IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-CA-02141 ~~SCT~~ COA

WILLIAM PHILLIPS — APPELLANT

V.

NATIONAL FIRE INSURANCE COMPANY ET AL — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF COAHOMA COUNTY, MISSISSIPPI

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

This case centers on the "hired auto" coverage contained in the NFICOH and CCC policies procured by NTC to fulfill its obligations under the September 19, 2000 TANF transportation sub-contract with Aaron flowing from Aaron's contract with DHS. The trial court concluded the ETSC vehicle driven by Hall on August 6, 2001 did not fall within the meaning of a "hired auto" and the liability insurance coverage under the NFICOH and CCC policies did not extend to ETSC and Hall or to appellant's bodily injuries.

The argument section of appellant's opening brief in this Court seeks appellate review of the legal correctness of the trial court's summary judgment order in favor of NFICOH and CCC. Specifically, appellant argued that the failure of the NFICOH policy to define "hire" rendered the term susceptible to varying reasonable interpretations and therefore ambiguous; that the cases

relied upon by the trial court to grant summary judgment were based upon dissimilar policy provisions or are otherwise distinguishable; and that the insuring provisions in the NFICOH policy has been construed by other courts to find coverage.

In their brief, appellees argue that the insuring provisions of the NFICOH policy are a clear and unambiguous; that there must be a separate contract providing for the insured for the insured's exclusive use and control for coverage to exist; and that the authorities cited by appellant in favor of coverage are inapposite. Brief of Appellee at pages 13.

This reply will address the issues raised in the Brief of Appellees in the same order as briefed by the appellees discussing first the evidence demonstrating that NTC did in fact "hire" the ETSC vehicle; then a brief discussion of applicable principles of Mississippi insurance law; then the provisions of the insuring agreement and exclusionary clauses set forth in the NFICOH insurance policy; and lastly a discussion of the cases cited by appellees are inapposite.

1. Record Evidence Demonstrating NTC Hired The ETSC Vehicle.

As noted in his opening brief, ETSC exclusively provided transportation services for NTC. Moreover, NTC was ETSC's only source of income. C.P. 181-182. ETSC collected payment from NTC after presenting NTC with an invoice for transportation services. NTC paid ETSC 50 cents per mile to pick up, transport, and drop off TANF participants. C.P. 180. NTC would fax an order for transportation to ETSC with the necessary information to transport

TANF participants such as when and where ETSC should pick and drop off participants. C.P. 99-101.

ETSC drivers used ETSC-owned vehicles to transport TANF participants and completed daily logs to indicate the client, pickup and drop off location and mileage under verbal agreement with NTC. The daily logs were used by ETSC to get paid by NTC. C.P. 191.

2. Applicable Principles of Mississippi Insurance Law.

The interpretation of an insurance policy, like any contract, is a legal question. Welborn v. State Farm Mut. Auto. Ins. Co., 480 F. 3d 685, 687 (5th Cir. 2007) (per curiam). The initial question of whether the contract is ambiguous is a matter of law. Benchmark Health Care Ctr. Inc. v. Cain, 912 So. 2d 175, 182 (Miss. 2005) (citation omitted). Mississippi courts give effect to the plain meaning of an insurance policy's clear and unambiguous language. Robley v. Blue Cross/Blue Shield of Miss., 935 So. 2d 990, 996 (Miss. 2006). No rule of construction requires or permits Mississippi courts to make a contract differing from that made by the parties themselves, or to enlarge an insurance company's obligation where the provisions of its policy are clear. State Farm Mut. Ins. Co. Of Columbus v. Glover, 176 So. 2d 256, 258 (Miss. 1965). Nor will a court resort to extrinsic evidence of rules of contract construction if policy provisions are unambiguous. Jackson v. Daley, 739 So. 2d 1031, 1041 (Miss. 1999).

If a court determines that ambiguity inheres in the policy language, the familiar maxim omnia praesumuntur contra proferentum

requires the court to construe ambiguous terms in favor of the policyholder. J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998). Ambiguity arises when a term or provision is susceptible to more than one reasonable meaning, but can also result from "internal conflict" between policy provisions that renders uncertain the meaning of the policy as a whole. See Miss. Farm Bureau Mut. Ins. Co. v. Walters, 908 So. 2d 765, 769 (Miss. 2005). The court must then select the interpretation "which give the greater indemnity to the insured." State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So. 2d 1371, 1372 (Miss. 1981). The insurer bears the burden of proving that a particular peril falls within a policy exclusion; the insurer must plead and prove the applicability of an exclusion as an affirmative defense. Commercial Union Ins. Co. v. Byrne, 248 So. 2d 777, 782 (Miss. 1971). Mississippi court strictly construe policy exclusions against the insurer. Scitzs, 394 So. 2d at 1372-73.

3. The Provisions Of The Insuring Agreement And Exclusionary Clause.

The general insuring provisions of Section II A 1 b of NFICOH policy 226760218 defines "INSURED" to include:

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:

i. 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.

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

iii. 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.

iv. 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".

v. 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.

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

C.P. 320. (emphasis added).

The general insuring provisions of Section II 2 e of the CCC policy 226760235 defines "INSURED" to include:

WHO IS AN INSURED

***

2. Each of the following is also insured:

***

d. 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. 337.

The thirteen (13) enumerated exclusions in the NFICOH policy do not apply to the facts of this case. See C.P. 321-323. Appellees' brief does not analyze the material undisputed facts under applicable Mississippi law governing the insuring and exclusionary provisions contained in the NFICOH and CCC insurance policies. Under Mississippi law, the interpretation of insuring and exclusions provisions is limited to the written terms of the policy. Alfa Ins. Co. v. Ryals, 918 So.2d 1260, 1262 (Miss.2005). NFIC's failure to define the term "hire" renders the insuring agreement susceptible to varying reasonable interpretations. Burton v. Choctaw County Nursing Center, 730 So. 2d 1, 8 (Miss.1999) (the policy's failure to define the policy term "nursing treatment" rendered the exclusionary clause ambiguous); Universal Underwriters Ins. Co. v. Ford, 734 So. 2d 173, 176 (Miss.1999). The NFIC insurance policy does not contain an insuring or exclusionary clause that expressly require a separate contract for the insured's exclusive use and control. The trial court's opinion granting summary judgment and appellees' argument to this Court import terms and text not contained in the NFICOH policy. Compare, Blakely v. State Farm Auto Ins. Co., 406 F. 3d 747, 752 (5th Cir.2005) (the Wilkinson policy is thus distinguishable because it did not expressly limit the definition of "repair" or "cost of repair" as the instant State Farm policy did. There is nothing in either the Smith or Newman policies that indicates the policies at issue in those cases contain an explicit limiting definition of

"repair", "replace" or "cost" of replacement"). The NFICOH policy contains no insuring or exclusionary provision expressly limiting the hired auto coverage to require a separate contract for NTC's exclusive use or control. The exclusions contained in the NFICOH policy do not apply in this case.

The insuring provisions of the NFICOH policy afford coverage "to anyone else while using with your permission a covered "auto" your own, hire or borrow . . . ." C.P. 721-22. Appellees concede that "[n]one of these exceptions are applicable. . . ." Appellees Brief at page 12, footnote 4. Appellees agrue that "such coverage does not extend to the users of non-hired vehicles that are merely be [sic] utilized to provide labor or services." Appellees Brief, page 14. This argument is in an effort made to limit or to exclude coverage under the hired auto endorsement. But neither of the thirteen (13) exclusions set forth in the NFICOH policy excludes coverage for the reasons asserted by appellees. The exclusions in the NFICOH policy are set forth at C.P. 321-323.

4. The Cases Relied Upon By Appellees.

The cases cited by appellees are mostly from jurisdictions other than Mississippi and are of limited use. First, though appellees are correct that courts in other jurisdictions have adopted in some form, the position appellees urge here, those courts did so in the context of interpreting exclusions (as opposed to an affirmative grant of coverage under an insuring agreement as is the case here). Each court tasked with interpreting an insurance policy must consider the specific language of the insurance policy

at issue. The reported cases relied upon by the trial court and appellees involve materially different policy language. In this case to limit the affirmative grant of coverage under the insuring provisions as urged by appellees would require this court to import the meaning of Black's Law Dictionary and limiting exclusions in other insurance policies into the NFICOH policy. The judicial decisions cited by the trial court's opinion and appellee's brief involve materially different insuring and/or exclusionary clauses than those contained in the NFICOH insurance policy. See, e.g. Sprow v. Hartford., 594 F. 2d 418, 422 (5th Cir.1979) (applying Mississippi law, but denied coverage under exclusion provisions that insurance did not apply to "a non-owned automobile used in a joint venture not designated as a named insured..." and "because there was not a separate contract under which the truck has hired to L.D.'s business"); Toops v. Gulf Coast Marine Inc., 72 F.3d 483, 487 (5th Cir.1996) (applying Texas law and noting "[a]ccording to the insurance policy at issue, Toops was required to prove that Dayton-Scott not only hired a "covered auto"...but that the drivers of the hired autos were under the control of Dayton-Scott").

The decision in Liberty Mutual Fire Ins. Co. v. Canal Ins. Co., 177 F.3d 326 (5th Cir.1999) is clearly inapposite and involves an insurer's duty to defend which is determined by the allegations of the complaint. In Liberty Mutual, on cross-motions for summary judgment, the district court entered summary judgment in Liberty Mutual's favor finding that ATCO was an insured under the Canal policy, that Liberty Mutual had no duty to defend McConnell Logging

and its driver, that Canal was liable for attorneys' fees and the $112,500 Liberty Mutual paid to settle the claims against ATCO.

On appeal, the Fifth Circuit affirmed that Canal had the duty to defend ATCO in the Carlock litigation because ATCO met the definition of an insured under the Canal policy under the allegations of the complaint rule, that Liberty Mutual had no duty to defend McConnell Logging and its driver, but reversed that district court's finding that Canal's breach of its duty to defend caused Liberty Mutual to pay the $112,000. In a duty to defend case, coverage is determined by the allegations in the complaint. See Farmland Mut. Ins. Co. v. Scruggs, 886 So. 2d 714, 719 (Miss. 2004).

The insuring provisions contained in the NFICOH and CCC policies do not require a separate contract by which the vehicle is hired to the insured for the insured's exclusive use and control. The insuring provisions contained in the NFICOH and CCC policies do not expressly limit coverage to situations involving a separate contract by which the vehicle is hired to the insured for the insured's exclusive use and control. The terms of the NFICOH and CCC policies do not expressly limit or exclude coverage for "a vehicle that is utilized to provide labor or services." Furthermore, the NFICOH and CCC policies contain no insuring or exclusionary clause which distinguishes between hiring "the temporary use of property" and hiring the "labor or services of another."

The deposition testimony of Jessie Jones (the owner of ETSC)

demonstrates that ETSC began providing transportation services for NTC in May 2001 at $0.50 per mile. ETSC did not provide transportation service for anyone other than NTC. C.P. 181-182. Furthermore, NTC required ETSC to complete daily logs as to mileage and the persons transported in order to be paid. C.P. 191. Under the relationship between NTC and ETSC, NTC faxed ETSC the work ETSC was to perform for NTC. Then, ETSC would invoice NTC and NTC would pay ETSC. C.P. 99-101.

Larry Skeen at American Auto Insurance Agency of Greenville, Inc. was NTC's insurance agent. After NTC received the TANF contract, Netterville took a copy of the contract to American Auto. NTC told American Auto that TANF participants were being transported under the Mississippi Department of Human Services contract and of the possibility of ETSC doing some transport work for NTC under the DHS contract. C.P. 115-117. NTC requested the agent, Larry Skeen at American Auto to insure the known risks of NTC's business, specifically including and contemplating the risk of being sued for personal injuries caused by collisions involving vehicles being used to carry out NTC's contractual transport obligations. Netterville also advised American Auto that ETSC would possibly do some TANF work for NTC. C. P. 115-117. By letter dated January 5, 2001, Lori Beaumont at Crump Group in Memphis, Tennessee requested additional information to 5 questions concerning NTC's operations from Larry Skeen at American Auto in order to provide a quote for insurance coverage. In response to question 3 on the January 5, 2001 letter, the handwritten notes state "At the present, they are also contracted to transport passengers to and

from work through the Mississippi Department of Human Services work program." C.P. 915. NTC paid $36,004.00 for the coverage under the NF and CCC polices. Neither Hall or plaintiff was an employee, partner, officer or director of NTC. On August 6, 2001, the 1995 Oldsmobile owned by ETSC was being used at in accordance with NTC's faxed request and was en route to Robinsonville in connection with NTC's business to pickup a TANF participant when the collision occurred.

The 1995 Oldsmobile involved in the August 6, 2001 collision was "hired" under the verbal agreement between ETSC and NTC and in accordance with NTC's faxed request for ETSC to pick up a TANF participant in Robinsonville. The August 6, 2001 collision was an "occurrence" which arose out of the use of a vehicle "hired" by NTC that falls within the coverage clauses of the NFICOH and CCC policies and endorsements. No exclusion or limitations clause contained in the endorsements of either the NFICOH or the CC policy excludes coverage for the August 6, 2001 collision. The words set forth in the insuring and exclusionary clauses are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy. The provisions of neither insurance policy limits the insurer's liability to the definition of "hire" set forth in Black's Law Dictionary or require a separate contract providing for the insured's exclusive use and control of the vehicle. The NFICOH policy does not contain an explicit limiting definition of "hire".

SO REPLIED, this the 27th day of December, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ELLIS TURNAGE, attorney for appellant Louise Boston, certify that I have this day served a copy of appellant's reply brief by United States mail with postage prepaid to the following:

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This the 27th day of December, 2007.

Ellis Turnage
ELLIS TURNAGE

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TABLE OF AUTHORITIES

CASES