite this headnote

[3] **Judgment**
⇐Absence of issue of fact

228Judgment
228VOn Motion or Summary Proceeding
228k181Grounds for Summary Judgment
228k181(2)Absence of issue of fact

Motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify

the application of the law.

Cases that cite this headnote

[4] **Appeal and Error**
⚖Cases Triable in Appellate Court

30Appeal and Error
30XVIReview
30XVI(F)Trial De Novo
30k892Trial De Novo
30k893Cases Triable in Appellate Court
30k893(1)In general

Interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed de novo on appeal.

Cases that cite this headnote

[5] **Appeal and Error**
⚖Cases Triable in Appellate Court

30Appeal and Error
30XVIReview
30XVI(F)Trial De Novo
30k892Trial De Novo
30k893Cases Triable in Appellate Court
30k893(1)In general

Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law subject to de novo review.

Cases that cite this headnote

[6] **Appeal and Error**
⚖Sufficiency of Presentation of Questions

30Appeal and Error
30VPresentation and Reservation in Lower Court of Grounds of Review
30V(A)Issues and Questions in Lower Court
30k179Sufficiency of Presentation of Questions
30k179(1)In general

Shipper's failure to challenge circuit court's determination in summary judgment order that shipper conceded that it was not an insured under additional insured endorsement of motor carrier's commercial general liability (CGL) policy did not result in waiver of assertion on appeal that shipper qualified as additional insured, where it argued that it stood in same shoes as carrier as result of carrier's insured contract to indemnify shipper for liability to injured truck driver and where significant evidence in record demonstrated shipper's status as additional insured.

Cases that cite this headnote

[7] **Insurance**
⚖Plain, ordinary or popular sense of language

217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1822Plain, ordinary or popular sense of language

Language in an insurance policy should be given its plain, ordinary meaning.

1 Cases that cite this headnote

[8] **Insurance**
⚖Scope of coverage

217Insurance
217XVIICoverage—Liability Insurance
217XVII(B)Coverage for Particular Liabilities
217k2359Manufacturers' or Contractors' Liabilities
217k2361Scope of coverage

Indemnity agreement in motor carrier's hauling and delivery agreement with shipper was "insured contract" within meaning of carrier's commercial general liability (CGL) policy defining such contract to include agreement to assume tort liability of another party to pay for injury to a third person, and thus shipper stood

in carrier's shoes as "additional insured" with respect to truck driver's claim for injury caused by driver of front-end loader.

Cases that cite this headnote

[9] **Insurance**
⚖Scope of coverage

217Insurance
217XVIICoverage—Liability Insurance
217XVII(B)Coverage for Particular Liabilities
217k2359Manufacturers' or Contractors' Liabilities
217k2361Scope of coverage

In a policy for commercial general liability (CGL) insurance, when a party has an insured contract, that party stands in the same shoes as the insured for coverage purposes.

Cases that cite this headnote

[10] **Insurance**
⚖Scope of coverage

217Insurance
217XVIICoverage—Liability Insurance
217XVII(B)Coverage for Particular Liabilities
217k2359Manufacturers' or Contractors' Liabilities
217k2361Scope of coverage

Shipper was acting on motor carrier's behalf as shipper's employee loaded shipper's coal onto truck with front-end loader, and thus shipper was "additional insured" under carrier's commercial general liability (CGL) policy with respect to truck driver's claim for injury caused by employee, even though amendment to hauling and delivery agreement omitted clause requiring shipper to supply loader and operator.

Cases that cite this headnote

[11] **Indemnity**
⚖Indemnitee's Own Negligence or Fault

Insurance
⚖Contracts and other instruments

208Indemnity
208IIContractual Indemnity
208k26Requisites and Validity of Contracts
208k30Indemnitee's Own Negligence or Fault
208k30(1)In general
217Insurance
217XIIProcurement of Insurance by Persons Other Than Agents
217k1702Contracts and other instruments

Motor carrier's agreement to indemnify shipper for its sole negligence and to purchase liability insurance did not violate public policy and was valid since agreement required carrier to purchase insurance for benefit of all concerned. West's Ann.W.Va.Code, 55–8–14.

Cases that cite this headnote

[12] **Indemnity**
⚖Indemnitee's Own Negligence or Fault

208Indemnity
208IIContractual Indemnity
208k26Requisites and Validity of Contracts
208k30Indemnitee's Own Negligence or Fault
208k30(1)In general

Contracts of indemnity against one's own negligence do not contravene public policy and are valid. West's Ann.W.Va.Code, 55–8–14.

Cases that cite this headnote

[13] **Indemnity**
⚖Indemnitee's own negligence or fault, in general

208Indemnity
208IIContractual Indemnity
208k31Construction and Operation of Contracts
208k31(6)Indemnitee's own negligence or fault, in general

Generally, contracts will not be construed to indemnify one against his own negligence,

unless such intention is expressed in clear and definite language.

Cases that cite this headnote

[14] **Insurance**
Vehicles and related equipment

217Insurance
217XVIICoverage—Liability Insurance
217XVII(A)In General
217k2273Risks and Losses
217k2278Common Exclusions
217k2278(13)Vehicles and related equipment
(Formerly 217k2681)

Front-end loader used to load shipper's coal onto motor carrier's truck was a "mechanical device" within meaning of carrier's commercial general liability (CGL) policy that defined "loading or unloading" to exclude movement of property by means of mechanical device, other than a hand truck, that was not attached to automobile, and, thus, loading of the coal was not "use" of an automobile thus making automobile exclusion inapplicable to truck driver's claim for injury caused by front-end loader flipping the truck.

1 Cases that cite this headnote

[15] **Insurance**
Ambiguity, Uncertainty or Conflict

217Insurance
217XIIIContracts and Policies
217XIII(G)Rules of Construction
217k1830Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832Ambiguity, Uncertainty or Conflict
217k1832(1)In general

Ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.

Cases that cite this headnote

[16] **Insurance**
Employment related exclusions
Insurance
Scope of coverage

217Insurance
217XVIICoverage—Liability Insurance
217XVII(A)In General
217k2273Risks and Losses
217k2278Common Exclusions
217k2278(11)Employment related exclusions
217Insurance
217XVIICoverage—Liability Insurance
217XVII(B)Coverage for Particular Liabilities
217k2359Manufacturers' or Contractors' Liabilities
217k2361Scope of coverage

Coal shipper was "additional insured" under motor carrier's following form excess liability policy, and thus exclusion of coverage for bodily injury to insured's employee did not apply to truck driver's claim against shipper for injuries caused by shipper's employee flipping truck with front-end loader; "insured contract" provisions of underlying commercial general liability (CGL) policy applied, carrier had insured contract to indemnify shipper, and shipper was not seeking coverage for injury to its own employee.

Cases that cite this headnote

**66 *Syllabus by the Court*

1. "Language in an insurance policy should be given its plain, ordinary meaning." Syllabus point 8, *Cherrington v. Erie Insurance Property & Casualty Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013) (internal quotations and citations omitted).

2. "In a policy for commercial general liability insurance ... when a party has an 'insured contract,' that party stands in the same shoes as the insured for coverage purposes." Syllabus point 7, in part, *Consolidation Coal Co. v. Boston Old Colony Insurance Co.*, 203 W.Va. 385, 508 S.E.2d 102 (1998).

3. "Contracts of indemnity against one's own negligence do not contravene public policy and are valid." Syllabus Point 1, **67 *Sellers v. Owens–Illinois Glass Co.,* 156 W.Va. 87, 191 S.E.2d 166 (1972).

4. "Generally, contracts will not be construed to indemnify one against his own negligence, unless such intention is expressed in clear and definite language." Syllabus point 3, *Sellers v. Owens–Illinois Glass Co.,* 156 W.Va. 87, 191 S.E.2d 166 (1972).

5. "It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syllabus point 4, *National Mutual Insurance Co. v. McMahon & Sons,* 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. United States Fidelity & Guaranty Co.,* 202 W.Va. 308, 504 S.E.2d 135 (1998).

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Opinion

DAVIS, Justice:

*515 Petitioner, Elk Run Coal Co., Inc., d/b/a Republic Energy ("Elk Run"), defendant and third-party plaintiff below, appeals four separate orders entered by the Circuit Court of Kanawha County on May 28, 2014. The orders grant summary judgment in favor of four different insurance companies and deny Elk Run's motion for partial summary judgment against one insurer. Third-party complaints filed by Elk Run against the four insurers were dismissed with prejudice. Elk Run contends that the circuit court erred in concluding that none of the insurance policies provided coverage to Elk Run where a contract between Elk Run and the named insured under the policies, Medford Trucking, LLC ("Medford"),[1] was an insured contract. The four insurance companies filed timely responses arguing that the circuit court did not err in relying on certain policy provisions to determine there was no coverage. After a careful review of the briefs submitted by the parties, the record submitted for appeal, the oral arguments presented to this Court, and the applicable case law, we determine that the circuit court erred in granting summary judgment to two of the insurers. We therefore reverse, in part; affirm, in part; and remand this case for additional proceedings consistent with this opinion.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts leading to the instant dispute begin with a "Hauling and Delivery Agreement" ("H & D Agreement") between Elk Run and Medford whereby Medford would haul Elk Run's coal to various destinations designated by Elk Run.

On May 31, 2011, Medford truck driver Timothy Walker ("Mr. Walker") was sitting seat-belted in his parked coal truck while the truck was being loaded with coal by Elk Run employee Eric Scott Redden ("Mr. Redden"). Mr. Redden had directed Mr. Walker where to park the truck and had begun loading it with coal using a piece of equipment referred to as an "end-loader" or "front-end loader." During the course of loading the truck, Mr. Redden allegedly lost consciousness and struck the truck with the front-end loader thereby flipping the truck and causing injury to Mr. Walker. Elk Run and Mr. Redden have stipulated that they "will not argue or assert a comparative negligence defense against Plaintiff Timothy Walker at the trial of this matter." Similarly, there has been no allegation that Medford caused or contributed to the accident in any way.

Following the accident, Mr. Walker commenced a civil action against Elk Run and others on October 3, 2011.

The instant dispute involves the availability of insurance coverage to Elk Run in relation *516 **68 to the above-described accident. In this regard, the H & D Agreement between Elk Run and Medford contains a broadly worded " Indemnity; Insurance" clause, which states:

> 9.1 Except as otherwise expressly provided herein, Contractor

> [Medford] shall indemnify, defend and save harmless Owner [Elk Run], its members, parent companies, sister companies, predecessors, successors, affiliates, insurers, reinsurers, other contractors, successors and assigns, and the officers, directors, shareholders, employees and agents of each of the foregoing (collectively "Owner's Indemnified Persons") from and against any and all demands, actions, suits, claims, rights, losses (including, but not limited to, diminution in value), controversies, damages, costs, expenses (including, but not limited to, interest, fines, penalties, costs of preparation and investigation, and the reasonable fees and expenses of attorneys, accountants and other professional advisers), and any other liability of whatsoever kind or nature against Owner's Indemnified Persons (collectively, "Losses"), whether on account of damage or injury (including death) to persons or property, violation of law or regulation, or otherwise, *relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly,* Contractor's performance of the Work [2] or other activities performed pursuant to this Agreement (including work and activities performed by subcontractors) or Contractor's nonperformance or breach of the terms of this Agreement....

(Emphasis and footnote added).[3]

In addition, pursuant to the "Indemnity; Insurance" clause of the H & D Agreement, Medford was required to purchase insurance:

> 9.3 Before commencing Work hereunder, Contractor [Medford] ... shall obtain, and throughout the term of this Agreement maintain, at its sole expense, the following insurance coverages:
>
> ....
>
> (b) *Commercial General Liability Insurance* with minimum limits of $2,000,000 for each occurrence and $2,000,000 general aggregate, for death, bodily injury and property damage, including coverage for independent contractors, products and completed operations, Blanket Broad Form Contractual, cross-liability, personal injury liability, Broad Form Property Damage, and where an exposure exists, coverage with the explosion, collapse and underground (XCU) hazard exclusions deleted from the policy.
>
> ....
>
> (d) *Automobile Liability Insurance,* including owned, non-owned and hired vehicle coverage with limits of liability of not less than $2,000,000 combined single limits for death, bodily injury and property damage claims.
>
> ....
>
> B. Except as to workers' compensation insurance, Owner [Elk Run] *shall be named as an additional insured.*

(Emphasis added).

In apparent accordance with the foregoing provisions, Medford purchased a commercial general liability ("CGL") policy from Canopius U.S. Insurance, Inc., f/k/a Omega U.S. Insurance, Inc. ("Canopius"), and a related commercial excess liability policy ("excess policy") from RSUI Indemnity Company ("RSUI"). Additionally, Medford purchased a commercial automobile liability policy, issued by National Casualty Company ("National"), and a related commercial automobile excess liability policy, issued by Scottsdale Insurance Company ("Scottsdale"). Each of these policies provided coverage in the amount of $1,000,000 per occurrence.

****69 *517** On November 1, 2011, Elk Run tendered a written demand for indemnification to Medford pursuant to the H & D Agreement, and asked Medford to place its insurance carriers on notice of Elk Run's demand. Medford's auto carrier, National, denied coverage based upon its conclusion that the claim did not result from "the ownership, maintenance or use of a covered auto as required under the insuring agreement." Medford's CGL carrier, Canopius, agreed to provide a defense to Elk Run subject to a reservation of rights to deny coverage upon further investigation of the relevant facts. Ultimately, Canopius denied indemnity and any further defense to Elk Run based upon the conclusion that the injury and damages allegedly suffered by Mr. Walker were "not caused in whole or in part by Medford's acts or omissions

or those of someone on its behalf, as is required for coverage under the ... Blanket Additional Insured Endorsement."

On October 9, 2012, Mr. Walker filed an amended complaint naming Elk Run and Mr. Redden as defendants. Thereafter, Elk Run asserted a third-party complaint against Dr. Yasar J. Aksoy.[4] On May 16, 2013, Elk Run filed an amended third-party complaint adding as defendants Canopius, RSUI, National, and Scottsdale. Elk Run's complaint sought, in relevant part, a declaration that there was insurance coverage for Mr. Walker's claim against Elk Run under either the CGL policy issued to Medford by Canopius (with excess coverage by RSUI) or the automobile liability policy issued to Medford by National (with excess coverage by Scottsdale).

Meanwhile, Mr. Walker made a settlement demand on Elk Run. Elk Run forwarded the demand to Canopius, and Canopius responded that it would not make any offer in response. Elk Run eventually reached a settlement agreement with Mr. Walker, and his claims against Elk Run and Mr. Redden were dismissed. None of the insurers contributed to the settlement; therefore, Elk Run's third-party declaratory action against the insurers remained.

In January 2014, Elk Run moved for partial summary judgment against Canopius. On February 3, 2014, and February 11, 2014, respectively, Canopius and RSUI each filed a motion for summary judgment against Elk Run. On March 7, 2014, National and Scottsdale each filed a motion for summary judgment. On April 8, 2014, Elk Run filed a cross-motion for summary judgment against National.

On May 28, 2014, the circuit court entered four separate orders granting summary judgment in favor of Canopius, RSUI, National, and Scottsdale, and denying Elk Run's motion for partial summary judgment against Canopius.[5] Elk Run's third-party complaints against Canopius, RSUI, National, and Scottsdale were dismissed with prejudice. This appeal followed.

II.

STANDARD OF REVIEW

[1] [2] [3] We review *de novo* Elk Run's appeal of the circuit court's summary judgment orders. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). To the extent that the circuit court also denied summary judgment to Elk Run, we note that "[t]his Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). Our *de novo* review is guided by the principle that ***518 **70** "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

[4] [5] We additionally observe that "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal." Syl. pt. 2, *Riffe v. Home Finders Assocs., Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999). It is also pertinent for us to note that the "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002). With due regard for the forgoing standards, we consider the issues raised by Elk Run.

III.

DISCUSSION

Elk Run seeks coverage under four policies of insurance; however, two of the policies are for excess coverage. Coverage under the excess policies is, in part, dependent upon coverage under the primary policies. Therefore, it is necessary to first determine whether there is coverage under the primary policies. We begin with the CGL policy.

[6] Elk Run asserts four errors by the circuit court in finding that Elk Run was not entitled to coverage under the Canopius CGL policy. We address them in turn. First, Elk Run contends that the H & D Agreement between Medford and Elk Run qualifies as an "insured contract." Accordingly, Elk Run stands in the shoes of Medford for coverage purposes.[6]

[7] [8] [9] The Canopius CGL policy defines an "insured

contract" in relevant part as:

> 9.f. That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

"Language in an insurance policy should be given its plain, ordinary meaning." Syl. pt. 8, *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013) (internal quotations and citations omitted). Applying the plain language above, it is clear that, insofar as the indemnity agreement between Elk Run and Medford was part of their H & D Agreement and required Medford to "assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization," it is an "insured contract" under the policy.[7] Because ***519 **71** the contract between Elk Run and Medford is an insured contract,[8] we observe this Court's prior holding that, "[i]n a policy for commercial general liability insurance ... when a party has an 'insured contract,' that party stands in the same shoes as the insured for coverage purposes." Syl. pt. 7, in part, *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102 (1998). Based upon this holding, we conclude that Elk Run "stands in the same shoes as [Medford] for coverage purposes" and is, therefore, an additional insured.

[10] Canopius argues that there is no coverage for Elk Run's sole negligence pursuant to the "Blanket Additional Insured Endorsement," which provides, in relevant part, that

> [t]he insurance provided to these additional insureds is limited as follows:
>
> 1. That person or organization is an additional insured *only with respect to* liability for "bodily injury", "property damage" or "personal and advertising injury" *caused, in whole or in part, by:*
>
> a. *Your acts or omissions;* or
>
> b. *The acts or omissions of those acting on your behalf.*

(Emphasis added). To the extent that "your" refers to Medford as the named insured, subsection (a) does not apply insofar as the underlying liability does not result from any act or omission by Medford. However, the circuit court also concluded that subsection (b) does not apply based upon its conclusion that Elk Run was not "acting on [Medford's] behalf" in loading coal onto Medford's truck. We disagree.

A case similar to the instant matter is *Norfolk Southern Railway Co. v. National Union Fire Insurance of Pittsburgh, PA,* 999 F.Supp.2d 906 (S.D.W.Va.2014). The facts of *Norfolk Southern* are that employees of Norfolk Southern Railway Company ("Norfolk Southern") and Cobra Natural Resources, LLC ("Cobra") were "positioning a train under a coal loading facility." *Id.* at 909. During this process, a rail broke causing several cars to derail. One car struck the coal loading facility causing it to collapse. Several lawsuits were subsequently filed against Norfolk Southern. Cobra did not cause the derailment. An agreement between Norfolk Southern and Cobra required Cobra to maintain insurance under which Norfolk Southern was an additional insured. The policy obtained by Cobra provided coverage for additional insureds "only with respect to liability arising out of 'Your Work', 'Your Product' and to property owned or used by you." *Id.* at 912 (internal quotations omitted).[9] The district court observed that "[t]he policy defines 'Your Work,' in relevant part, as '(1) work or operations performed by you or *on your behalf;* and (2) materials, parts or equipment furnished in connection with such work or operations.' " *Id.* (emphasis added). The court concluded that the policy provided coverage for Norfolk Southern, the additional insured, because the derailment "arose out of" Cobra's "work" as defined in the policy. *Id.* at 914. *See also Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1264 (11th Cir.2007) (finding coverage for indemnity obligation triggered by accident arising out of indemnitor's work because the work placed indemnitor's employees in the path of accident caused by indemnitee's negligence); *Perkins v. Rubicon, Inc.*, 563 So.2d 258, 259 (La.1990) (finding indemnity provision requiring injury "arising out of" indemnitor's performance of work required "connexity similar to that required for determining cause-in-fact," and concluding that injury triggered indemnification because injured employee would not have been present to be ***520 **72** injured "but for performance of the work under the contract").

Similarly, we find coverage for Elk Run under the Canopius policy provision qualifying Elk Run as "an additional insured only with respect to liability ... caused, in whole or in part, by: ... [the] acts or omissions of those acting on your [Medford's] behalf." The underlying injury

in this case occurred while an Elk Run employee was loading coal onto a Medford truck. In loading the coal onto the Medford truck, Elk Run was acting on Medford's behalf. First, the H & D Agreement originally acknowledged that Elk Run "shall supply a loader with operator to *assist Contractor* [*Medford*] in the performance of the Work." The circuit court rejected this clause as evidence that Elk Run's activities were on behalf of Medford because this provision was omitted by an amendment to the H & D Agreement that became effective prior to the incident underlying this claim. To the contrary, however, we find the fact that Elk Run was no longer contractually obligated to supply a loader with operator to assist Medford does not diminish the fact that Elk Run, nevertheless, continued to provide this assistance and, in doing so, was acting on Medford's behalf.

[11] [12] Elk Run next contends that the circuit court erred by finding that the public policy of the State of West Virginia does not permit one to obtain indemnification for one's own conduct. The circuit court relied on W. Va.Code § 55–8–14 (1975) (Repl Vol.2008) as a general source for this asserted public policy. The circuit court's reliance on W. Va.Code § 55–8–14 is misplaced. That statute expressly applies only to certain types of contracts not at issue in this case; therefore it does not provide a basis for a public policy against all contracts indemnifying one for his or her own conduct. Assuming, *arguendo,* that W. Va.Code § 55–8–14 did apply, it does not prohibit indemnity contracts for the sole negligence of the indemnitee where the contract includes an agreement to purchase insurance:

> W. Va.Code § 55–8–14 requires courts to void a broad indemnity agreement *only:* (1) if the indemnitee is found by the trier-of-fact to be solely (100 percent) negligent in causing the accident; *and* (2) it cannot be inferred from the contract that there was a proper agreement to purchase insurance for the benefit of all concerned.

Syl. pt. 2, *Dalton v. Childress Serv. Corp.,* 189 W.Va. 428, 432 S.E.2d 98 (1993) (emphasis added); *see also Id.,* at 431, 432 S.E.2d at 101 ("[A] just public policy demands that indemnity agreements be permitted unless they go beyond a mere allocation of potential joint and several liability and indemnify against the sole negligence of the indemnitee *without an appropriate insurance fund,* bought pursuant to the contract, for the express purpose of protecting all concerned. A contract that provides in substance that A shall purchase insurance to protect B against actions arising from B's sole negligence does not violate the statute as public policy encourages both the allocation of risks and the purchase of insurance." (emphasis added)). The H & D Agreement between Elk Run and Medford clearly included an agreement to purchase insurance for the benefit of all concerned; therefore, even under *Dalton,* the agreement is not void and unenforceable. Finally, the circuit court's conclusion is contrary to this Court's precedent. Indeed, this Court has expressly declared that "[c]ontracts of indemnity against one's own negligence do not contravene public policy and are valid." Syl. pt. 1, *Sellers v. Owens–Illinois Glass Co.,* 156 W.Va. 87, 191 S.E.2d 166 (1972). *Accord* Syl. pt. 3, *Riggle v. Allied Chem. Corp.,* 180 W.Va. 561, 378 S.E.2d 282 (1989); Syl. pt. 4, *State ex rel. Vapor Corp. v. Narick,* 173 W.Va. 770, 320 S.E.2d 345 (1984). Consequently, we find the circuit court erred in concluding that the H & D Agreement violated the public policy of this State.

[13] Elk Run next asserts that the circuit court erred in finding the language of the H & D Agreement was not sufficiently clear to express that Medford had agreed to indemnify Elk Run for accidents arising from Elk Run's sole negligence. This Court, in *Sellers v. Owens–Illinois Glass Co.,* 156 W.Va. 87, 191 S.E.2d 166, held that, "[g]enerally, contracts will not be construed to indemnify one against his own negligence, unless such intention is expressed in clear and definite ***521 **73** language." Syl. pt. 3, *id.* The indemnifying clause at issue in *Sellers* provided that " 'Subcontractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Subcontractor, his agents or employees.' " *Id.,* at 94, 191 S.E.2d at 170. The Court found "[t]he language of the indemnity agreement is not sufficiently clear and definite to require [subcontractor] to indemnify the [contractor], for its sole negligence." *Id.* Unlike the agreement in *Sellers,* the instant agreement was not limited to damages "occasioned by" the indemnitor. Rather, the H & D Agreement required Medford to obtain insurance to broadly indemnify Elk Run for losses "*relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly,* [Medford's] performance of the Work."[10] The indemnity clause in the Elk Run/Medford agreement is more broad than a clause found to be sufficiently clear in the case of *Eastern Gas & Fuel Associates v. Midwest–Raleigh, Inc.,* 374 F.2d 451 (4th Cir.1967), which is discussed in *Sellers.* The *Eastern Gas* court considered an indemnity agreement requiring the indemnitor to " 'protect and indemnify Eastern against loss or damage to property and injury and death to

persons resulting from, *arising out of or incident to* the performance of this contract.' " *Id.*, 374 F.2d at 452. Also pursuant to the agreement, "Midwest would maintain bodily injury and property damage liability insurance to cover any liability arising from the performance of the contract." *Id.* Following an explosion that killed two workers, a judgment was obtained against Eastern for the damages. Eastern then sought indemnification in accordance with its agreement with Midwest. The court held that the "the contract is 'clear and definite' in its indemnity of Eastern against all liability arising from performance of the contract, despite its own negligence." *Id.*, 374 F.2d at 454. Likewise, we find the broad language used in the H & D Agreement, which includes losses relating to or in connection with Medford's work, either directly or indirectly, is sufficiently clear and definite to express that Medford agreed to indemnify Elk Run for Elk Run's sole negligence so long as that negligence bore some relation, either directly or indirectly, to Medford's work. The circuit court erred in finding otherwise.

[14] Elk Run's final argument related to the CGL policy is that the circuit court erred in finding the auto exclusion in the Canopius policy applicable. The Canopius policy contains an exclusion for " '[b]odily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any ... 'auto' ... owned or operated by ... any insured." The Medford truck in which Mr. Walker was sitting at the time of his injury qualifies as an "auto" under the Canopius policy.[11] The question, then, is whether the loss was caused by the "use" of the auto. Pursuant to the policy, "[u]se includes operation and 'loading or unloading.' "[12] Significantly, however, the definition ***522 **74** of the term "loading or unloading" contained in the policy clarifies that the term "*does not include* the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the ... 'auto.' " (Emphasis added). Given this definition of "loading or unloading," we must determine whether the front-end loader used to load coal onto the Medford truck is a "mechanical device."

[15] The Canopius policy fails to define the term "mechanical device." As Elk Run notes, courts have concluded that a "front-end loader" is a "mechanical device." *See Palp, Inc. v. Williamsburg Nat'l Ins. Co.*, 200 Cal.App.4th 282, 292, 132 Cal.Rptr.3d 592, 600 (2011) (referring to a front-end loader as a mechanical device); *Cobb Cnty. v. Hunt,* 166 Ga.App. 409, 410, 304 S.E.2d 403, 405 (1983) (referring to a front-end loader as a mechanical device); *Lafata v. Village of Lisle,* 185 Ill.App.3d 203, 207, 133 Ill.Dec. 373, 541 N.E.2d 210, 213 (1989) (finding that front-end loader was a mechanical contrivance or device), *aff'd,* 137 Ill.2d 347, 148 Ill.Dec. 732, 561 N.E.2d 38 (1990). "It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syl. pt. 4, *National Mut. Ins. Co. v. McMahon & Sons,* 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. United States Fid. & Guar. Co.,* 202 W.Va. 308, 504 S.E.2d 135 (1998). Thus, given the authorities for concluding that a "front-end loader" is a "mechanical device," we will treat it as such for purposes of the Canopius policy.

Because " 'loading or unloading' does not include the movement of property by means of a mechanical device other than a hand truck," and because the coal was being loaded onto Medford's truck using a mechanical device, the loading of the coal was not a "use" of an automobile as excluded by the policy. Accordingly, the circuit court erred in applying the auto exclusion of the Canopius policy as a grounds for finding coverage was not available to Elk Run.[13]

Based upon our reasoning above, we conclude that the circuit court erred in granting summary judgment to Canopius based upon the circuit court's erroneous finding that Elk Run was not entitled to coverage under the Canopius policy. We therefore reverse the circuit court's grant of summary judgment to Canopius. Because we additionally have found coverage for Elk Run under the terms of the Canopius policy, we likewise reverse the circuit court's denial of Elk Run's motion for partial summary judgment. We remand this case for proceedings consistent with this opinion, including the entry of an order granting partial summary judgment to Elk Run on the issue of coverage under the Canopius policy.

[16] We next consider the excess policy issued by RSUI that is related to the Canopius policy. The circuit court gave two grounds for granting summary judgment to RSUI. First, the circuit court found that the RSUI excess policy does not apply to any occurrence for which the underlying insurance does not apply. Because we find coverage under the Canopius policy, this portion of the circuit court's ruling is erroneous. In addition, the circuit court found that the RSUI policy contains an exclusion that precludes coverage for Mr. Walker's claim against Elk Run independent of the Canopius policy. This "Employers Liability Exclusion Endorsement" provides, in relevant part, that the RSUI policy "does not apply to bodily injury ... to: ... [a]n employee of the insured arising out of and in the course ***523 **75** of employment by the insured." The provision goes on to provide that "[t]his exclusion applies: ... [w]hether the insured may be liable

as an employer or in any other capacity; and [t]o any obligation to share damages with or repay someone else who must pay damages because of the injury." We conclude that this exclusion does not preclude coverage for Elk Run in the instant matter.

RSUI concedes that its policy is a following form policy. RSUI explains that such a policy incorporates the same terms as the Canopius Policy, unless the RSUI policy specifies otherwise.[14] Notably, the RSUI policy contains no provisions addressing insured contracts. Therefore, the insured contract provisions of the Canopius policy apply. We determined above, in relation to the Canopius policy, that because this action involves an insured contract, Elk Run steps into the shoes of Medford for coverage purposes. *See* Syl. pt. 7, *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102 ("In a policy for commercial general liability insurance ... when a party has an 'insured contract,' that party stands in the same shoes as the insured for coverage purposes."). Thus, Elk Run is an additional insured under the RSUI policy, just as it is under the Canopius policy. Looking at the plain language of the RSUI exception from the perspective of Elk Run as an insured thereunder, it becomes apparent that the exclusion does not apply. Elk Run is neither seeking coverage for an injury to its own employee, nor seeking to repay someone else who must pay damages because of the injury. Accordingly, the circuit court erred in granting summary judgment to RSUI and we reverse the same.

IV.

CONCLUSION

For the reasons stated in the body of this memorandum decision, we reverse the May 28, 2014, order of the circuit court of Kanawha County granting summary judgment to Canopius and denying Elk Run's motion for partial summary judgment. Likewise, the circuit court's order of May 28, 2014, granting summary judgement to RSUI is reversed. We remand this case with instructions to the circuit court to enter an order granting partial summary judgment to Elk Run on the issue of coverage under the Canopius policy, and for further proceedings consistent with this memorandum decision. The two orders granting summary judgment to National and Scottsdale, also entered on May 28, 2014, are affirmed.[15]

Reversed, in part; Affirmed, in part; and Remanded.

All Citations

235 W.Va. 513, 775 S.E.2d 65

Footnotes

1 Medford is not a party to this action.

2 The H & D Agreement provided the following description of the term "work": "Contractor [Medford] shall, during the term of this Agreement, haul coal from Owner's [Elk Run's] premises to various locations set forth on Exhibit A. All of such services are sometimes hereinafter collectively referred to as the 'work.' "

3 The language quoted above from paragraph 9.1 of the "Indemnity; Insurance" clause appears in the fourth amendment to the H & D Agreement, which amendment was applicable at the time relevant to this action.

4 Dr. Yasar J. Aksoy ("Dr. Aksoy") had been Mr. Redden's physician. Elk Run alleged that Dr. Aksoy had prescribed Mr. Redden opiate and benziodiazepine medications, and that Dr. Aksoy negligently provided Elk Run with written certification declaring Mr. Redden was medically stable to operate a front-end loader and perform other work-related duties while taking the prescribed opiate and benziodiazepine medications. Elk Run asserted that the certification provided by Dr. Aksoy deviated from the acceptable standard of care and caused an unjustifiable risk of harm to third parties. Dr. Aksoy is not a party to this appeal.

5 The circuit court did not expressly deny Elk Run's motion for summary judgment against National. However, the circuit court's grant of summary judgment to National necessarily amounts to a denial of Elk Run's summary judgment motion.

6 This Court rejects Canopius' assertion that Elk Run has waived the issue of whether it qualifies as an "additional insured" under the Canopius CGL policy. This assertion is predicated upon the circuit court's determination in its order

266 N.J.Super. 386
Superior Court of New Jersey,
Appellate Division.

PARKWAY IRON & METAL CO. and Lewis Williams, Plaintiffs–Appellants,
v.
NEW JERSEY MANUFACTURERS INSURANCE COMPANY, Defendant–Respondent.

Argued June 9, 1993.
|
Decided July 28, 1993.

Synopsis

Comprehensive general liability carrier appealed from order of the Superior Court, Law Division, Passaic County, which found that exclusion in automobile policy was valid. The Superior Court, Appellate Division, King, P.J.A.D., held that exclusion from policy of coverage for bodily injury or property damage resulted from movement of property by mechanical devise not attached to the vehicle was invalid.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***387** ****1352** Robert G. Klinck, Livingston, for plaintiffs-appellants (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, attorneys; Mr. Klinck, on the brief).

George W. Connell, Roseland, for defendant-respondent (Connell, Foley & Geiser, attorneys; Michael S. Olsan, on the brief).

Before Judges KING, BRODY and THOMAS.

Opinion

The opinion of the court was delivered by

KING, P.J.A.D.

This case involves a dispute between a motor vehicle liability insurance carrier and a comprehensive general liability carrier (CGL) over the efficacy of an exclusion in the vehicle policy. The exclusion seeks to eliminate coverage for certain loading and unloading operations. The exclusion says:

> This insurance does not apply to:
>
> 8. Bodily injury or property damage resulting from the movement of property by a mechanical device (other than a hand truck) not attached to the covered auto.

New Jersey Manufacturers Insurance Company (NJM), the insurer of the vehicle, contends that the exclusion is valid under New Jersey law. The Law Division judge so ruled and granted summary judgment to NJM. Liberty Mutual, the CGL carrier,

claims that the exclusion is invalid and against the declared public policy of this State. We resolve the dispute against NJM and find the exclusion invalid.

***388** On June 16, 1989 Paul Passenti was the operator of a truck owned by Bonland Industries, Inc. and insured by defendant, NJM. Plaintiff Lewis Williams was a crane operator employed by Parkway Iron and Metal Company (Parkway). On that date Passenti drove his truck to Parkway, ****1353** the consignee of its cargo, where the truck was unloaded by a crane operated by Williams.

Passenti alleged in his complaint filed in the Law Division, that Williams was negligent during the course of unloading Bonland Industries' truck causing a dangerous condition resulting in Passenti's injury. Passenti claimed that he "was the operator of a truck vehicle which he brought to ... Parkway at 613 Route 46 East in the City of Clifton for the purpose of removing scrap metal from the aforesaid truck." Passenti claimed that:

> At the time and place aforesaid, the defendant, PARKWAY IRON & METAL CO. was the owner of a crane vehicle which was operated by the defendant, LEWIS WILLIAMS, as agent, servant and/or employee of defendant, PARKWAY IRON & METAL CO., in a careless and negligent manner causing a dangerous and hazardous condition to exist on the truck vehicle which plaintiff was operating.

As a result of the alleged negligence of Williams, who was acting for Parkway, the claimant Passenti demanded damages for "severe and permanent injuries." Passenti seemed to claim that while Williams was unloading sheet metal from the truck with Parkway's crane, Williams loosened a metal bar on the truck which later caused the accident and Passenti's injuries. Parkway's crane was not attached to the truck.

Under Part IV(A) of the "Business Auto Policy" issued to Passenti's employer, Bonland Industries, NJM agreed to:

> (1) pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies caused by an accident and resulting from the ownership, maintenance or use of a covered auto.
>
> (2) [NJM has] the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage not covered by this policy.

Part IV(D) of NJM's policy defined the class of users covered under the policy, providing:

> Anyone else is an insured while using with your permission a covered auto you own, hire or borrow....

***389** "Use" was not otherwise defined in the NJM policy. The words "loading and unloading" were not used or defined in the policy.

The exclusion at issue here is at Part IV(C)8 of NJM's policy, entitled "*WE WILL NOT COVER–EXCLUSIONS,*" which provides:

> Bodily injury or property damage resulting from the movement of property by a mechanical device (other than a hand truck) not attached to the covered auto.

NJM claims that this exclusion was adopted by the automobile insurance industry as a response to our 1977 opinion in *Bellafronte v. General Motors Corp.*, 151 *N.J.Super.* 377, 376 *A.*2d 1294 (App.Div.), *certif. denied*, 75 *N.J.* 533, 384 *A.*2d 513 (1977), a decision in which Judge Pressler held that an automobile insurance carrier could not limit the class of users insured under the "loading and unloading clause." The carrier in *Bellafronte* had attempted to exclude "(1) a lessee or borrower of the automobile, or (2) an employee of the named insured or of such lessee or borrower" from coverage during loading and unloading operations. *Id.* 151 *N.J.Super.* at 381, 376 *A.*2d 1294. We held in *Bellafronte* that the language of this exclusion limiting a class of users as insureds under the "loading and unloading" aspect of the omnibus clause was void as against public policy because inconsistent with *N.J.S.A.* 39:6–46(a). That statute specifically required coverage for "any other person using or responsible for the use of any such vehicle" against liability "growing out of the maintenance, use or operation of the motor vehicle." *Bellafronte, supra,* at 380–81, 376 *A.*2d 1294. *N.J.S.A.* 39:6–46(a) has been replaced by the currently applicable *N.J.S.A.* 39:6B–1, which states:

> Every owner or registered owner of a motor vehicle registered or principally garaged in this State shall maintain motor vehicle liability insurance coverage, under provisions approved by the Commissioner ****1354** of Insurance, insuring against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the *ownership, maintenance, operation or use* of a motor vehicle.... [Emphasis added.]

While NJM's Exclusion 8 is structured expressly to eliminate coverage for a particular type of activity, the net effect is to deprive certain persons or entities of omnibus coverage in certain situations. In the case before us, the crane operator, Williams, ***390** and his employer, the consignee of cargo, Parkway, are eliminated as permissive users and additional insureds because Parkway's crane was used in the unloading operation. We recognize that there may be underwriting merit to the insurance industry's effort to eliminate fortuitous coverage for certain owners of business premises and their employees while using their own equipment who are usually adequately covered under their CGL policies. But we must conclude that Exclusion 8 is invalid and against the public policy of this State.

NJM contends that Judge Pressler's holding in *Bellafronte* "implicitly demonstrates" that it is permissible to limit the activity covered and scope of permission without violating New Jersey's public policy as long as the class of users is not restricted. NJM claims that a vehicle policy can limit "the type of activity covered rather than restrict the Class of users."

We disagree with NJM's contention. Exclusion 8 attempts, in effect, to eliminate coverage for a class of users of the vehicle during the loading and unloading operation where the injury or damage results "from the movement of property by a mechanical device (other than a hand truck) not attached to the covered auto."

Judge Pressler's language in her opinion in *Bellafronte, supra,* 151 *N.J.Super.* at 383, 376 *A.*2d 1294, might suggest to some that certain activities by potential users could be circumscribed by valid exclusions to the "loading and unloading" aspect of the omnibus coverage. Whatever *Bellafronte* may imply in that regard, we conclude that the present Exclusion 8 is, in our court's words in that case, "an unwarranted attempt to diminish the extent of coverage required by the statute." *Id.* at 383, 376 *A.*2d 1294.

This conclusion is compelled in our view by our Supreme Court's decision in *Ryder/P.I.E. Nationwide, Inc. v. Harbor Bay,* 119 *N.J.* 402, 575 *A.*2d 416 (1990), a case involving the limits of liability available to a self-insurer and its additional insured for a "loading and unloading" accident. In *Ryder/P.I.E. Nationwide,* the Supreme Court stated, "Our analysis has two considerations.

***391** We first examine an insurer's obligation to provide coverage to an additional insured in a loading and unloading accident in the context of a liability insurance policy." *Id.* at 404, 575 *A.*2d 416. In her initial analysis, Justice Garibaldi first recognized, "The obligation to provide coverage to an additional insured in a loading and unloading case can arise from the explicit language in a liability policy." *Id.* at 406–07, 575 *A.*2d 416. She then stated, "New Jersey courts also have recognized that the obligation to provide coverage in a 'loading and unloading' accident arises from statute and *therefore cannot be limited by contract.*" *Id.* at 407, 575 *A.*2d 416 (emphasis added), citing *Bellafronte, supra,* 151 *N.J.Super.* at 377, 376 *A.*2d 1294. Then Justice Garibaldi unequivocally expressed our Supreme Court's understanding of the legal duty of the automobile insurer in the loading and unloading context:

> *Bellafronte* makes clear the broad *scope* of coverage that an insurer must provide for accidents arising during loading and unloading. Because of statutorily-imposed omnibus requirements, any contractual attempt to exclude coverage for an additional insured will be held invalid. Moreover, all parties subject to omnibus coverage requirements—both self-insurers and those with liability policies—must provide coverage. [119 *N.J.* at 408, 575 *A.*2d 416.]

With this strong expression from our Supreme Court, we cannot condone Exclusion 8 in NJM's policy which attempts to ****1355** exclude coverage for Williams, the crane operator, and his employer, Parkway, the consignee of the cargo, for this claim against them allegedly arising out of the unloading of Bonland Industries truck with Parkway's crane. Exclusion 8 is invalid and against the public policy of this State as expressed in *N.J.S.A.* 39:6B–1 and *Ryder/P.I.E. Nationwide.* The exclusion refers to mechanical equipment but effectively serves to eliminate coverage for certain additional insureds during the unloading operation. *Accord Truck Ins. Exchange v. Home Ins. Co.,* 841 *P.*2d 354, 358 (Colo.Ct.App.1992), *cert. denied,* Dec. 1, 1992 (identical mechanical device exclusion held violative of Colorado's public policy).

Reversed.

All Citations

266 N.J.Super. 386, 629 A.2d 1352

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Declined to Follow by Great West Casualty Company v. Decker, D.Minn., January 7, 2019

841 P.2d 354
Colorado Court of Appeals,
Div. II.

TRUCK INSURANCE EXCHANGE, Plaintiff–Appellee,
v.
The HOME INSURANCE COMPANY, Defendant–Appellant.

No. 91CA1112.
|
June 4, 1992.
|
Rehearing Denied July 2, 1992.
|
Certiorari Denied Dec. 1, 1992.

Synopsis
Comprehensive general liability carrier for aluminum company brought action against business automobile liability insurer for employer seeking indemnification from defendant for amount of judgment, interest, attorney fees, and costs the plaintiff was required to pay for injuries sustained by employee of employer as result of aluminum company's alleged negligence during loading of employer's truck. The District Court, City and County of Denver, Connie L. Peterson, J., entered summary judgment in favor of the plaintiff, and defendant insurer appealed. The Court of Appeals, Tursi, J., held that: (1) aluminum company and its employees were permissive users of the truck, thus, were entitled to qualify as insureds pursuant to Automobile Accident Reparations Act, and, thus defendant's exclusion was invalid to the extent it attempted to limit compulsory classifications of insureds to whom defendant was obligated to provide insurance, and (2) the employee's injuries arose out of the use of the covered motor vehicle.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***355** Anderson, Campbell and Laugesen, P.C., Franklin D. Patterson, Charles A. Madison, Denver, for plaintiff-appellee.

Wood, Ris & Hames, P.C., Jeffrey Clay Ruebel, Mary E. Gibbons, Denver, for defendant-appellant.

Opinion

Opinion by Judge TURSI.

Defendant, Home Insurance Company, (Home) the business automobile liability insurance carrier for Dixie Petrochemical Co., appeals a summary judgment entered in favor of plaintiff, Truck Insurance Exchange, (Truck) comprehensive general liability carrier for Golden Aluminum Co. In that judgment, the district court found Home to be primarily liable for coverage of injuries sustained by an employee of Dixie as a result of Golden's negligence during the loading of a Dixie truck. We affirm.

The driver of the Dixie truck was injured while acting within the course and scope of his employment. When the accident occurred, the driver was standing on the bed of a Dixie truck upon which a metal cylinder containing chlorine gas was being

loaded at the Golden plant. The cylinder was attached by hooks to an independent loading mechanism owned by Golden and operated by Golden's employee. During the ***356** loading process, the cylinder fell from the hooks onto the bed of the truck. The driver jumped to the ground to avoid being struck and suffered injuries in doing so. Part of his injuries were sustained when a truck railing which had been removed and propped against the truck fell over and struck his lower back.

The driver received workers' compensation benefits and then filed suit against Golden for the negligence of its employees. Truck provided a defense to Golden, but sought primary coverage from Home on the ground that driver's injuries arose out of the ownership or use of a vehicle owned by Home's insured. Home denied that its insurance coverage extended to Golden and, therefore, declined to provide either coverage or a defense.

Upon jury trial of his negligence action, the driver was awarded $247,150. Truck satisfied this judgment on behalf of Golden and then brought this action seeking indemnification from Home for the amount of the judgment, interest, attorney fees, and costs.

Home contended that it is not liable for primary coverage or driver's claims because (1) the policy language did not include Golden as an insured and (2) it excluded any bodily injuries resulting from the movement of property by a mechanical device not attached to the covered vehicle. Alternatively, it contended that the driver's injuries did not arise out of the use of a motor vehicle, thereby defeating compulsory coverage.

Ruling on cross-motions for summary judgment presented on stipulated facts, the trial court entered judgment in favor of Truck. It specifically held that the driver's injuries arose out of the use of the motor vehicle and that the exclusions in Home's policy were in derogation of the Colorado Automobile Accident Reparation Act and were, therefore, invalid.

I.

Home first contends that the trial court erroneously found that Golden and its employees are insureds under its business automobile liability policy. We disagree.

The Colorado Automobile Accident Reparations Act (Act) mandating compulsory no-fault insurance also requires "registrants of motor vehicles in this state to procure insurance covering legal liability arising out of ownership or use of such vehicles and also providing benefits to persons ... injured in accidents involving such vehicles." Section 10–4–702, C.R.S. (1987 Repl.Vol. 10A); *see* *Leland v. Travelers Indemnity Co.,* 712 P.2d 1060 (Colo.App.1985).

Under § 10–4–706(1), C.R.S. (1991 Cum.Supp.), an owner of a motor vehicle must comply with the Act by providing statutorily-mandated minimum coverages which are subject only to limitations and exclusions specifically authorized by the Act.

The statutory classification of persons to whom this coverage must extend is codified at § 10–4–703(6), C.R.S. (1987 Repl.Vol. 4A), which provides:

> Insured means the named insured, relatives of the named insured who reside in the same household as the named insured, *or any person using the described motor vehicle with the permission of the named insured.* (emphasis supplied)

The provisions of the Act are included as part of every automobile insurance policy and govern in any conflict between a policy and the Act. *Allstate Insurance Co. v. Allen,* 797 P.2d 46 (Colo.1990).

Although insurers may exclude risks or limit coverage so long as public policy is not violated, *Chacon v. American Family Mutual Insurance Co.,* 788 P.2d 748 (Colo.1990), insurance policy provisions which attempt to dilute, restrict, or condition coverages required by the Act are void and invalid. *Meyer v. State Farm Mutual Automobile Insurance Co.,* 689 P.2d 585 (Colo.1984); *Murphy v. Dairyland Insurance Co.,* 747 P.2d 691 (Colo.App.1987).

Based on its policy, Home contends that Golden and its employees are excluded from coverage as insureds since they were moving property to and from the vehicle. The provision defining insureds, upon which Home relies, provides that:

> ***357** Anyone else is an insured while using with your permission a covered auto you own, hire or borrow *except* ... [a]nyone other than your employees, a lessee or borrower or any of their employees, while moving property to or from a covered auto. (emphasis supplied)

The trial court held that this exclusion improperly narrows the class of insureds to whom Home is required by the Act to provide coverage. We agree.

It is undisputed that the driver's injuries occurred when cylinders of chlorine were being loaded onto the truck, that Golden employees were loading the cylinders onto the truck, and that they had permission to use the truck during the loading process. Therefore, if the Golden employees were using the truck with permission, they are insureds under the Act to whom Home is obligated to provide coverage.

Here, Home's policy provides loading and unloading coverage, thereby expanding the coverage intended by the word "use". *See* *Colorado Farm Bureau Mutual Insurance Co. v. West American Insurance Co.,* 35 Colo.App. 380, 540 P.2d 1112 (1975). Because Golden employees were permissive users of the truck, they are entitled to qualify as insureds pursuant to the Act. Therefore, to the extent Home's policy exclusion attempts to limit the compulsory classification of insureds to whom defendant is obligated to provide coverage, it is contrary to the Act and invalid. *See Trinity Universal Insurance Co. v. Hall,* 690 P.2d 227 (Colo.1984); *Bukulmez v. Hertz Corp.,* 710 P.2d 1117 (Colo.App.1983), *aff'd in part sub nom. Blue Cross v. Bukulmez,* 736 P.2d 834 (Colo.1987).

Contrary to Home's contention, the Act does not permit optional exclusions limiting the scope of insureds to whom compulsory coverage must be provided.

The Act does spell out limited permissible exclusions by which an insurer may restrict or condition coverage. *See* § 10–4–712, C.R.S. (1991 Cum.Supp.) and § 10–4–721, C.R.S. (1987 Repl. Vol 4A). However, statutes which specify certain situations must be construed to exclude from its operation all other situations not specified. *See* *In re Marriage of Van Inwegen,* 757 P.2d 1118 (Colo.App.1988). Accordingly, because none of the enumerated exclusions apply here, we construe the Act to prohibit an exclusion which narrows the statutory classification of insured entitled to compulsory automobile liability coverage.

We also reject Home's contention that § 10–4–707(1), C.R.S. (1991 Cum.Supp.) limits the scope of mandatory insureds. This section applies only to insureds who are entitled to receive personal injury protection benefits. Hence, it is inapplicable here. *Cf.* *Milbank Mutual Insurance Co. v. Dairyland Insurance Co.,* 373 N.W.2d 888 (N.D.1985).

Finally, we agree with the trial court's conclusion that the holding in *Allied Mutual Insurance Co. v. Home Insurance Co.,* 797 P.2d 763 (Colo.App.1990) is not dispositive of this issue. In that case, we construed the identical "insured" clause to exclude from coverage those who are neither an employee, lessee, or borrower of the named insured who are not involved in the moving of property to or from an insured vehicle.

Our disposition of that case turned on our construction of an unambiguous policy provision and did not extend to the public policy issue whether the provision constitutes an improper limitation in derogation of the Act. Accordingly, it is not persuasive authority here. *See* *Littleton Education Ass'n v. Arapahoe County School District No. 6,* 191 Colo. 411, 553 P.2d 793 (1976).

II.

Home next contends that, even if Golden is an insured for purposes of the Act, coverage is precluded since driver's injuries were incidental to, and did not arise out of, the use of the motor vehicle. We disagree.

The loading and unloading of the insured vehicle in this case constitutes a covered use which is not foreign to the inherent use of the insured vehicle. *See* ***358** *Colorado Farm Bureau Mutual Insurance Co. v. West American Insurance Co., supra;* *Azar v. Employers Casualty Co.,* 178 Colo. 58, 495 P.2d 554 (1972).

However, for an injury to "arise out of the use" of a motor vehicle, there must be a causal connection or relationship between the injury and the use of the vehicle which must show that the injury would not have occurred "but for a conceivable use of the vehicle that is not foreign to its inherent purpose." *Kohl v. Union Insurance Co.,* 731 P.2d 134 (Colo.1986); *see* *Titan Construction Co. v. Nolf,* 183 Colo. 188, 515 P.2d 1123 (1973); *Trinity Universal Insurance Co. v. Hall, supra.* It is sufficient if the claimants demonstrate that the injury originated in, grew out of, or flowed from a use of the vehicle. *Kohl v. Union Insurance Co., supra;* *State Farm Automobile Insurance Co. v. Cung La,* 819 P.2d 537 (Colo.App.1991).

Again, agreeing with the trial court, we conclude that the injuries sustained by the driver flowed from the loading of the truck. But for the loading of the cylinder onto the truck, the injuries would not have occurred. Thus, pursuant to § 10–4–706(1), C.R.S. (1991 Cum.Supp.), Home must provide liability coverage for the bodily injuries sustained from the accident.

III.

The automobile liability policy also contains an exclusion which precludes coverage for "[b]odily injury or property damage resulting from the movement of property by a mechanical device (other than a hand truck) not attached to the covered auto." Home contends that this policy exclusion operates to preclude coverage. We disagree.

Since we have determined that driver's injuries arose from a covered use of the truck, the Act mandates that Home provide compulsory coverage therefor. Accordingly, the exclusion is invalid inasmuch as it narrows the circumstances under which compulsory coverage applies. *Cf.* *Williams–Diehl v. State Farm Fire & Casualty Co.,* 793 P.2d 587 (Colo.App.1989).

The judgment is affirmed.

STERNBERG, C.J., and SMITH, J., concur.

All Citations

841 P.2d 354

278 Fed.Appx. 454

United States Court of Appeals,
Fifth Circuit.

GULF UNDERWRITERS INSURANCE COMPANY, Plaintiff–Appellant,
v.
GREAT WEST CASUALTY COMPANY, Defendant–Appellee,
v.
Hammerblow Corporation, Defendant–Appellant.

No. 06–51294.
|
May 22, 2008.

Synopsis

Background: Excess insurer sued automobile insurer, seeking a declaration that the automobile insurer's policy afforded coverage for claims in an underlying tort suit. The United States District Court for the Western District of Texas, 2005 WL 946834, granted summary judgment against the excess insurer, and it appealed.

Holdings: The Court of Appeals held that:

term "operation," within the meaning of a Wisconsin statute requiring the automobile policy to cover liability of vehicle owners or operators arising from the negligent operation of the vehicle, encompassed loading and unloading done by use of a mechanical device, but

genuine issues of material fact existed as to whether an operator had permission to load and unload an insured trailer.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***454** Richard P. Colquitt, Fulbright & Jaworski, Houston, TX, for Plaintiff–Appellant.

***455** Anthony Scott Cox, Hermes Sargent Bates, Dallas, TX, for Defendant–Appellee.

Appeal from the United States District Court for the Western District of Texas, USDC No. 04–CV–432.

Before KING, STEWART, and PRADO, Circuit Judges.

Opinion

PER CURIAM: *

**1 This is a declaratory judgment case addressing coverage under an automobile policy issued by Great West Casualty Co. ("Great West") with respect to an underlying state court tort suit brought by Arturo Garcia against Hammerblow Corporation ("Hammerblow"). Gulf Underwriters Insurance Co. ("Gulf"), Hammerblow's excess insurer, sought a declaration that the Great West policy afforded coverage to Hammerblow for the claims within the tort suit. The district court, relying on a mechanical device exclusion contained in the Great West policy, granted summary judgment to Great West. Because we conclude that the district court erred in upholding the exclusion, and therefore in granting summary judgment to Great West, we vacate the judgment entered below and remand for further proceedings.

I.

Hammerblow is a manufacturer and distributor of trailer jacks and couplers, headquartered in Wisconsin. Roehl Transport, Inc. ("Roehl") is a transport company that is based in Wisconsin, but also does business in Texas. In 1994, Hammerblow and Roehl reached an agreement authorizing Hammerblow to use Roehl's trailers. Under this arrangement, Roehl transported raw materials from Wisconsin to Hammerblow's El Paso facility. Roehl would then drop the loaded trailer in El Paso and hookup to a trailer with finished goods, which it would transport to other cities on its way back to Wisconsin. After Roehl dropped off the loaded trailer of raw materials in El Paso, Hammerblow would move the Roehl trailers to Hammerblow's Juarez, Mexico facility and then back to El Paso. It is undisputed that, under the agreement between the parties, Hammerblow had permission to load and unload the Roehl trailers with loads that would be transported by Roehl. However, the parties dispute whether the agreement permitted Hammerblow to load and unload the trailer with other materials, that would not be transported by Roehl, for its own purpose and use.

On December 11, 2002, Arturo Garcia, an independent Mexican truck driver, was injured at the El Paso Hammerblow facility when steel pipes fell onto him from the bed of a trailer owned Roehl. Prior to Garcia's arrival at the yard, Javier Rodriguez was utilizing a forklift to load the bundles of round steel tubes onto the flat-bed trailer. Roehl had not been contracted to haul the steel tubes that Rodriguez was loading on to the Roehl trailer. Rodriguez had not yet completed loading the trailer when Garcia arrived to pick up the load and was injured by the falling pipes. At the time of Garcia's injury, Rodriguez was not operating the forklift, but was walking back to the forklift to complete the loading of the pipes. After the pipes fell, Rodriguez used the forklift to move the pipes off Garcia.

Hammerblow had several insurance policies in place at the time of the accident. It had a primary commercial general liability policy issued by Northfield Insurance ***456** Company ("Northfield") and a primary auto policy issued by Royal Insurance Company ("Royal"). [1] Hammerblow also had a commercial excess liability policy issued by Gulf. This policy limited Gulf's indemnity obligation to "ultimate net loss" in excess of the amount of insurance provided by policies of "underlying insurance," and expressly provided that the policy was "excess over any other valid and collectible insurance whether such other insurance stated to be primary, contributing, excess, contingent or otherwise."

**2 At the time of the accident, Roehl was covered by a commercial auto policy issued by Great West. The Great West policy was issued in Wisconsin to Roehl, a Wisconsin insured. Hammerblow is not named insured under this policy. The Great West policy provided primary liability coverage to anyone who permissibly used a covered auto owned by Roehl. The policy contains the following mechanical device exclusion:

B. EXCLUSIONS

This insurance does not apply to any of the following:

....

8. MOVEMENT OF PROPERTY BY MECHANICAL DEVICE

"Bodily injury" ... resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered "auto" ...

The policy states that: " 'Auto' means a land motor vehicle, 'trailer' or semitrailer designed for travel on public roads but does not include 'mobile equipment.' " The Great West policy issued to Roehl contains an endorsement stating that "[a]ny provision of this Coverage Part that is in conflict with a Wisconsin statute or rule is hereby amended to conform to that statute or rule."

On February 10, 2003, Garcia and his family filed a tort suit against Hammerblow and others in state court in El Paso.[2] After Garcia filed suit, Hammerblow tendered the claim to several insurers, including Gulf and Great West, for defense and coverage. Initially, Great West denied Hammerblow's request for coverage and defense, but subsequently, pursuant to a reservation of rights, Great West agreed to defend Hammerblow in the underlying tort suit in conjunction with Royal.

Gulf then filed this declaratory judgment action seeking a declaration that Hammerblow qualifies as an additional insured under the Great West policy; that the Gulf Policy is the "excess policy;" and that the Great West policy is an "underlying insurance" policy affording coverage to Hammerblow. At Great West's request, Hammerblow was added to the suit as a defendant. Hammerblow then filed a cross-claim against Great West seeking a declaration that Great West has a duty to defend and indemnify Hammerblow in the underlying lawsuit.

Gulf and Great West filed cross-motions for summary judgment. The district court granted the motion of Great West on the basis that the mechanical device exclusion in the Great West policy is valid under Wisconsin law and precludes the damages sought. The court then denied all other pending motions as moot, including Gulf's motion for summary judgment. Gulf subsequently sought reconsideration and leave to file a second amended complaint, but ***457** the district court denied both requests. Hammerblow and Gulf filed a timely notice of appeal from the district court's grant of Great West's motion for summary judgment and denial of Gulf's motions.

II.

This court reviews de novo a district court's grant of summary judgment, applying the same legal standards as the district court. *Allstate Ins. Co. v. Disability Servs. of the Sw. Inc.,* 400 F.3d 260, 262–63 (5th Cir.2005). Under Federal Rule of Civil Procedure 56, summary judgment is appropriate when the record discloses that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. FED R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In addition, we review de novo a district court's determination of a state law question. *Folks v. Kirby Forest Indus., Inc.,* 10 F.3d 1173, 1182 (5th Cir.1994).

****3** Coverage under an insurance policy is generally a question of law, *Kremers–Urban Co. v. Am. Employers Ins. Co.,* 119 Wis.2d 722, 351 N.W.2d 156, 163 (1984), although occasionally insurance coverage is the subject of factual disputes that make summary judgment inappropriate. *See, e.g., Atl. Mut. Ins. Cos. v. Lotz,* 384 F.Supp.2d 1292(E.D.Wis.2005).

III.

It is undisputed that the Great West policy contains a clear and unambiguous mechanical device exclusion. However, on appeal, Gulf contends that the mechanical device exclusion contained in the Great West policy is invalid under Wisconsin law [3] because Wisconsin law mandates that coverage under an automobile policy extend to a third party who is unloading or loading an insured vehicle. Therefore, Gulf argues, the mechanical device exclusion is unenforceable, and the district court's grant of summary judgment to Great West was in error.

Under Wisconsin law, when an exclusion in an insurance policy is in reference to some risk of coverage not required by statute, such exclusion is valid. *See* *Schneider v. Depies,* 266 Wis. 43, 62 N.W.2d 431, 434 (1954). Conversely, Wisconsin courts have invalidated exclusions contrary to the provisions of the Wisconsin insurance statutes or public policy. *See, e.g., Rocker v. USAA Cas. Ins. Co.,* 289 Wis.2d 294, 711 N.W.2d 634, 645 (2006). Finally, "[c]overages omitted from an insurance contract may nevertheless be compelled and enforced as though a part thereof where the inclusion of such coverage is required by a properly enacted statute." *Id.* at 646 (quoting *Progressive N. Ins. Co. v. Romanshek,* 281 Wis.2d 300, 697 N.W.2d 417 (2005)).

Wisconsin Statute § 194.41(1) requires, in part, that a motor carrier be covered by an insurance policy providing:

> that the insurer shall be directly liable for and shall pay all damages for injuries to or for the death of persons or for injuries to or destruction of property that may be recovered against the owner or operator of any such motor vehicles by reason of the negligent operation thereof in such amount as the department may require.

WIS. STAT. § 194.41 (2006). The statute does not define "operation," but in *Mullenberg v. Kilgust Mech., Inc.,* 235 Wis.2d 770, 612 N.W.2d 327 (2000), the Wisconsin Supreme ***458** Court examined "[w]hether Wis. Stat. § 194.41 because of its use of the term 'negligent operation' requires insurers to cover the loading activities of third-parties." *Id.* at 328. The court answered in the affirmative, stating that the words "operation" and "operator" in § 194.41 "must be read in the context in which they are used in order to promote the legislature's objective in enacting the statute." *Id.* Further, under Wisconsin Statute § 194.02, the words must be given " 'the most liberal construction to achieve the aim of a safe, competitive transportation industry.' " *Id.* (citing WISC. STAT.. § 194.02). Applying this principle, the court concluded that "the word 'operation' is not to be restricted to only a moving vehicle" and held that " 'negligent operation' encompasses loading and unloading" and that " 'operator' includes a third party permissively unloading the vehicle." *Id.* at 330–331.

****4** Under *Mullenberg,* it is clear that § 194.41 mandates that Great West provide coverage for injuries occurring during the loading and unloading of a vehicle by a permissive user. 612 N.W.2d at 328; *see also Lukaszewicz v. Concrete Research, Inc.,* 43 Wis.2d 335, 168 N.W.2d 581, 586 (1969) (interpreting "operate" to include the loading and unloading of a vehicle); *Bauer v. Century Sur. Co.,* 293 Wis.2d 382, 718 N.W.2d 163, 165 (2006) ("It is undisputed that if Johnston was loading or unloading the flatbed truck when the power line incident occurred, Great West must provide insurance coverage to Johnston under the policy." (citing *Mullenberg,* 612 N.W.2d at 327)). [4] Therefore, to the extent that the mechanical device exclusion omits coverage for loading and unloading, the exclusion is void under Wisconsin law, and Great West is obligated to provide such coverage under the policy.

Great West attempts to distinguish *Mullenberg* on the basis that it did not expressly consider the issue of whether § 194.41 requires coverage for loading and unloading conducted using motorized equipment not attached to the covered vehicle and not insured by the insurer. Great West further contends that the mechanical device exclusion at issue here is "widely used in

insurance policies" and "routinely upheld." It argues that adopting Gulf's construction of the statute would require Great West to provide coverage for a separate risk, the mechanical device, which Great West has not elected to insure and for which it has not received a premium. In support, Great West points us to a number of cases from other jurisdictions upholding similar exclusions, including *Travelers Indemnity Co. v. General Star Indemnity Co.,* 157 F.Supp.2d 1273 (S.D.Ala.2001); *Excel Logistics, Inc. v. Maryland Casualty Co.,* No. CV–93–0046415–S, 1995 WL 66990, 1995 Conn.Super. LEXIS 373 (Conn.Super.Ct. Feb. 1, 1995); and *Hanover Insurance Co. v. Canal Insurance Co.,* No. 05–1591(SDW), 2007 WL 1413413, 2007 U.S. Dist. LEXIS 39635 (D.N.J. April 3, 2007). However, as the Wisconsin Supreme Court has noted: "Cases from outside of this state are of little help in deciding a construction of our statute." *Lukaszewicz,* 168 N.W.2d at 586.

***459** As a federal court sitting in diversity, in the absence of a final decision by the state's highest court on the issue at hand, it is our duty to determine, in our best judgment, how the highest court of the state would resolve the issue if presented with the same case. *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.,* 953 F.2d 985, 988 (5th Cir.1992). In *Mullenberg,* the Wisconsin Supreme Court stated that:

> A motor carrier by definition undertakes to transport passengers and property. Wis. Stat. § 194.01(1). Inherent in this task is that the carrier will be loaded and unloaded. Loading and unloading involves repeated, frequent contact with the motor carrier. Within this framework and considering the subject matter of Wis. Stat. ch. 194, as well as the legislature directive to construe ch. 194 liberally to protect the shipping public as well as the traveling public, we conclude that "negligent operation" encompasses loading and unloading.

****5** 612 N.W.2d at 330–31. In light of these broad policy concerns, we conclude that the Wisconsin Supreme Court would interpret the word "operation" in § 194.41 to encompass all loading and unloading, including that done by use of a mechanical device. *See Bauer,* 718 N.W.2d at 165 (holding that § 194.41 mandated that the insurer provide coverage for an injury occurring during unloading of the covered vehicle and involving the use of a mechanical device). Our conclusion furthers Wisconsin's goal of interpreting § 194 "liberally" to "protect the shipping public as well as the traveling public." *See Mullenberg,* 612 N.W.2d at 331. Although Great West advances some persuasive policy arguments in support of its position, it has not pointed us to any caselaw indicating that Wisconsin would adopt these arguments and exclude loading and unloading by way of mechanical devices from the scope of § 194.41.

Therefore, because we conclude that the word "operation" in § 194.41 includes loading and unloading through the use of a mechanical device, an injury occurring during the permissive unloading of the vehicle must be covered by the motor carrier's policy, even if such loading or unloading is accomplished through the use of a mechanical device. To the extent that the Great West policy excludes such coverage, the exclusion is invalidated and coverage is compelled as though a part of the policy. *Rocker,* 711 N.W.2d at 646. Therefore, the application of the mechanical device exclusion contained in the Great West policy can not support a grant of summary judgment in its favor.

IV.

This is not, however, the end of our inquiry. As the Wisconsin Supreme Court has held, coverage under § 194 is only mandated if the individual was permissively loading or unloading the vehicle. *See Mullenberg,* 612 N.W.2d at 330–31 (defining the word "operator" in § 194.41 to include "a third party permissively unloading the vehicle"). Therefore, Great West is only required to provide coverage for Garcia's injury if Hammerblow's loading of the pipes onto the trailer was a permissive use. The burden of

proving requisite permission rests with the party seeking to establish coverage. *Derusha v. Iowa Nat'l Mut. Ins. Co.,* 49 Wis.2d 220, 181 N.W.2d 481, 482 (1970). Each party argues that the evidence regarding permissive use entitles it to summary judgment.

The district court's opinion evidences some confusion over the proper allocation of the burdens of proof with regard to summary judgment on this issue. "[T]he party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate ***460** the elements of the nonmovant's case." *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994). If the moving party meets the initial burden of showing that there is no genuine issue, the burden shifts to the nonmovant to set forth specific facts showing the existence of a genuine issue for trial. FED.R.CIV.P. 56(e). The nonmovant cannot satisfy his summary judgment burden with conclusional allegations, unsubstantiated assertions, or only a scintilla of evidence. *Little,* 37 F.3d at 1075.

****6** Applying this framework to the case at hand, with regard to Great West's motion for summary judgment, Great West was required to "demonstrate the absence of genuine issue of material fact" that Hammerblow *did not* have permission to load the trailer. *Id.* If Great West did so, the burden would then shift to Gulf to "go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial" regarding whether Hammerblow had permission. [5] *Id.* If Gulf failed to meet this burden, Great West's motion would be granted. Conversely, to succeed on its motion for summary judgment, Gulf was required to demonstrate an "absence of a genuine issue of material fact" that Hammerblow *had* permission to load the trailer. Therefore, if a genuine question of fact exists as to whether Hammerblow had permission to load and unload the trailer with the pipes, it would not be appropriate to grant either parties' motion for summary judgment.

Gulf argues that it is entitled to summary judgment because the undisputed evidence demonstrates that, as a matter of law, Hammerblow was permitted to load and unload the trailers for its own purposes. Great West argues that § 194.41 does not mandate coverage for Hammerblow because the evidence shows that, as a matter of law, Hammerblow was not a permissive user at the time of the accident. Our review indicates that the following evidence was submitted by the parties on the issue of permission: April 4, 1994 letter written by Michael Gross, a sales representative of Roehl; affidavit signed by Gross; deposition excerpts of Gross; the deposition testimony of Tom Liebl, a former Hammerblow employee responsible for scheduling the delivery of raw materials from Wisconsin to the El Paso plant; and the affidavit of Ted Christie, the general manager of the Hammerblow El Paso plant at the time of the incident.

A review of this evidence indicates that the issue of permission is squarely in dispute. Both parties produced testimony supporting their view of the permission issue. Great West produced an affidavit from Gross that "under the agreement, the trailer was not supposed to be used for any loads that Roehl itself was not going to pick up and was not to be used at Hammerblow's will and convenience." The affidavit also states that Rodriguez's loading of the pipes onto the trailer was outside of the agreement with Roehl. His affidavit also indicates his belief that Hammerblow was never permitted, in the history of the agreement, to use the trailers for its own purposes. In his deposition testimony, Gross discusses the unloading and loading permitted under the arrangement. He stated that with respect to the trailers surrendered to Roehl, "he expected it to be unloaded in Mexico and reloaded in Mexico with freight that Roehl was going to haul." However, as Gulf points out, ***461** Gross's testimony is directly contradicted by that of Liebl and Christie. Liebl testified that his understanding of the agreement was that "whatever trucking outfit there was that [sic] going down there that they'd have to allow their trailer to be transported across the border and unloaded and reloaded if needed." In his affidavit Christie states that the business arrangement "included Roehl's agreement to keep a Roehl trailer at the Hammerblow facility in El Paso/Juarez so that it would be unloaded and loaded by Hammerblow at Hammerblow's convenience. He concluded that "[u]nder the business arrangement in place prior to and during December 2002, Hammerblow was permitted by Roehl to load and unload Roehl trailers with material at the Hammerblow facility in El Paso."

****7** Given the conflicting testimony, neither party is entitled to summary judgment because there is a genuine issue for trial regarding permission. At summary judgment, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder

of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Here, each party provided evidence sufficient to support a jury verdict in its favor regarding permission. Resolution of this issue comes down to a credibility determination, which is a genuine issue for trial.

V.

For the reasons stated above, we VACATE the district court's grant of summary judgment in favor of Great West and its dismissal of Gulf's motions for summary judgment and for leave to file a second amended complaint and REMAND this case to the district court for further proceedings not inconsistent with this opinion.

All Citations

278 Fed.Appx. 454, 2008 WL 2150022

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 Royal is not a party to this declaratory judgment action and paid its $1 million policy limits in the settlement of the Garcia tort suit.

2 The state tort suit settled shortly after the district court entered its final judgment in this declaratory judgment action. The settlement was funded by Royal and Gulf; Great West did not contribute.

3 The parties agree that, under Texas choice of law rules, Wisconsin law governs the issue of coverage under the Great West policy. *See, e.g., St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 (5th Cir.1996).

4 Great West attempts to distinguish *Mullenberg* on the grounds that its holding rested on whether the exclusion applied equally to all insureds under Wis. Stat. § 632.32. This argument is meritless. Because the court reached its holding based on the language of § 194.41, the *Mullenberg* court explicitly declined to consider whether § 632.32 would invalidate the exclusion at hand. *See Mullenberg*, 612 N.W.2d at 329 n. 4. Rather, the court clearly held that: "We conclude that the word 'operation' in Wis. Stat. § 194.41(1) includes loading and unloading and an individual permissively unloading the vehicle is covered by the motor carrier's policy." *Id.* at 328–29.

5 It is at this point that the district court erred. Rather than permit a showing of a dispute of material fact over the issue of permission to defeat Great West's motion for summary judgment, the district court appears to have required Gulf to show that Hammerblow had permission as a matter of law. This was incorrect, as a showing that the issue of permission was squarely in dispute would be sufficient to defeat Great West's motion.

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