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

WILLIAM PHILLIPS — APPELLANT

V.

ENTERPRISE TRANSPORTATION SERVICE COMPANY, ET. AL. — APPELLEES

APPEAL FROM THE THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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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 Judges of this Court may evaluate possible disqualifications or recusal.

1. William Phillips, Appellant
2. Honorable Ellis Turnage, Counsel For Appellant
3. National Fire Insurance Company of Hartford, Appellee
4. Continental Casualty Company, Appellee
5. Honorable Jeffrey E. Dilley, Counsel for appellees
6. Honorable Thomas C. Gerity, Counsel for appellees
7. Honorable Charles E. Webster, Circuit Court Judge

Ellis Turnage

ELLIS TURNAGE
Counsel of Record for Appellant

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II. STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings And Disposition In The Court Below

This appeal stems from bodily injuries sustained by appellant, a guest passenger, in an automobile driven by Clifton Hall (Hall), owned by Enterprise Transportation Service Company (ETSC) and hired by NTC. On August 6, 2001, while in the course and scope of his employment at ETSC, Hall was driving a 1995 Oldsmobile northbound on Highway 1 near Moon Lake in Coahoma County and rear ended another northbound vehicle causing appellant's severe and permanent bodily injuries.

In May 2001,ETSC and NTC entered into a verbal agreement under which ETSC was paid $.50 per mile to transport Temporary Assistance to Needy Families (TANF) participants to various work locations in several Delta counties. NTC procured "hired auto" liability insurance coverage contained in policy number 226760218 issued by National Fire Insurance Company of Hartford (NFICOH) and policy number 22670235 issued by Continental Casualty Company (CCC) which were in effect on August 6, 2001. By order dated July 11, 2005, the trial court entered an order granting NTC's motion for summary judgment concluding the relationship between ETSC and NTC was an independent contractor and dismissed appellant's claims against NTC with prejudice. On March 31, 2006, the trial court granted summary

judgment in favor of NFICOH and CCC concluding the ETSC vehicle involved in the August 6, 2001 collision 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. Feeling aggrieved, appellant filed a notice of appeal to this Court on December 14, 2006.

B. STATEMENT OF THE FACTS

NTC was incorporated in 1998 by Jackie Netterville and Evelyn Netterville. NTC started out as a cab company and operated as such for approximately one year while also providing airport shuttle services. C.P. 82-84.

On September 19, 2000, DHS entered into a contract for transportation services with The Aaron E. Henry Community Health Service Center, Inc. ("Aaron"). Under the agreement, Aaron was compensated $1.74 per mile for transporting TANF participants. C.P.380-393.

Because Aaron was unable to service the entire Delta regions, DHS permitted Aaron to contract with for-profit companies like NTC that had the manpower and equipment to service the contract. Aaron agreed to pay NTC $1.00 per mile to transport TANF participants. C.P. 100. DHS could not contract with for profit entities like NTC. C.P. 93-95.

In the September 19, 2000 contract between DHS and Aaron for transportation services, paragraph 17 of the MDHS Contract For Personal Or Professional Services required $1,000,000 on all vehicles used to provide transportation services. C.P.383-384; C.P. 111.

ETSC began doing business and began providing transportation services in May 2001 when NTC verbally agreed to pay ETSC $0.50 per mile to transport TANF participants. C.P. 68-70; C.P. 100.

On average, ETSC transported six to ten TANF participants per day, but had transported as high as fifteen participants in a day. C.P. 184. The trips usually involved the transportation of participants between their residences in Washington, Bolivar, Sunflower, Coahoma and Tunica Counties and their places of employment at casinos in Robinsonville, Mississippi. C.P. 184. 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.

After ETSC and NTC entered into the verbal agreement, ETSC employees received training from NTC on how to complete the TANF forms and how to conduct themselves as drivers. NTC also provided driver training to some ETSC employees. Likewise, NTC would perform car inspections on ETSC's automobiles and would review ETSC

employee files to insure ETSC was meeting TANF requirements. C.P. 190.

On August 6, 2001, at the time of the collision, the ETSC 1985 Oldsmobile was hired by NTC to transport a TANF participant from Robinsonville in Tunica County to their home. The vehicle was furnished by ETSC as part of its verbal business arrangement with NTC to transport TANF participants upon NTC's faxed request.

Jackie Netterville, Sr., the owner of NTC informed Larry Skeen at American Auto in Greenville (the insurance agency that procured the NFICOH and CCC insurance policies) that NTC was transporting TANF participants and that ETSC would be hired to do TANF work for NTC. C.P. 115-117; By letter dated and faxed January 5, 2001, the Crump Group in Memphis, Tennessee requested additional from Larry Skeen at America Auto in Greenville concerning the procurement of insurance coverage for NTC. In response, Larry Skeen handwrote the answers to the questions and advised "they are contracted to transport passengers to and from work through Miss. Department of Human Service Work Program." C.P.915.

On August 6, 2001, appellant was a guest passenger in an automobile owned by ETSC, hired by NTC to provide transportation services under the MDHS contract and driven by Hall in a northerly direction on Highway 1, near Moon Lake, in Coahoma County, Mississippi to pick up a TANF participant waiting for transportation back to a residence in Bolivar County. C.P.234-235.

Prior to August 6, 2001, on two other occasions ETSC had permitted non-TANF participants to ride as guest passengers. On one of the occasions, NTC called ETSC and asked Jessie Jones if he

would take a stranded non-TANF participant to his home. C.P. 249.

On August 6, 2001, NTC had in force and effect NFICOH policy number 226760218 which provided $1,000,000 commercial liability insurance and CCC commercial umbrella liability policy number 226760235 which provided $1,000,000 excess liability coverage. C.P. 308. 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:
>
> 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.

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.

III. SUMMARY OF ARGUMENT

The determination central to the resolution of this case is the "hired auto" endorsement contained in NFICOH and CCC contracts of insurance. The familiar rule of contract interpretation under Mississippi law is that a clear an unambiguous contract will be enforced as written. Century 21 Deep South Properties v. Keys, 652 So.2d 707, 717 (Miss. 1995). Furthermore, "in contract construction cases our focus is on the objective fact- the language of the contract. We are concerned with what the contracting parties have said to each other, not some secret thought of one not communicated to the other." Heritage Cablevision v. New Albany Elec. Power System of New Albany, 646 So.2d 1305, 1313 (Miss. 1994) (quoting

Osborne v. Bullins, 549 So.2d 1337, 1339 (Miss.1989)).

However, "the familiar public policy" in Mississippi is that "courts must interpret the terms of an insurance policy (and the statutes from which they derive) liberally in favor of providing coverage for the insured." Gulf Guar. Life Ins. Co. v. Duett, 671 So.2d 1305, 1308 (Miss.1996) (citing Aetna Cas. and Sur. Co. v. Williams, 623 So.2d 1005, 1008 (Miss.1993)). Therefore an ambiguous term in an insurance policy must be construed against the drafter of the policy and in favor of the insured. Nationwide Mutual Ins. Co. v. Garriga, 636 So. 2d 658, 662 (Miss. 1994). An ambiguity in an insurance policy exists when the policy can be interpreted to have two or more reasonable meanings. See Insurance Co. Of North America v. Deposit Guaranty Nat. Bank , 258 So.2d 798, 800 (Miss.1972). Further, where a policy is subject to two interpretations equally reasonable, that which gives the greater indemnity to the insured should be adopted. State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So.2d 1371, 1372 (Miss. 1981); State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So.2d 805,811 (Miss.1970). In construing the hired auto endorsement, all ambiguities will be construed against the insurer. So, to benefit from an exclusionary provision in an insurance contract, the insurer must show that the exclusion applies and that it is not subject to any other reasonable interpretation that would afford coverage.

Under the general insuring provisions of policy number 226760218 and policy number 226760235, NFICOH and CCC are obligated to pay damages on an insured's behalf up to the stated policy

limits of $1,000,000. The ETSC vehicle driven by Hall on August 6, 2001 was a covered under the NFICOH and CCC policies as a "hired auto" as defined under the Business Auto Coverage form of the NFICOH and CCC policies. The suit against Hall and ETSC arose from the use of a covered hired auto. As such, there is coverage and NFICOH and CCC should be required to pay any judgment rendered in this action against Hall and ETSC for the August 6, 2001 collision.

Hall and ETSC are covered "insureds" under the applicable definitions of the NFICOH and CCC policies; the vehicle being driven by Hall was a covered "hired auto" within the meaning of the NFICOH and CCC insurance policies under Mississippi law and NFICOH and CCC are legally obligated to pay any judgment rendered against Hall and ETSC in appellant's favor arising out of the August 6, 2001 collision.

IV. LEGAL ARGUMENTS

1. Whether The "Hired Auto" Endorsement Of The Insurance Policies Issued By NFICOH and CCC Provide Liability Insurance Coverage For The Collision?

The Business Auto Coverage Form Declarations of the NFICOH policy provides:

BUSINESS AUTO COVERAGE FORM
DECLARATIONS
***

Item	
2.	SCHEDULE OF COVERAGES AND COVERED AUTOS
	This policy provided only those coverages where a charge is shown in th premium column below. Each of these coverages will apply only to those "autos" shown as covered "auto". "Autos" are shown as covered "autos" for a particular coverage by the entry of one or more of the symbols from the COVERED AUTO Section of the Business Auto Coverage Form next to the name of th coverage.

	COVERAGES	COVERED AUTOS (Entry of one or more of the symbols from the COVERED AUTO Section of the Business Auto Coverage Form shows which autos are covered autos)	LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS	PREMIUM
	LIABILITY	7,8,9	$1,000,000	$27,131.00

C.P. 308

The Business Auto Coverage Form of the NFICOH policy provides:

BUSINESS AUTO COVERAGE FORM

***

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

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.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V - Definitions.

SECTION I - COVERED AUTOS

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

A. Description Of Covered Auto Designation Symbols

SYMBOL	DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS	
SYMBOL	DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS	
7	Specifically Described "Autos"	Only those "auto's 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 "auto" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent, or borrow from any of our "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Nonowned "Autos" Only	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 of their household but only while used in your or your personal affairs.

***

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 any one 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, "auto" unless that business is your.
(4) Anyone other than your "employees", partners (if you are a partnership), members (if you are 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.

C.P. 319-320. (emphasis ours).

A. Mississippi Law On Construction of Insurance Policies.

Under Mississippi law, an insurance policy is a contract subject to the general rules of contract interpretation. Clark v. State Farm Mutual Ins. Co., 725 So.2d 779, 781 (Miss.1998). Therefore, courts interpret insurance policies according to

contract law. This interpretation is limited to the written terms of the policy. Alfa Insurance Corp. v. Ryals, 918 So.2d 1260, 1262 (Miss.2005); Farmland Mut. Ins. Co. v. Scruggs, 886 So.2d 714, 717 (Miss.2004); State Farm Mut. Auto Ins. Co. v. Universal Underwriters Ins. Co., 797 So.2d 981, 985-86 (Miss.2001). If the policy is unambiguous, its terms must be given their plain meaning and enforced as written. J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So.2d 550, 552 (Miss.1998). Further, provisions that limit or exclude coverage are to be construed liberally in favor of the insured and most strongly against the insurer in order that the purpose of insurance shall not be defeated. Such ambiguities must be construed in favor of coverage. Nationwide Mutual Ins. Co. v. Garriga, 636 So.2d 658, 662 (Miss.1994). An ambiguity exists when a provision in an insurance policy is subject to more than one reasonable interpretation. J & W Foods Corp., 723 So.2d at 551-52. If the Court finds ambiguity in the language of the insurance policy, then "the Court must necessarily find in favor of coverage." Id. at 552. The Mississippi Supreme Court has "recognized the need to protect insureds because of their uneven bargaining power in dealing with insurance companies." U.S. Fidelity & Guar. Co. v. Ferguson, 698 So.2d 77, 80 (Miss.1997). Policy terms should be understood in their plain, ordinary, and popular sense rather than in a philosophical or scientific sense. Blackledge v. Omega Ins. Co., 740 So.2d 295, 298 (Miss.1998).

An insurer's failure to define a term in an insurance policy renders the policy susceptible to varying reasonable

interpretations. Old Southern Life Ins. Co. v. McLaurin, 334 So.2d 361, 363 (Miss.1976) (undefined term "alcoholism" rendered policy ambiguous); National Old Line Ins. Co. v. Brownlee, 349 So.2d 513, 514-15 (Miss.1977) (undefined term "neoplasm" was not clearly expressed and too general in nature to eliminate coverage); Burton v. Choctaw County, 730 So.2d, 8 (Miss.1999) (the failure to define policy term "nursing treatment" renders exclusionary clause ambiguous). An ambiguity is created when a policy can logically be interpreted in more than one way, one of which would allow coverage. Universal Underwriters Ins. Co. v. Ford, 734 So.2d 173, 176 (Miss.1999). Because the term "hire" as used in the NFICOH and CCC policies can logically be interpreted in more than one way, the undefined term "hired" is ambiguous.

In the trial court, NFICOH and CCC cited Black's Law Dictionary (8th ed.2004) to import a definition not contained in either of the two policies. C.P. 898. The need to cite Black's Law Dictionary confirms no definition of "hire" is contained in the clauses of the NFICOH and CCC policies. If the definition of hire contained in Black's Law Dictionary was expressly stated in the NFICOH and CCC policies, there would be no reason to cite the Black's Law Dictionary definition. As aforestated, the reference to Black's Law Dictionary is an attempt to import terms into the policies that are plainly not in either policy. In order to limit or exclude coverage to "a vehicle that is utilized to provide labor or services engaged by NTC", the Court would need to read into the text of the limiting provisions that are simply not present. To be

effective, a limitation or exclusion must expressly limit the definition of "hire." Here, the policies failed to do so. See Universal Underwriters, 734 So. 2d at 178 (multiple acts of theft are sufficient related to constitute one occurrence or loss only where the applicable policy language states multiple acts may be so treated).

Next, NFICOH and CCC argued to the trial court that "the overly broad construction [for coverage] proposed by Plaintiff would lead to absurd results." C.P. 899. The hypothetical coverage analogy is unconvincing. When analyzing an insurance contract for ambiguity, the relevant facts are those in the instant case, not any possible hypothetical that may eliminate the ambiguity at a theoretical level. The case concerns "hired auto" coverage as defined in NFICOH and CCC policies. Any ambiguities in the insuring or exclusion clauses are strictly construed against NFICOH and CCC. Since neither policy expressly limits the definition of hire, if the 1995 Oldsmobile was "hired" by NTC on August 6, 2001 under any reasonable interpretation, coverage is available. Furthermore, none of the enumerated exclusions in either policy are applicable here. See C.P. 321-323. The exclusionary terms of the 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." Furthermore, the Court must interpret terms of insurance policies, particularly exclusion and limitation clauses, favorably to the insured wherever reasonably possible. Id. at 1373.

Furthermore, insurance policies are to be construed in the light of their purpose and the hazards they were designed to protect. Id. at 535. The term "hire" is undefined in the policies. The parties have demonstrated more than one reasonable interpretations of "hire." This Court should construe "hire" so that the purpose of the policies will not be defeated. It is reasonable on the facts of this case to interpret "hire" as to include coverage for the 1995 Oldsmobile on August 6, 2001. Consequently, there is coverage under the policies.

A hired auto provision includes coverage for "borrowed" and "loaned" vehicles. American Indemnity Ins. Co. v. Code Electric Corp, 157 Ariz. 571, 572, 760 P.2d 571, 572 (1988). Thus, the same legal analysis is used for borrowed, loaned or hired autos. The decisions in American Indemnity, 760 P.2d at 574; Kresse v. The Home Ins. Co., 765 F.2d 753, 755 (8th Cir. 1985); Indemnity Company v. Swearinger, 169 Ca. App.3d 779, 784, 214 Cal. Rptr. 383, 386 (1985), Pawtucket Mut. Ins. Co. v. Hartford Ins. Co., 147 N.H. 369, 372, 787 A.2d 870, 873 (2001) and Brile v. Estate of Brile, 296 Ill. 661, 666, 695 N.E. 2d 1309, 1312-13 (1998) found an ambiguity in either the term "borrow" or "hire" in a hired auto policy and applied the familiar rules of construction to find coverage. These decisions provide support for the argument that the undefined term "hired" in the policies is susceptible to varying reasonable interpretations. Thus, coverage is provided for the August 6, 2001 collision, due to the ambiguity arising from the undefined term "hire."

B. The Hired Auto Endorsement Does Not Require A Separate Contract For The Insured's Exclusive Use and Control.

The hired auto endorsement of the NFICOH and CCC policies do not require a separate contract by which vehicle is hired to the insured for the insured's exclusive use and control for coverage. Neither policy contains an express limitation or exclusion of coverage for the "hired" 1995 Oldsmobile involved in the August 6, 2001 collision. The policies' exclusions are specifically enumerated, C.P. 321-323, and none expressly limits or excludes Hall, the 1995 Oldsmobile and the August 6, 2001 collision from coverage under the NFICOH and CCC policies. Therefore, the outcome determinative question of policy interpretation is whether Hall, the 1995 Oldsmobile and the August 6, 2001 collision come within the coverage as defined within the NFICOH and CCC policies.

The order granting summary judgment requires the importation terms into the policies. The policies contain no limitation or exclusion which require "a separate contract by which the vehicle is hired for the insured's exclusive use and control." In order to limit the hired auto coverage provisions as urged by the insurers, the Court would need to read into the text exclusionary provisions that are not contained in the policies. Where, as here, if an undefined term used in an insurance policy is susceptible to varying interpretations, the Court should construe the undefined term in such a manner as to find coverage.

The trial court's importation of exclusionary terms into the policies is fundamentally inconsistent with the Court's duty to

faithfully apply the governing principles of Mississippi contract law. NFICOH and CCC have not pointed to any Mississippi legislative or judicial pronouncement that require an insurance policy written in Mississippi to include provisions which mandate there must be "a separate contract by which the vehicle is hired to the insured for the insured's exclusive use and control." To the contrary, under Mississippi law, in the absence of an affirmative expression of an overriding public policy by the legislature or judiciary, coverage is governed by the terms of each insurance policy in which it is afforded, including terms of limitation. Wooten v. MFBIC, 924 so. 2d 519, 523 (Miss. 2006); Alfa Ins. Corp v. Ryals, 908 So.2d 1260, 1263 (Miss.2005) (policy definition of "use" as the "actual manual and physical driving of a car" excluded uninsured motorist coverage for off road use of MDOT bucket). Due to the ambiguity in the undefined term "hire", the August 6, 2001 collision arose out of the use of a "hired" auto within the meaning of the policies. Therefore, Hall, the 1995 Oldsmobile and the August 6, 2001 collision come within NFICOH's and CCC's coverage obligation. Although NFICOH and CCC may well have intended to limit their "hired" auto coverage obligation, the limiting and exclusionary clauses contained in the policies did not expressly do so, as required by Mississippi law.

C. The Cases Relied Upon By The Trial Court Involve Materially Different Exclusionary Clauses.

The NFICOH and CCC provisions are factually distinguishable from the policy provisions interpreted in the cases relied upon by

the trial court. C.P. 961-963. The policy provisions at issue in those cases expressly required a separate contract by which the vehicle is hired to the insured for the insured's exclusive use and control. See, e.g. Sprow v. Hartford Ins. Co., 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 was 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 hired auto endorsement contains no provisions which require a separate contract by which the vehicle is hired on behalf of the insured for the insured's exclusive use and control. The cases relied upon by the trial court are of limited, if any, relevance to the instant situation because they involved policies that did explicitly limit coverage to require a separate contract by which the vehicle is hired to the insured for the insured's exclusive use and control. In the Who Is An Insured provisions of the NFICOH and CCC policies, "[a]nyone else while using with your permission, a covered auto you own, hire or borrow..." is an insured. There is no mention of a separate contract on behalf of the insured by which the vehicle is hired to the insured for the

insured's exclusive use and control.

The decisions relied upon by the trial court from jurisdictions other than Mississippi are of limited utility. First, though the courts in other jurisdictions have adopted, in some form, the position NFICOH and CCC urge here, those courts have done so in the context of interpreting exclusions which expressly limited coverage. Thus, the courts were bound to construe the exclusions narrowly. Second, in the cases relied upon by the trial court each court was tasked with interpreting those policies had to consider the specific language at issue.

D. One Case Relied Upon By The Trial Court Involves An Insurer's Duty to Defend.

The trial court relied upon Liberty Mutual Fire Ins. Co. v. Canal Insurance Co., 177 F. 3d 326 (5th Cir. 1999) to reach the conclusion of no coverage. Liberty Mutual is clearly inapposite and involves an insurer's duty to defend which is determined by the allegations of the complaint. In Liberty Mutual, after the underlying tort action (the Carlock litigation) was tried and a jury returned a verdict for $513,000 for the wrongful death of Jane Love, Liberty Mutual filed a declaratory judgment action against Canal for breach of the duty to defend ATCO (a sawmill insured by Liberty Mutual that had a Cutting and Hauling Agreement with McConnell Logging to transport ATCO logs). In the Carlock litigation, the plaintiffs' complaint alleged that McConnell Logging and its driver that caused the collision that killed Jane Love operated under had a master-servant relationship with ATCO.

As an equitable subrogee, Liberty Mutual filed a declaratory

judgment action and sought attorneys' fees and expenses incurred in the defense of ATCO in the Carlock litigation and the return of the $112,500 it paid to settle the Carlock claims against ATCO. Canal filed a counter-claim and asserted Liberty Mutual breached its duty to defendant McConnell Logging and its driver. 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 the district court's finding that Canal's breach of its duty to defend caused Liberty Mutual to pay the $112,000. As can be easily discerned, the decision in Liberty Mutual involved an insurer's duty to defend, but not the duty to indemnify. This case has nothing at all to do with the case at bar. The Liberty Mutual decision does not control the outcome of the Mississippi issued NFICOH and CCC insurance policies.

The NFICOH and CCC insurance policies issued to NTC provide coverage for the August 6, 2001 collision under the "Hired Auto" endorsement. According to Section II (A) under the Business Auto Coverage Form, the policy provides liability coverage for "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 fo a covered `auto'." The policy further provides that an "insured" is anyone else while using with your permission a covered `auto' you own, hire or borrow." The Declarations page of the policy provides coverage for various covered autos, including coverage for "Hired Autos." A "Hired Auto" under the insurance contract is defined as "only those `autos' you lease, hire, rent, or borrow." Based upon these contractual provisions in the policy, ETSC and/or Hall are insureds if Hall was using an automobile "hired" by NTC. The Mississippi Supreme Court has repeatedly stated, "Our familiar rule of contract interpretation is that a clear and unambiguous contract will be enforced as written." Gulf Guaranty Life Insurance v. Duett, 671 So.2d 1305, 1308 (Miss. 1996). "A court must effect `a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties.'" Delta Pride Catfish, Inc. v. Home Ins. Co .,697 So.2d 400, 404 (Miss. 1997) (quoting Cherry v. Anthony, Gibbs, Sage, 501 So.2d 416, 419 (Miss. 1987)). "Under Mississippi law, ambiguous and unclear policy language must be resolved in favor of the non-drafting party-the insured." Noxubee County School District v. United National Insurance Co., 883 So. 2d 1159, 1165 (Miss. 2004). Provisions that limit or exclude coverage are to be construed liberally in favor of the insured and most strongly against the insurer. Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 662

(Miss. 1994).

According to the record evidence, it is undisputed that NTC hired ETSC's automobiles to perform its transportation obligations under its contract with Aaron to transport participants of the TANF program. According to the deposition of Jackie Netterville, NTC would fax ETSC an order for transportation of a TANF participant and NTC would hire ETSC's automobiles and drivers to transport the participant. C.P. 99-101. Aaron would pay NTC $1.00 per mile to transport the TANF participants and NTC would pay ETSC $.50 per mile. C.P. 100. NTC required ETSC drivers to comply with training requirements and to attend NTC training classes. C.P. 108. Jackie Netterville informed NTC's insurance agent that NTC would be engaging ETSC's automobiles and drivers to transport the TANF participants. C.P. 116; C.P. 915. Jessie Jones, the President and CEO of ETSC, testified that ETSC did not provide its automobiles to anyone other than NTC. NTC was ETSC's only source of income. C.P. 181-182. Jones also testified Jackie Netterville, the owner of NTC, would review ETSC's employee files to make sure ETSC was meeting all of the TANF requirements. C.P. 190. NTC would perform car inspections on ETSC's automobiles and required ETSC to turn in daily transportation logs for each participant it transported. C.P. 190. Based upon these undisputed facts, the policy language provides ETSC and Hall were insured under the contract since NTC had hired ETSC's automobiles to perform its obligations under their TANF contract. NTC faxed daily orders for transportation, requested daily log records, trained the drivers, and inspected the vehicles that it had hired. There is no doubt permission was given to

ETSC's drivers to operate the automobiles NTC had hired to fulfill its obligations to Aaron.

The vehicle driven by Hall was a "hired auto" under NFICOH and CCC's policy language. Courts in other jurisdictions have similarly declined to add this additional restrictive requirement to the policy. See Pawtucket Mut. Ins. Co. v. Hartford Ins. Co., 787 A.2d 870,873 (N.H. 2001). The only purpose ETSC's automobiles served was to transport TANF participants under NTC's contract with Aaron. Jessie Jones testified that NTC was the only company that hired its automobiles and ETSC's only source of income.

IV. CONCLUSION

The NFICOH and CCC policies provide "hired auto" coverage for ETSC, Hall and the August 6, 2001 collision. Since Hall was using an automobile "hired" by NTC, there is coverage. This Court should reverse and render judgment that the NFICOH and CCC insurance policies provides coverage for the August 6, 2001 collision.

SO BRIEFED, the 21st day of August, 2007.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, ELLIS TURNAGE, attorney for petitioner, certify that I have this day mailed, postage prepaid, a true and correct copy of APPELLANT'S BRIEF to:

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THIS, the 21st day of August, 2007.

Ellis Turnage
ELLIS TURNAGE