No. 2006-CA-02141

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

WILLIAM PHILLIPS

Appellant

v.

NATIONAL FIRE INSURANCE COMPANY
OF HARTFORD, ET AL.

Appellees

Appeal from the Circuit Court of Coahoma County, Mississippi
The Honorable Charles E. Webster, Circuit Court Judge

BRIEF OF THE APPELLEES
(ORAL ARGUMENT NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. William Phillips, who is the Appellant.

2. Ellis Turnage (Turnage Law Office), who is counsel of record for William Phillips.

3. National Fire Insurance Company of Hartford, which is an Appellee. National Fire Insurance Company of Hartford is a wholly-owned subsidiary of Continental Casualty Company (see # 4).

4. Continental Casualty Company, which is an Appellee. Continental Casualty Company is a wholly-owned subsidiary of The Continental Company, which is owned by CNA Financial Corporation. The common stock of CNA Financial Corporation is publicly traded. Loews Corporation, whose stock is also publicly traded, owns approximately 89% of the common stock of CNA Financial Corporation.

5. Jeffrey S. Dilley (Henke-Bufkin, P.A.), who is attorney of record for National Fire Insurance Company of Hartford and Continental Casualty Company.

6. Enterprise Transportation Service Company, which is a defendant below but not a party to this appeal. Upon information and belief, the only stockholders of Enterprise Transportation Service Company are Jessie and Ethel Jones.

7. Clifton Hall, who is a defendant below but not a party to this appeal.

8. Thomas C. Gerity (Wyatt, Tarrant & Combs, LLP), who is counsel of record for Enterprise Transportation Service Company and Clifton Hall.

SO CERTIFIED on this, the 22nd day of October, 2007.

Jeffrey S. Dilley
Attorney for National Fire Insurance Company of Hartford and Continental Casualty Company

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument need not be permitted in this case, as the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE CASE

A. Nature of the Case

William Phillips ("Phillips") allegedly sustained personal injuries as a result of a motor vehicle accident that occurred on August 6, 2001, in Coahoma County, Mississippi. At the time of the accident, Philips was a guest passenger in an automobile owned by Enterprise Transportation Service Company ("Enterprise") and operated by Clifton Hall ("Hall"), an Enterprise employee. Phillips contends that Hall's negligence and/or gross negligence was the sole proximate cause of the accident and that such negligence and/or gross negligence is imputed to Enterprise under the doctrine of *respondeat superior*.

As of August 6, 2001, Enterprise was contracted with NTC Transportation, Inc. ("NTC") to provide transportation services to participants in the Temporary Assistance to Needy Families ("TANF") program. Phillips was not a TANF participant (although the vehicle in which he was riding was en route to pick up a TANF participant at the time of the accident), and Phillips was not being transported at the request of NTC. Enterprise maintained liability insurance coverage on its fleet of vehicles, including the vehicle in question, under a policy issued by National Fire & Marine Insurance Company. NTC maintained separate automobile liability coverage; NTC's primary liability coverage was provided by National Fire Insurance Company of Hartford ("National"), and its excess liability coverage was provided by Continental Casualty Company ("Continental").

Neither Enterprise nor Hall was designated as an insured under NTC's policies. Likewise, none of Enterprise's vehicles were scheduled on NTC's policies.

The policies issued by National and Continental afford coverage to anyone who, with NTC's permission, operates a vehicle that is owned, hired or borrowed by NTC. Phillips maintains that, at the time of the accident, Enterprise's vehicle had been "hired" by NTC and that, as a result, the National and Continental policies afford coverage to Hall and Enterprise. National and Continental deny that hired auto coverage applies in this instance, since NTC did not hire this vehicle from Enterprise but merely contracted with Enterprise for transportation services.

B. Summary of the Proceedings Below

Phillips commenced this action on September 10, 2001, by filing a complaint against Hall and Enterprise. [C.P., pp. 6-13][1] On September 29, 2003, Phillips amended his complaint to add NTC as a defendant. [C.P., pp. 16-19] As grounds for his claim against NTC, Phillips generally asserted that, at the time of the accident, Enterprise and Hall were engaged in performing transportation services for NTC and that, as a result, NTC should be held vicariously liable for the alleged negligence of Hall. [C.P., pp. 17-18] On May 2, 2005, Phillips filed a second amended complaint, adding a claim for declaratory judgment against National, which insured NTC under a primary liability policy, and Continental, which insured NTC under an umbrella liability policy. [C.P., pp. 494-505] In his second amended complaint, Phillips requested a judicial declaration that, by virtue of the relationship between NTC and Enterprise, Hall and Enterprise were covered under the National and Continental policies. [C.P., pp. 500-504]

---

[1] *In all citations to the record contained in this brief, "C.P." shall reference the clerk's papers, "R.E."* shall reference the record excerpts filed by Phillips, and "Transcript" shall reference the composite transcript of the motion hearings conducted in the court below.

Prior to the filing of the second amended complaint, NTC filed a motion for summary judgment. [C.P., pp. 39-192] On July 12, 2005, the circuit court entered an opinion granting summary judgment in favor of NTC, concluding, *inter alia*: that Enterprise was an independent contractor and not an employee or agent of NTC; that Hall was not an employee of NTC; and that NTC bore no vicarious liability for any actions or omissions of Enterprise and/or Hall in connection with the accident. [C.P., pp. 640-652] In accordance with this opinion, on July 28, 2005, the court entered a final judgment dismissing the claims against NTC with prejudice. [C.P., p. 662] Phillips did not appeal the final judgment entered in favor of NTC.

On December 30, 2005, National and Continental filed a motion for summary judgment, asserting that, under the clear and unambiguous policy terms, the liability coverage afforded to NTC did not extend to Hall and Enterprise. [C.P., pp. 663-784] On January 25, 2006, Phillips responded to National and Continental's motion and also filed a cross-motion for partial summary judgment on the issue of coverage. [C.P., pp. 785-803] Phillips argued that coverage extended to Hall and/or Enterprise under the "hired auto" provision of the National Fire policy, claiming that the automobile involved in the accident was "hired" by NTC under an oral subcontract between Enterprise (which owned the vehicle) and NTC. [C.P., pp. 790-792] Phillips further asserted that coverage was afforded under the excess (Continental) policy because said policy extends coverage to any insured designated under the primary (National) policy. [C.P., p. 792]

Both sides submitted memoranda to the court supporting their respective interpretations of the policies, and, on March 22, 2006, Circuit Judge Larry O. Lewis heard oral argument from counsel on the motion and cross-motion. [Transcript, pp. 1-23] On April 3, 2006, the court entered an order granting National and Continental's motion for summary judgment, denying Phillips' cross

motion for partial summary judgment and dismissing with prejudice the claims asserted against National and Continental. [C.P., pp. 955-963; R.E. at 3]

On June 19, 2006, Phillips served a motion for reconsideration. [C.P., pp. 964-971] By this time, Judge Lewis had retired from the bench, and Judge Charles E. Webster had taken his place. Both sides submitted memoranda to the court relative to the motion for reconsideration, and, on August 28, 2006, the court heard oral argument from counsel concerning this motion. [C.P., pp. 964-981; Transcript, pp. 24-43] On November 21, 2006, the court entered an order denying Phillips' motion for reconsideration. [C.P., pp. 982-985; R.E. at 4] On the same date, the court also entered final judgment in favor of National and Continental pursuant to M.R.C.P. 54(b). [C.P., pp. 986-987; R.E. at 5] This appeal followed.

C. Summary of Facts Relevant to the Issue Presented for Review

As noted, this action arises from a motor vehicle accident that occurred on August 6, 2001, in Coahoma County. [C.P., p. 494] At the time of the accident, Phillips was a passenger in a motor vehicle that was being operated by Hall, an Enterprise employee. [C.P., pp. 494-495] Said vehicle was being utilized by Enterprise for the purpose of transporting participants in the TANF program, which is funded by the Mississippi Department of Human Services ("DHS").[2] [C.P., pp. 93-95] The participation by Enterprise in the TANF program can be ultimately traced to a contract between DHS and a consortium of non-profit entities, which provided for the non-profits to transport TANF participants in the Delta region to and from work or school. [C.P., pp. 94-95] Because the non-profits did not have the resources to service the entire Delta, they were permitted by DHS to contract with for-profit companies such as NTC. [C.P., pp. 95-96] NTC had contracts with several non-

[2]As will be explained, Phillips was not a TANF participant. However, a brief summary of the TANF program, as it relates to Enterprise, is necessary to understand the relationship between Enterprise and NTC.

profit entities, pursuant to which it was compensated at a rate of $1.00 per mile to transport TANF participants. [C.P., p. 100] NTC subsequently entered into a verbal subcontract with Enterprise for the transportation of TANF participants. [C.P. pp. 96-101, 238-239] Under the Enterprise/NTC subcontract, Enterprise was compensated by NTC at a rate of 50 cents per mile for transporting TANF participants. [C.P., pp. 100, 239]

At all times relevant to this action, Enterprise was a free-standing, independent transportation service. [C.P., pp. 243-245] Enterprise maintained its own fleet of cars, purchased its own insurance policies, and hired its own drivers. [C.P., pp. 241-242] Enterprise paid its drivers $6.25 per hour and withheld payroll taxes from the wages of its employees. [C.P., p. 242] Pursuant to its transportation services contract with NTC, Enterprise transported between six and ten TANF participants per day. [C.P., p. 243] NTC informed Enterprise of when and where to pick up TANF participants. [C.P., pp. 250, 402] Enterprise used its own manpower and equipment to transport the TANF participants, and NTC did not dictate which car or type of car was to be used or which driver was to operate the vehicle. [C.P., pp. 98-100, 241-242] Enterprise invoiced NTC and received payment from NTC for transportation services rendered at the aforementioned rate of 50 cents per mile. [C.P., p. 100]

At the time of the subject accident, Hall was driving a vehicle owned by Enterprise and was en route to Robinsonville to pick up a TANF participant waiting for transportation back to a residence in Bolivar County. [C.P., pp. 234-235, 260-261] Phillips was a passenger in the vehicle driven by Hall but was not a TANF participant. [C.P., p. 454] Enterprise permitted Phillips to ride in its vehicle at the request of Phillips; NTC had no role in Enterprise's decision to provide transportation to Phillips. [C.P., p. 249]

As of August 6, 2001, NTC was insured under a commercial automobile policy issued by National, being policy number 226760218, which provided primary liability coverage up to $1 million per accident. [C.P., pp. 694-742; R.E. at 7] The National policy provides in pertinent part as follows:

BUSINESS AUTO COVERAGE FORM

...

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

...

SECTION I - COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages.[3] The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

A. Description of Covered Auto Designation Symbols

...

Symbol	Description of Covered Auto Designation Symbols	
7	Specifically Described "Autos"	Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).
8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Nonowned	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households but only while used in your business or your personal affairs.

...

[3]Item Two of the Declarations provides that covered "autos" for liability are those designated by numerical symbols 7, 8 and 9. [C.P., p. 711; R.E. at 7]

SECTION II - LIABILITY COVERAGE

A. Coverage

We will pay all sums an "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".

...

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply.

...

1. Who Is an Insured

The following are "insureds".

a. You for any covered "auto".

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:

(1) The owner or anyone else from whom you hire or borrow a covered "auto". This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

(2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.

(3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.

(4) Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company), or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".

(5) A partner (if you are a partnership), or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.

c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

...

SECTION V - DEFINITIONS

...

F. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

[C.P., pp. 721-722, 729; R.E. at 7]

NTC was likewise insured under a commercial umbrella liability policy issued by Continental, being policy number 226760235, which provided liability coverage of $1 million per accident excess of the underlying coverage afforded under the National policy. [C.P., pp. 743-769; R.E. at 8] The Continental policy provides in pertinent part as follows:

COMMERCIAL UMBRELLA PLUS COVERAGE PART

...

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we," "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under **SECTION II - WHO IS AN INSURED**.

...

SECTION I - COVERAGES

1. Insuring Agreement.

We will pay on behalf of the insured all sums that the insured becomes legally obligated to pay as "ultimate net loss" because of:

a. "Bodily injury";

b. "Property Damage";

c. "Personal Injury"; or

d. "Advertising Injury",

caused by an "incident" which takes place during the policy period and in the policy territory.

...

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:

...

c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

2. Each of the following is also an insured:

...

e. Any other persons or organizations included as an insured under the provisions of the "scheduled underlying insurance" in Item 5. of the Declarations and then only for the same coverage, except for limits of liability, afforded under such "scheduled underlying insurance".

[C.P., pp. 752, 755]

Neither Hall nor Enterprise was a named insured under the National policy or the Continental policy. [C.P., pp. 693, 710, 745; R.E. at 7, 8] Likewise, the vehicle owned by Enterprise and being operated by Hall at the time of the accident was not a scheduled vehicle under the primary (National) policy. [C.P., pp. 693, 698-705, 712-713]

SUMMARY OF THE ARGUMENT

The question presented on appeal is whether Hall and Enterprise are additional insureds under the primary and excess liability policies issued by National and Continental respectively to NTC. Phillips' sole argument in favor of coverage is that the vehicle operated by Hall at the time of the accident was "hired" by NTC, thus extending coverage to Hall and Enterprise as permissive users. The National policy affords coverage to "anyone using with your permission a covered 'auto' you own, hire or borrow," subject to certain exceptions that follow. In the policy preamble, the terms "you" and "your" are defined to mean the named insured, which is NTC. Thus, coverage is afforded to anyone operating, with NTC's permission, a *vehicle owned, hired or borrowed by NTC.* The Continental policy affords coverage to anyone designated as an insured under the primary (National) policy, meaning that a person qualifying as an insured under the National policy will likewise qualify as an insured under the Continental policy. As such, the dispositive issue is whether the subject vehicle was a "hired auto" under the terms of the National policy.

The relevant policy terms and conditions are clear and unambiguous. The term "hire", when used in conjunction with the term "auto", is not subject to more than one reasonable interpretation. To "hire" an "auto" is to procure the use of an auto. The undisputed evidence shows that NTC entered into an agreement with Enterprise for transportation services. There is absolutely no evidence that NTC procured the use of this vehicle. According to the established case law in Mississippi and elsewhere, in order to be considered a hired automobile for purposes of insurance coverage, there must be a separate contract by which the vehicle is hired or leased to the insured for the insured's exclusive use and control. In this instance, there was no contract for hire of the vehicle and, likewise, NTC never had exclusive use and control of this vehicle. Accordingly, the judgment in favor of National and Continental should be affirmed.

ARGUMENT

A. Standard of Review

A grant or denial of summary judgment is reviewed *de novo* on appeal based upon the same Rule 56(c) standard employed by the trial court. Hudson v. Courtesy Motors, Inc., 794 So.2d 999, 1002 (Miss. 2001). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). The party seeking summary judgment bears the burden of showing that there is no genuine issue of material fact to be tried. Pearl River County Board v. South East Collection, 459 So.2d 783, 785 (Miss. 1984). Once this showing has been properly made and supported, the party opposing the motion must bring forth probative evidence legally sufficient to make apparent the existence of triable fact issues. Smith v. First Fed. Sav. & Loan Assn. of Grenada, 460 So.2d 786, 792 (Miss. 1984). In order to constitute a "triable fact issue," an issue must be "a material one, one that matters in an outcome determinative sense." Shaw v. Burchfield, 481 So.2d 247, 252 (Miss. 1985); see also Erby v. North Miss. Medical Center, 654 So.2d 495 (Miss. 1995).

The interpretation of insurance policy language is a question of law, not one of fact. Lewis v. Allstate Ins. Co., 730 So.2d 65, 68 (Miss.1998). Thus, a dispute concerning the presence or absence of coverage, where there exist no underlying factual issues affecting coverage, is properly the subject of a summary judgment motion. Johnson v. Preferred Risk Auto. Ins. Co., 659 So.2d 866, 871 (Miss. 1995).

B. Rules of Policy Interpretation

In determining the intentions of the parties to a contract of insurance, a court must limit its examination to the "four corners" of the policy, and the insurance contract must be construed in accordance with its plain language. Lewis v. Allstate Ins. Co., 730 So.2d 65, 68 (Miss. 1998); Farmers Mutual Ins. Assn. v. Martin, 226 Miss. 515, 521, 84 So.2d 688, 690 (1956). Thus, it is only when a policy term is ambiguous that it will be construed in favor of the insured; when the contract is not ambiguous, it must be given effect as written. Id. Where an insurance policy does not provide the definition for a term or phrase, the term or phrase shall be afforded its ordinary and popular meaning. Blackledge v. Omega Ins. Co.,740 So.2d 295, 298 (Miss.1999). Additionally, insurance policies are to be enforced according to their provisions; the Court may not accept a strained, forced or unrealistic construction of a policy in violation of long-standing contractual interpretation principles. Noxubee County School Dist. v. United Nat. Ins. Co., 883 So.2d 1159, 1166 (Miss. 2004). Finally, the Court should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result. J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So.2d 550, 552 (Miss. 1998).

C. The National Policy

Pursuant to its "hired auto" provision, the National policy extends coverage to "anyone using with *your* permission a covered 'auto' *you* own, *hire* or borrow," subject to certain exceptions that follow.[4] See Business Auto Coverage Form, Section II (emphasis added). In the policy preamble, the terms "you" and "your" are defined to mean the named insured, which is NTC. Thus, under

[4]None of these exceptions are applicable to the dispositive issue, which is whether the vehicle in question was a hired auto.

these clear and simple terms, coverage is afforded to one operating, with NTC's permission, a *vehicle* that is *hired* by NTC.

There is no evidence that the vehicle in question was hired by NTC; rather, the record unequivocally shows that NTC and Enterprise entered into an oral contract for transportation services. Further, it is undisputed that the vehicle was owned by Enterprise, that the vehicle was being used and controlled exclusively by Enterprise (not NTC) at the time of the accident, and that there was no rental agreement or lease between NTC and Enterprise relating to said vehicle. Likewise, as Enterprise had the sole and exclusive use of the vehicle, Enterprise did not obtain (and, indeed, had no reason to obtain) the permission of NTC to operate said vehicle. While the scope of hired auto coverage has not been previously addressed by the Mississippi Supreme Court, the Fifth Circuit Court of Appeals has recognized that, under Mississippi law, the hiring of a contractor to furnish transportation services is not tantamount to the hiring of an automobile and does not invoke hired auto coverage. This is consistent with the well-established rule that, in order for a vehicle to constitute a hired automobile for purposes of insurance, there must be a separate contract by which the vehicle is hired or leased to the insured for the insured's exclusive use and control. As NTC did not hire Enterprise's vehicle, Hall and Enterprise are not covered under the National policy.

In an effort to establish coverage on behalf of Hall and Enterprise under the National policy, Phillips argues: (1) that the term "hire" as used in conjunction with "auto" in the National policy is ambiguous and must therefore be defined in the broadest sense possible so as to afford coverage to Hall and Enterprise; (2) that the cases upon which the trial court relied in granting summary judgment are based upon dissimilar policy provisions or are otherwise distinguishable; and (3) that the hired auto language at issue in this case has been construed by other courts to afford coverage under similar circumstances. As hereinafter discussed, none of these assertions are meritorious.

1. The hired auto language in the National policy is clear and unambiguous.

Phillips has failed to demonstrate any ambiguity in the National policy's usage of the terms "hire" and "auto". As noted, the National policy affords coverage to the permissive user of an "auto you ... hire," with the term "you" referring to NTC, the named insured. Thus, the clear and unambiguous meaning of this provision is that coverage is afforded to one who is operating, with NTC's permission, a vehicle hired by NTC; such coverage does not extend to the users of non-hired vehicles that are merely be utilized to provide labor or services. Black's Law Dictionary defines the term "hire" as follows:

> 1. To engage the labor or services of another for wages or other payment. 2. To procure the temporary use of property, usu. at a set price. 3. To grant the temporary use of services <hire themselves out>.

Black's Law Dictionary (8th ed. 2004). Thus, Black's distinguishes between hiring "the temporary use of property" (i.e., a vehicle) and hiring the "labor or services of another" (i.e., the services of someone to remove transport TANF participants). Mississippi law makes this same distinction. See Liberty Mutual Fire Ins. Co. v. Canal Ins. Co., 177 F.3d 326 (5th Cir. 1999) (holding that, under Mississippi law, a contract for logging and transportation services was not a "contract of hire" for a particular vehicle). The undisputed proof is that NTC retained the services of Enterprise; Phillips has not alleged, and there is no proof to show, that NTC hired the vehicle that was being operated by Hall at the time of the accident.

This policy language clearly requires that the thing hired by the named insured be an automobile for the named insured's own use. It does not insure "any person who performs services for you while using an automobile," which is the construction that is urged by Phillips. In addition, the policy language requires the named insured to be the party who hired the vehicle for its own use;

otherwise, the named insured would be in no position to grant anyone permission to use the vehicle. In this instance, Phillips seeks to have the Court adopt a strained interpretation of the policy, contrary to the clear and precise language that was used. The Court is not free to, in effect, re-write the policy and ascribe a meaning that was never intended in order to manufacture coverage that does not exist. See Life & Cas. Ins. Co. v. Harvison, 187 So.2d 847, 853 (Miss. 1966).

The question of whether a policy provision is ambiguous presents a legal issue, and an ambiguity will only be deemed to exist where the language is subject to more than one *reasonable* interpretation. Universal Underwriters Ins. Co. v. Ford, 734 So.2d 173, 176 (Miss.1999). The interpretation offered by Phillips is not reasonable, and it bears no relationship to the actual language utilized in the policy. Certainly, when used alone, the term "hire" can have two meanings; however, the term "hire", when used in conjunction with the term "auto", is not subject to more than one reasonable interpretation. To "hire" an "auto" is to procure the use of an auto. The circuit court properly found that the National policy is not ambiguous and concluded that there was no evidence that NTC had procured the use of the vehicle in question. Under the clear and plain meaning of the hired auto provision of the National policy, no coverage is afforded to Hall or Enterprise.

2. For hired auto coverage to exist there must be a separate contract providing for the insured's exclusive use and control of the vehicle.

Exclusive use and control by the named insured is the predominate factor in determining whether a particular vehicle constitutes a "hired auto". 8A COUCH ON INSURANCE § 118:46 (3rd ed. 2007).

> The key inquiry regarding whether an automobile will fall within the hired automobiles provision of the policy is whether the insured exercised dominion, control or the right to direct the use of the vehicle.
>
> * * *

Automobiles which are owned and being used by subcontractors and independent contractors hired by the insured will not constitute hired automobiles under the policy because, under most circumstances, the subcontractor or independent contractor exercises independent control over the vehicle, not the insured. The mere fact that an amount is paid to subcontractors, independent contractors, or employees to account for mileage or wear and tear of a vehicle does not make the vehicle a hired or leased auto.

Id. (emphasis added)

Shortly after Phillips filed his second amended complaint (bringing National and Continental into the case), the circuit court granted summary judgment in favor of NTC, finding as a matter of law that Enterprise was an independent contractor of NTC. [C.P., pp. 640-652] The court subsequently entered a final judgment in favor of NTC in accordance with M.R.C.P. 54(b), and Phillips did not appeal this judgment. [C.P., p. 602] In so ruling, the court found as follows:

> 32. NTC did not furnish the means and appliances for the work. [Enterprise] purchased its own fleet of vehicles, maintained the vehicles, financed its own operations, and hired its own drivers.
>
> 33. NTC did not have control of [Enterprise's] premises. While NTC or its employees may have visited [Enterprise's] premises, it did not have any ownership [or] control of the premises or right to enter the premises.
>
> * * *
>
> 35. NTC did not have the right to supervise and inspect the work of [Enterprise]. Ownership of [Enterprise] may have allowed ownership of NTC to review employee records, but there is no evidence that NTC had any role in oversight of the actual transportation of the TANF participants. Further, there is no indication that NTC evaluated, disciplined, hired, or terminated any driver of [Enterprise].
>
> 36. NTC had no right to direct the details of the manner in which the transportation was to be done. NTC merely notified [Enterprise] of which TANF participants needed transportation and when and where to pick up and drop off the passengers. Only essential information was provided, and NTC did not have any other influence over which car or type of car was used, which driver operated the vehicle, or any other logistics of how best to transport all the TANF participants to and from work or school.

[C.P., pp. 648-649] As the lower court found, and as an independent review of the summary judgment record will confirm, the vehicle in question was owned by Enterprise and utilized to transport TANF participants, the vehicle was being used by Enterprise (not NTC) at the time of the accident, Enterprise (not NTC) had exclusive use and control of the vehicle, and there was no separate agreement between NTC and Enterprise relating to the vehicle (i.e., NTC did not contract with Enterprise for the use of the vehicle). As Enterprise was an independent contractor providing transportation services to NTC, its vehicle did not constitute a "hired 'auto'" for purposes of the National policy.

The question of what constitutes a hired automobile was considered by the Fifth Circuit Court of Appeals in Liberty Mut. Fire Ins. Co. v. Canal Ins. Co., 177 F.3d 326 (5th Cir. 1999), a case decided under Mississippi law.[5] This case arose from an automobile accident involving McConnell, a contract logger. McConnell was an independent contractor for ATCO, a sawmill operator, and the accident occurred in connection with McConnell's activities under the contract. Summarizing the contract, the court noted that "ATCO had the right to inspect McConnell's operations to ensure compliance with the Agreement; but ATCO had no right to control the time, manner, or method by which McConnell fulfilled his obligations under the contract and had no right to select or control the activities of McConnell's employees. The Agreement did not require McConnell to use any particular vehicle to fulfill the contractual transportation and delivery obligations. Nor did it entitle ATCO to use or operate any vehicles owned by McConnell or to select the delivery routes taken by McConnell or his employees." Liberty Mut, 177 F.3d at 330. In considering whether McConnell

[5]Phillips has criticized the circuit court's reliance on Liberty Mut. because this decision addressed the insurer's duty to defend rather than its duty to indemnify. Of course, neither duty will arise in the absence of coverage, so this distinction is inconsequential. The ultimate question addressed in Liberty Mut. was whether the vehicle in question was a hired auto so as to establish coverage for the insured's subcontractor under the insured's policy. Liberty Mut., 177 F.3d at 335.

was covered under ATCO's policy, the court found that ATCO did not "hire" McConnell's vehicle but merely contracted with McConnell for labor and services. Id. at 335. Thus, the court concluded that McConnel was not the permissive user of a hired automobile and that, as such, ATCO's policy afforded no coverage to McConnell or McConnell's driver. Id.

Because of the requirement of exclusive use and control, it is further recognized that, in order to be considered a hired auto for purposes of insurance coverage, there must be a separate contract by which the vehicle is hired or leased to the insured for the insured's exclusive use and control. 8A COUCH ON INSURANCE § 118:45 (3rd ed. 2007). This principle has been accepted in most jurisdictions across the United States. For instance, in Toops v. Gulf Coast Marine Inc., 72 F.3d 483 (5th Cir. 1996), the Fifth Circuit reversed the district court's determination of coverage under an almost-identical "hired auto" provision. In that case, Dayton-Scott Equipment Company contracted with a shipping company, Rig Runner, to transport heavy equipment from Louisiana to Texas. Rig Runner subcontracted with two independent owner-operators to do the job. While moving the equipment, one of the drivers was involved in an accident that resulted in the death of the driver of the other vehicle. Toops, 72 F.3d at 485.

The decedent's parents obtained a judgment against Rig Runner and the trucker, which they sought to recover against Dayton-Scott's insurer, arguing that Rig Runner was insured under Dayton-Scott's policy because the vehicle was a hired auto. The district court found that there was coverage, concluding that Dayton-Scott "hired" Rig Runner to transport the equipment. Id. Applying Texas law, the Fifth Circuit reversed, recognizing the fundamental distinction between hiring a vehicle and hiring someone to perform a service:

> [T]he facts show that [the truck driver] was not even a Rig Runner employee driving a Rig Runner truck, but was an independent contractor who owned his own truck and was paid on commission. The District Court failed to make this distinction between

> hiring a company that provides transportation and hiring a truck. "*[F]or a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use and control.*"

Id. at 487 (emphasis added; citations omitted). The Fifth Circuit concluded that, because the truck was not under the exclusive use and control of Dayton-Scott, it was not a "hired" vehicle for purposes of Dayton-Scott's insurance policy. Id.

In Toops, the Fifth Circuit cited Sprow v. Hartford Ins. Co., 594 F.2d 418 (5th Cir. 1979), a case which, interestingly enough, was decided under Mississippi law. In Sprow, it was held that "for a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control." Sprow, 594 F.2d at 422.

The same conclusion was reached by the Louisiana Court of Appeals in Gore v. State Farm Mut. Ins. Co., 649 So.2d 162 (La. Ct. App.), *writ denied*, 653 So.2d 555 (La. 1995). As recited in the court's opinion, Gore Logging had a contract with a paper company to haul timber. Gore Logging subcontracted some of the work to George Log Cutting. After an accident, George claimed to be an omnibus insured under Gore Logging's business automobile liability insurance policy. Like the policy in this case, the policy in Gore also covered hired autos. George argued that his truck qualified as a hired auto. The court squarely rejected this contention, stating:

> We believe that the clear meaning of the policy definition[6] of "hired autos" refers only to those vehicles which the insured has procured for his own use by agreement with the owner. ...

---

[6]The policy definition cited in the Gore case was virtually identical to the "Hired 'Autos' Only" description in the National policy. It stated:

> HIRED "AUTOS" ONLY. Only those "autos" you, lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your employees or partners or members of their households.

Gore, 649 So.2d at 165.

* * *

> It is clear from the cases cited that the key inquiry regarding whether a vehicle is leased, hired, rented or borrowed for the purposes of the "hired auto" provision of the policy is whether the alleged lessee, hirer, renter or borrower exercised dominion, control or the right to direct the use of the vehicle.
>
> Payment to George as a subcontractor, even presuming George factored in the wear and tear and use of his own equipment in his contract price does not make the vehicle a hired auto under this analysis. In the instant case, the evidence is clear that Gore Logging exercised no control over George's vehicle, and that George was, in fact, an independent contractor with respect to Gore. Accordingly, we conclude that the George vehicle was not a "hired auto" within the meaning of [Gore's] insurance policy.

Gore, 649 So.2d at 165.

This issue was also addressed in Earth Tech, Inc. v. United States Fire Ins. Co., 407 F.Supp.2d 763 (E.D. Va. 2006). In that case, a contractor was seeking coverage under its subcontractor's commercial automobile policy, asserting that the contractor had "hired" the subcontractor's vehicle. In rejecting this contention, the court observed:

> Clearly, at some point, the distinction between a hired auto and a company hired to perform transportation services must be drawn, lest a "hired auto" clause be construed to cover every auto involved, however tangentially, in the provision of a service. In recognition of this problem, courts distinguishing "hired autos" from transportation services generally have done so depending on the level of control over the auto exercised by the entity claiming coverage.
>
> * * *
>
> Given this, it follows that the tractor-trailer at issue here is not a "hired-auto" but an auto separately owned and operated by Capitol's subcontractor, FCI. The terms of the contract between Capitol and FCI establish that the tractor-trailer was not specifically "hired" by Capitol, but was simply the means by which FCI was performing the transportation services required by the contract.

Earth Tech, 407 F.Supp.2d at 771-72 (internal citations omitted).

Similarly, in Chicago Ins. Co. v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc., 929 F.2d 372 (8th Cir. 1991), the court, applying Arkansas law, found that the vehicle utilized by a subcontractor

to haul grain was not a "hired automobile" within the meaning of the contracting firm's automobile policy. In United States Fire Ins. Co. v. Milood Ben Ali, 198 F.Supp.2d 1313 (S.D.Fla. 2002), the same result was reached applying Florida law.

In the instant case, it is undisputed that Enterprise furnished its own vehicles (the accident vehicle being one) in the performance of its oral subcontract with NTC to transport TANF participants. Moreover, NTC had no control over how, when, or where Enterprise operated its vehicles. It paid no expenses for the operation of Enterprise's vehicles and maintained no insurance on them. Finally, NTC did not have a separate contract with Enterprise for the use of the vehicle in question. As the circuit court recognized in granting NTC's motion for summary judgment, Enterprise was an independent contractor that employed Hall to drive its vehicle. As NTC did not have exclusive use or control of the subject vehicle, this vehicle was not a "hired auto".

3. The authorities cited in support of Phillips' coverage argument are inapposite.

The legal authorities cited by Phillips in support of his coverage argument are not relevant to the issue at hand. For instance, while Pawtucket Mut. Ins. Co. v. Hartford Ins. Co., 147 N.H. 369, 787 A.2d 870 (2001), addresses hired auto coverage, the vehicle at issue in that case was in fact rented by an employee of the insured and the rental charge was paid by the insured. The court concluded that, notwithstanding the fact that the employee used the rental vehicle for a pleasure trip (on which he was accompanied by a long-time client), the employer/insured paid for the rental and thus "hired" the vehicle. Id., 787 A.2d at 873. Thus, the vehicle at issue in Pawtucket Mutual was the subject of a contract for hire (i.e. the rental agreement) and was under the exclusive control of the insured's employee. Neither of these factors are present in the case at hand.

The scope and applicability of hired auto coverage was also addressed in Kresse v. Home Ins. Co., 765 F.2d 753 (8th Cir. 1985). That case arose from a gravel hauling contract between Cass County and Kresse. Pursuant to the contract, the County was afforded significant control over the manner in which Kresse operated his truck. As the court noted, "the [C]ounty determined the route to be used and had the right to dismiss any driver that deviated from it. The trucks had specified hours of operation determined by the county. The County loaded the trucks and supervised the unloading." Id. At 755. In addition, "Kresse's truck's hauling capacity was measured by the County at the beginning of the season. Once measured, Kresse was required to use the specific truck for the entire hauling season." Id. 765 F.2d at 756. The court concluded there was sufficient control by Cass County over Kresse's truck to bring the truck within the ambit of the hired auto coverage of the County's policy. Id. As shown above, NTC had no control over the manner in which Enterprise operated its fleet, and NTC had no role in selecting the particular vehicle that Enterprise would utilize at a given time in the performance of its contract. Whereas Cass County had extensive (if not exclusive) control over Kresse's truck, NTC had no control over the vehicle herein at issue.

The remaining cases cited by Phillips address "borrowed" vehicles. While the same provision in the National policy addresses both hired and borrowed automobiles, there is absolutely no evidence that NTC "borrowed" the subject vehicle. "The term 'borrow' as it relates to this provision means that the insured receives both the benefit of the borrowed automobile's use and temporary possession, dominion, or control of the use of the automobile. The use of the terms 'loaned' or 'borrowed' thus still require inquiry into the insured's control over the automobile." 8A COUCH ON INSURANCE § 118:47 (3rd ed. 2007). Thus, in American Indemnity Ins. Co. v. Code Electric Corp., 157 Ariz. 571, 760 P.2d 571 (Ariz. Ct. App. 1988), the court concluded that a vehicle in the temporary possession and subject to the insured's exclusive use was a "borrowed" automobile

for purposes of the possessor's policy. Id., 760 P.2d at 573. Likewise, in Brile v. Estate of Brile, 296 Ill.App.3d 661, 695 N.E.2d 1309 (1998), the court concluded that a truck rented by an employee of the insured and being used in an employment capacity was borrowed by the employer/insured. Id. 695 N.E.2d at 1613. Finally, The Travelers Indemnity Co. v. Swearinger, 169 Cal.App.3d 779, 214 Cal.Rptr. 383 (1985), concerned the issue of whether a vehicle operated by a student on school business was "borrowed" by the insured school district. Each of these cases involved a scenario where the insured had temporary possession, domination or control over a vehicle. It is without dispute that NTC had no possession, domination or control with respect to the subject Enterprise vehicle.

Contrary to Phillips' position, there is an important distinction, recognized under Mississippi law, between engaging one's services and hiring one's vehicle. By engaging the services of Enterprise to provide transportation services for TANF participants, NTC did not hire the vehicle in question or any of the other vehicles in the Enterprise fleet. Accordingly, no coverage is afforded to Hall or Enterprise under the hired auto provision of the National policy.

D. The Continental Policy

Phillips has asserted no separate grounds for coverage under the Continental policy. He merely asserts that, to the extent Hall and Enterprise are afforded coverage under the hired auto provision of the National policy, they are likewise afforded excess coverage under the Continental policy, since the Continental policy covers any insureds delineated under the National policy. As already shown, Hall and Enterprise are not covered by the National policy.

CONCLUSION

Based upon the authorities hereinabove set forth, the Appellees, National Fire Insurance Company of Hartford and Continental Casualty Company, respectfully request that the circuit court's grant of summary judgment in their favor be affirmed.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Jeffrey S. Dilley, attorney of record for the Appellees, National Fire Insurance Company of Hartford and Continental Casualty Company, do hereby certify that, on October 22, 2007, I filed the original and three copies of the Appellees' Brief, along with a copy of the same on electronic disk, with the clerk of the Supreme Court and Court of Appeals by depositing the same in the United States mail and that I forwarded a true and correct copy of the Appellees' Brief by United States mail to each of the following persons:

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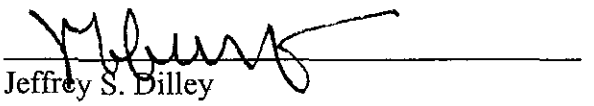

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