PEGGY BRAZAN AND BROOKES BRAZAN WAGUESPACK

VERSUS

JEROLD WASHINGTON, CHARLOTTE ALEXANDER, SCOTTSDALE INSURANCE COMPANY AND WHY

NO. 16-CA-61

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES, STATE OF LOUISIANA
NO. 35,740, DIVISION "B"
HONORABLE THOMAS J. KLIEBERT, JR., JUDGE PRESIDING

June 14, 2016

FREDERICKA HOMBERG WICKER
JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Hans J. Liljeberg

LILJEBERG, J., DISSENTS WITH REASONS

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AFFIRMED

Defendant, Hallmark Specialty Insurance Company ("Hallmark")[1], appeals the trial court's November 16, 2015 grant of summary judgment in favor of plaintiffs, Peggy Brazan and Brookes Brazan Waguespack, and defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), finding that a sugarcane trailer was covered by a commercial auto policy issued by Hallmark to its named insured, Arabie Trucking Services, L.L.C. ("Arabie Trucking"). For the reasons fully discussed herein, we affirm the trial court's judgment declaring that Hallmark's policy covered the sugarcane trailer in question.

PROCEDURAL AND FACTUAL HISTORY

Hallmark's insured, Arabie Trucking, is in the transportation business, at least a portion of which includes transporting raw sugarcane from cane fields to sugar mills. Arabie Trucking entered into a Trucking Service Agreement with Lafourche Sugars, L.L.C. ("Lafourche") to transport sugarcane from Lafourche's cane farmer customers' fields to Lafourche's sugar mill. Arabie Trucking, in turn,

[1] Hallmark was erroneously named as "Hallmark Specialty Underwriters, Inc." in the trial court record.

entered into an agreement, entitled "Owner/Operator Independent Contract of Service Agreement," with WHY, a trucking company owned by Charlotte Alexander, to provide a 1999 International tractor, owned by WHY, and a driver to transport the sugarcane from the field to Lafourche's sugar mill.

Pursuant to the contract, Arabie Trucking assigned a 2007 MAGN sugarcane trailer, owned by Arabie Brothers Leasing, Inc., to WHY for use during the cane hauling season. Despite sharing the same principal owner, Arabie Trucking and Arabie Brothers Leasing, Inc., are distinct business entities. Though the record reflects that Arabie Brothers Leasing, Inc. owned the sugarcane trailer, there is no evidence of any agreement between Arabie Trucking and Arabie Brothers Leasing, Inc. regarding use of the trailer by Arabie Trucking or WHY. WHY, pursuant to its obligations under the contract, provided the 1999 International tractor and hired its driver, Jerold Washington, who was pulling the sugarcane trailer on December 14, 2012, at the time of the fatal accident at issue in this matter.

On the date of the accident, Mr. Washington was driving the tractor south on LA 20, a two-lane highway in St. James Parish. The tractor was towing the 2007 MAGN sugarcane trailer filled with raw sugarcane. According to a Louisiana State Police Uniform Motor Vehicle Traffic Crash Report, prior to the accident, a vehicle stopped in the southbound lane of LA 20 to avoid hitting a hunting dog running in the road. The decedent, Gaspard Brazan, was standing on the side of the road attempting to retrieve the dog. Mr. Washington told the investigating officer that he crossed the centerline of the road in an attempt to avoid hitting the vehicle stopped in southbound lane of the the road. The tractor driven by Mr. Washington struck an oncoming vehicle in the northbound lane before veering off the road. The tractor then struck Mr. Brazan's truck on the side of the road, which

in turn struck Mr. Brazan. The tractor and attached trailer eventually fell over onto their side and into a ditch.

The police crash report reflects that Mr. Washington told the investigating officer that he tried to stop, but the brakes did not work. The report also indicates Mr. Washington's commercial driver's license was "disqualified" at the time of the accident due to a "DWI." The Louisiana State Police also prepared a Commercial Vehicle Post-Crash Investigative Report, which states that its investigation of the trailer indicated that at least twenty percent of the brakes on the trailer were not working prior to the accident. The report also notes that Mr. Washington told the officer the trailer was in the shop within two weeks prior to the accident, but he did not know why it was in the shop. Maintenance records produced by Arabie Trucking indicate that Arabie Trucking's employee, Ernest Boyd, changed two tires on the cane trailer on the morning of the accident.

On March 25, 2013, plaintiffs filed a Petition for Wrongful Death and Survival Action against Jerold Washington, Charlotte Alexander, WHY and WHY's insurer, Scottsdale Insurance Company. On September 23, 2013, plaintiffs filed a Supplemental and Amended Petition adding State Farm Mutual Automobile Company ("State Farm"), as the underinsured/uninsured motorist carrier for Peggy and Gaspard Brazan.

Plaintiffs amended their petition for a second time on December 6, 2013, adding Hallmark as a defendant for insuring the trailer, which they alleged was owned by Arabie Trucking,[2] and as the excess carrier insurer for Mr. Washington. On June 19, 2014, plaintiffs filed a Third Supplemental and Amending Petition adding Arabie Trucking as a defendant. Plaintiffs alleged that a cause of the accident was the negligence of Arabie Trucking, which included Arabie Trucking's

[2] The parties now agree that Arabie Brothers Leasing, Inc., rather than Arabie Trucking, owned the trailer.

failure to "properly maintain the trailer connected to the tractor being driven by Washington, specifically the brakes, to ensure they were in proper working order," Arabie Trucking's negligently entrusting "its trailer to a driver with a suspended driver's license," and "other acts of negligence which will be more fully shown at trial."

On September 8, 2015, State Farm filed a motion for summary judgment seeking to establish that the trailer is a covered auto under a "nonowned autos" provision of Hallmark's insurance policy.[3] State Farm argued that Arabie Trucking admitted in its most recent discovery responses that it did not "own, lease, hire, rent or borrow" the trailer. State Farm further argued the trailer was "used in connection with" Arabie Trucking's business on the date of the accident, because Arabie Trucking admitted it was in the business of transporting sugarcane for Lafourche, and at the time of the accident, the trailer was being used to transport sugarcane for Lafourche. On September 28, 2015, plaintiffs filed a summary judgment motion adopting State's Farm's argument that coverage existed under Hallmark's policy because the trailer was a nonowned auto.

Hallmark filed a cross-motion for summary judgment and opposition to the summary judgment motions filed by plaintiffs and State Farm, in which it argued that the trailer did not qualify as a nonowned auto under its policy because it was not used in connection with Arabie Trucking's business. Arabie Trucking also filed a Renewed Motion for Summary Judgment on October 5, 2015, seeking dismissal of the plaintiffs' claims against it under the "independent contractor doctrine," which plaintiffs and State Farm opposed.

On November 16, 2015, after oral argument, the trial court signed a written judgment granting plaintiffs' and State Farm's motions for summary judgment

[3] The policy defines nonowned autos as autos that Arabie does not own, lease, hire, rent, or borrow that are used in connection with Arabie's business.

finding coverage under Hallmark's policy, denying Hallmark's cross-motion for summary judgment, and continuing Arabie Trucking's renewed motion for summary judgment pending the deposition of Jerold Washington.[4] The trial court also found no just reason for delay and designated the judgment as final pursuant to La. C.C.P. art. 1915(B) because "any trial without final resolution of coverage would result in a waste of judicial resources and could result in multiple trials."

Hallmark timely filed this appeal, assigning error to the trial court's grant of partial summary judgment in favor of plaintiffs and State Farm finding that the nonowned auto provision of the Hallmark policy provided coverage for the trailer driven by Jerold Washington at the time of the accident.

LAW AND ANALYSIS

Appellate courts review the granting of a summary judgment *de novo* using the same criteria governing the trial court's consideration of whether summary judgment is appropriate. *Burns v. Sedgwick Claims Mgmt. Servs.*, 14-421 (La. App. 5 Cir. 11/25/14), 165 So.3d 147; *Prince v. K—Mart Corp.*, 01-1151 (La. App. 5 Cir. 3/26/02), 815 So.2d 245, 248; *Duncan v. U.S.A.A. Ins. Co.*, 06-363 (La. 11/29/06), 950 So.2d 544, 547. A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B)(2).[5]

The summary judgment procedure is favored and shall be construed to secure the just, speedy, and inexpensive determination of most actions. La. C.C.P. art. 966(A)(2); *Trench v. Winn-Dixie Montgomery LLC*, 14-152 (La. App. 5 Cir.

[4] On appeal, neither Hallmark nor Arabie Trucking complains of the trial court's rulings on their motions for summary judgment. Therefore, we do not address them. *See* Uniform Rules---Courts of Appeal, Rule 1–3.

[5] The summary judgment hearing in this case was held on November 2, 2015. Accordingly, we apply the version of La. C.C.P. art. 966 in effect at that time.

9/24/14), 150 So.3d 472. The party moving for summary judgment bears the burden of proof. La. C.C.P. art. 966(C)(2). A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case as to that party or parties. La. C.C.P. art. 966(E).

In support of their motions for partial summary judgment, State Farm and plaintiffs alleged that Arabie Trucking entered into a contract which provided for WHY to supply a truck and driver to transport sugarcane for Lafourche using the trailer at issue. State Farm further asserted that Lafourche would have paid Arabie Trucking if WHY had delivered the sugarcane it was hauling in the trailer at the time of the accident. State Farm argued that, considering these contractual relationships and Arabie Trucking's expectation that it would be paid if WHY completed the delivery, the undisputed facts established that the trailer was used in Arabie Trucking's sugarcane transportation business at the time of the accident.

In its opposition, Hallmark maintained that Arabie Trucking's business of transporting sugarcane for its clients is not sufficient under Louisiana law to find that the trailer at issue was used in connection with Arabie Trucking's business at the time of the accident. In support, Hallmark cited Louisiana cases analyzing nonowned auto provisions wherein courts considered whether the insured was liable for the actions of the person using the auto at the time of accident through the exercise of control over the person or entity. Hallmark contended that it was undisputed that Jerold Washington was an employee of WHY, not Arabie Trucking, and that pursuant to the terms of the Owner/Operator Independent Contract of Service Agreement, WHY was an independent contractor. Hallmark argued that, based on this agreement, Arabie Trucking did not control the manner

or means by which WHY transported the sugarcane to Lafourche. Thus, Hallmark asserted, the undisputed facts established that Arabie Trucking did not exercise any control over WHY or Mr. Washington at the time of the accident, and therefore, the trailer was not being used in connection with Arabie Trucking's business at the time of the accident.

In their reply to Hallmark's opposition, plaintiffs argued that jurisprudence cited by Hallmark was factually distinguishable, that Arabie Trucking was in the business of transporting sugarcane, and that the trailer was being used in connection with Arabie Trucking's business to haul sugarcane for its client, Lafourche, when the accident occurred, and therefore the trailer was covered under the plain language of Hallmark's policy. State Farm further argued that jurisprudence cited by Hallmark was distinguishable from the instant case, because, unlike other cases dealing with vicarious liability of a non-employee driver, plaintiffs had asserted claims of independent negligence against Arabie Trucking for Arabie Trucking's maintenance of the trailer.

In granting partial summary judgment in favor of plaintiffs and State Farm, the trial court declared that the trailer at issue is a "covered auto" as described by Hallmark's policy. Thus, our review is limited to the trial court's declaration that the trailer at issue is a "covered auto" under Hallmark's policy, and the issue of Hallmark's liability for plaintiff's claims is not subject to our review.

The interpretation of an insurance policy is usually a legal question that can be properly resolved on a motion for summary judgment. *Davis v. Scottsdale Ins. Co.*, 13-255 (La. App. 5 Cir. 10/30/13), 128 So.3d 471, 475. An insurance policy is a contract between the parties and has the effect of law between them. *Bryant v. United Services Auto. Ass'n.*, 03-3491 (La. 9/9/04), 881 So.2d 1214, 1221. The intent of the parties, as reflected by the words of the insurance policy, determines

the extent of coverage. *Louisiana Insur. Guar. Ass'n. v. Interstate Fire and Casualty Co.*, 93-911 (La. 1/14/94), 630 So.2d 759, 763. When courts interpret insurance policies, they must determine the parties' common intent to ensure that the interpretation of the insurance policy is not conducted in a strained manner so as to enlarge or restrict its provisions beyond what is reasonably contemplated by the policy's terms. *Huggins v. Gerry Lane Enterprises, Inc.*, 06-2816, (La. 5/22/07), 957 So.2d 127, 129. If the words of the insurance policy are clear and express the intent of the parties, the agreement must be enforced as written. *Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94), 634 So. 2d 1180, 1183. Any ambiguity in the terms of the policy must be construed against the drafter and in favor of the insured. *Id.*

Hallmark's policy provides that "[Hallmark] 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.'" The policy's "Business Auto Coverage Form Declarations" page provides that autos covered by the policy are those described under Symbols 7 (Specifically Described Autos), 8 (Hired Autos), and 9 (Nonowned Autos) of the policy's "Description of Covered Auto Designation Symbols" page. Specifically Described Autos, under Symbol 7, include autos listed on the declaration page.[6] Hired Autos, under Symbol 8, include:

> 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.
>
> Nonowned Autos, under Symbol 9, are defined as:

[6] The definition of an auto in the policy includes trailers or semitrailers designed for travel on public roads.

> 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.

The parties agree that the trailer does not fall within the specifically described autos designation or the hired autos provision, and thus the only relevant provision under the policy with respect to whether the trailer is a covered auto is the nonowned autos provision. The policy defines a nonowned auto as an auto the named insured "does not own, lease, hire, rent or borrow" and that is "used in connection with" the named insured's business. The parties also agree that Arabie Trucking did not own, lease, hire, rent or borrow the trailer. Therefore, the question before this Court is whether the trailer was used in connection with Arabie Trucking's business.

Arabie Trucking's Answers to Interrogatories and the deposition of Arabie Trucking's corporate representative reflect that Arabie Trucking was in the business of transporting raw sugarcane pursuant to a contract with Lafourche. The contract between Arabie Trucking and WHY reflects that Arabie Trucking hired WHY to provide trucks and drivers "in order to pursue its business of transporting raw sugar for [Arabie Trucking]'s clients," and the contract required WHY to use sugar cane trailers assigned, inspected, and maintained by Arabie Trucking. In her deposition, Arabie Trucking's corporate representative testified that Arabie Trucking would have been paid by Lafourche had the shipment of sugarcane been completed on the day of the accident. The record reflects that at the time of the accident, WHY's driver, Jerold Washington, was driving WHY's truck with an attached trailer full of sugarcane, which had been assigned by Arabie Trucking.

Applying the facts of this case to the plain language of Hallmark's policy, we find no genuine issue exists as to whether the trailer was used in connection with Arabie Trucking's business at the time of the accident. The trailer was assigned by Arabie Trucking for transport by WHY in order to fulfill Arabie Trucking's contractual obligation to transport sugarcane to Lafourche's sugar mill, and at the time of the accident, the trailer was being hauled pursuant to Arabie Trucking's contract with Lafourche. At least a portion of Arabie Trucking's business was transporting Lafourche's sugarcane. Thus, under the plain language of the nonowned autos provision, the trailer was clearly "used in connection with" Arabie Trucking's business at the time of the accident.

Hallmark contends that in order for the nonowned auto provision to apply, the policy language requires that the accident occur while the vehicle is being used in the course and scope of the named insured's business and under the control of the named insured. *See Adams v. Thomason*, *supra*; *Davis v. Scottsdale Insurance Company*, *supra*; *Gore v. State Farm Mutual Insurance Company*, 26,417 (La. App. 3 Cir. 1/25/95), 649 So.2d 162, 166; *Union Standard Insurance Company v. Hobbs Rental Corp.*, 566 F.3d 950 (10th Cir. 2009); *United States Fidelity & Guaranty Company v. Sanders*, 5:03-0702 (S.D. W.Va. 3/23/06), 2006 U.S. Dist. LEXIS 23135. However, a review of all of the cases cited by Hallmark indicates that the courts therein were analyzing whether an employee was using the nonowned auto in the course and scope of employment or whether the insured was vicariously liable for a subcontractor or other third parties use of the nonowned auto. Neither the plain language of Hallmark's policy nor Louisiana jurisprudence impose such a requirement for finding that an auto is covered by a nonowned auto provision in an insurance policy. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made

in search of the parties' intent. La. C.C. art. 2046. Therefore, we find no authority to impose the additional requirements asserted by Hallmark.

Accordingly, for the reasons provided herein, we find no error in the trial court's grant of partial summary judgment finding that this trailer is a covered auto under the nonowned autos provision of Hallmark's policy with Arabie Trucking, and we affirm the judgment of the trial court.

AFFIRMED

PEGGY BRAZAN AND BROOKES BRAZAN WAGUESPACK

VERSUS

JEROLD WASHINGTON, CHARLOTTE ALEXANDER, SCOTTSDALE INSURANCE COMPANY AND WHY

NO. 16-CA-61

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

LILJEBERG, J., DISSENTS WITH REASONS

I have considered the opinion of the majority. Based on the clear and concise language of the policy, as well as controlling jurisprudence, I cannot agree. I believe the trial court improperly granted the motions for summary judgment filed by plaintiffs, Peggy Brazan and Brookes Brazan Waguespack, and defendant, State Farm Mutual Automobile Insurance Company ("State Farm"). I further believe the trial court erred in finding the trailer is a "covered auto" under the nonowned autos provision of the insurance policy issued by defendant, Hallmark Specialty Insurance Company, to defendant, Arabie Trucking Company, L.L.C. ("Arabie Trucking").

The majority agrees with the trial court that the trailer is a nonowned auto under Hallmark's policy because the trailer was *used* in connection with Arabie Trucking's business. The trial court and majority fail to recognize, however, that plaintiffs' claim for damages does not arise out of Arabie Trucking's alleged liability for the *use* of the trailer, but rather plaintiffs allege their damages are the result of Arabie Trucking's *maintenance* of the trailer. Louisiana courts have found that maintenance and use are distinct terms in insurance policies. I believe a comparison of the facts and claims at issue with the terms of the policy requires a determination that damages

resulting from the insured's maintenance of a nonowned auto is not covered under Hallmark's policy.

An insurance contract is to be construed as a whole and each provision in the contract must be interpreted in light of the other provisions. *Sims v. Mulhearn Funeral Home, Inc.*, 07-54 (La. 5/22/07), 956 So.2d 583, 589. One provision of the policy should not be construed separately at the expense of disregarding other provisions. *Succession of Fannaly v. Lafayette Ins. Co.,* 01-1144 (La. 1/15/02), 805 So.2d 1134, 1139. If the words of the insurance policy are clear and express the intent of the parties, the agreement must be enforced as written. *Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94), 634 So.2d 1180, 1183.

In this matter, the coverage analysis must start with the policy's insuring clause which provides:

> 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'.** [Emphasis added.]

As explained in the majority opinion, the parties agree the only covered auto definition at issue is the nonowned autos provision which states:

> 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. [Emphasis added.]

The insuring clause clearly states that Hallmark's policy only covers the sums the insured is liable to pay and which result from the ownership, maintenance or use of a covered auto. The parties agree Arabie Trucking did not own the trailer. Therefore, in order for coverage to exist under

Hallmark's policy, the damages must result from either the "maintenance or use of a covered 'auto.'"

As the majority points out in its opinion, State Farm contends the damages plaintiffs seek to recover under Hallmark's policy are the result of Arabie Trucking's alleged improper *maintenance* of the trailer. They do not seek to recover damages for Arabie Trucking's alleged vicarious liability for WHY's and Jerold Washington's *use* of the trailer at the time of the accident. A review of the record before this Court indicates that plaintiffs have maintained this position throughout these proceedings.[1]

I agree with the majority that the question before this Court is not whether Arabie Trucking is in fact liable for damages. I further agree the coverage question before this Court requires a determination of whether the trailer was used in connection with Arabie Trucking's business. However, the coverage question posed by the trial court and majority is incomplete. I believe their analysis of the coverage issue neglects to compare the facts upon which plaintiffs seek damages, the alleged improper maintenance of the trailer, with the relevant terms of the policy.

When determining whether coverage exists, the court must analyze whether the injured party raises a claim and facts which would be covered under the terms of the policy. *Smith v. Reliance,* 01-888 c/w 0-889 to 01-898 and 01-387 (La. App. 5 Cir. 1/15/02), 807 So.2d 1010, 1015. Plaintiffs' facts and allegations must be compared with the terms of the policy to determine whether coverage exists. *Id.* The insured must prove that the incident from which the claim arises is covered by the policy. *Jones v. Estate of Santiago,* 03-1424 (La. 4/14/04), 870 So.2d 1002, 1010.

[1] In response to Arabie Trucking's summary judgment motions on liability, plaintiffs represented that they were not alleging a claim for vicarious liability against Arabie Trucking for Mr. Washington's and WHY's conduct, but rather sought to recover damages against Arabie Trucking for its independent acts involving the maintenance of the trailer.

In a recent decision, *State Farm Fire & Cas. Co. v. Lezina*, 15-1417, p. 10 (E.D. La. 3/7/16), 2016 U.S. Dist. LEXIS 30823, the court noted that when interpreting nonowned autos provisions, Louisiana courts apply different tests depending on the circumstances and basis for liability asserted against the insured. For example, when a plaintiff alleges the insured is liable for an employee's use of an alleged nonowned auto at the time of the accident, Louisiana courts analyze the "used in connection with [the insured's] business" language by inquiring as to whether the employee was using the auto in the course and scope of the employer's business or whether the employee was using the vehicle for his or her personal reasons at the time of the accident. *See, e.g., Perkins v. Guaranty Nat'l Ins. Co.*, 95-229 (La. App. 3 Cir. 11/2/95), 667 So.2d 559, 563-64, *writ denied*, 96-0759 (La. 5/31/96), 673 So.2d 1033 ("The jurisprudence has interpreted the nonowned autos provision as requiring that the accident occur while the nonowned auto is being used in the course and scope of the insured's business or personal affairs.").[2]

When the matter involves the use of an auto by a nonemployee or subcontractor, Louisiana courts often utilize the "course and scope" analysis, as well as a consideration of the control the insured maintains over the auto and the person using the auto at the time of the accident, when considering a nonowned autos provision. *See, e.g., Adams v. Thomason*, 32,728 (La. App. 2 Cir. 3/1/00), 753 So.2d 416, 421, *writ denied*, 00-1221 (La. 6/16/00), 764 So.2d 965; *Gore v. State Farm Mutual Insurance Company*, 26,417 (La. App. 2 Cir. 1/25/95), 649 So.2d 162, 166, *writ denied*, 95-481 (La. 4/21/95), 653 So.2d 555; *Davis v. Scottsdale Insurance Company*, 12-255 (La. App. 5

[2] I disagree with the majority's finding that Louisiana jurisprudence does not employ a "course and scope of employment" analysis when analyzing nonowned autos provisions.

Cir. 10/30/13), 128 So.3d 471, 477, *writ denied*, 13-2818 (La. 2/14/14), 132 So.2d 967; *Union Standard Insurance Company v. Hobbs Rental Corp.*, 566 F.3d 950 (10th Cir. 2009); *United States Fidelity & Guaranty Company v. Sanders*, 5:03-0702 (S.D. W.Va. 3/23/06), 2006 U.S. Dist. LEXIS 23135.[3]

Unfortunately, Louisiana cases analyzing nonowned autos provisions largely involve situations where the plaintiffs seek damages resulting from the use of the auto at the time of the accident, as opposed to the maintenance of the auto. However, as explained above, courts must simply compare the relevant facts with the policy terms. When this element is added to the analysis, the coverage question before this Court becomes whether the insured's *maintenance* of the trailer constitutes the *use* of the trailer in connection with the insured's business. Hallmark contends its policy does not cover its insured's maintenance of a nonowned auto.

Louisiana courts have found the terms maintenance and use are distinct in the context of an insurance policy. *See Wall v. Windmann*, 142 So.2d 537 (La. App. 4th Cir. 1962); *Chase v. Dunbar,* 185 So.2d 563, 569 (La. App. 1 Cir. 1966), *writ denied,* 187 So.2d 738 (1966). The inclusion of the term "use" in an auto liability policy is a broad catch-all designed to encompass all proper uses of a vehicle not falling within the terms maintenance or ownership, and involves simply employment for the purposes of the user. *Bernard v. Ellis*, 11-2377 (La. 7/2/12), 111 So.3d 995, 1003; *Cantrelle v. State Farm General Insurance Co.*, 92-0568 (La. App. 1 Cir. 4/23/93), 618 So.2d 997, 1001. Furthermore, Louisiana courts have held that faulty repair work amounts to "maintenance" under provisions of

[3] In *Union Standard Insurance v. Hobbs* and *United States Fidelity v. Sanders*, the courts employ the analysis set forth in *Adams* and *Gore, supra,* to determine whether a vehicle was used in connection with the insured's business and therefore, a nonowned auto.

auto liability policies. *Jones v. Louisiana Timber Co.*, 519 So.2d 333, 336, fn.1 (La. App. 2 Cir. 1988); *Chase, supra; Wall, supra.*

Black's Law Dictionary defines "use" as, "to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end." *Black's Law Dictionary* 1541 (6th ed. 1990). "Maintenance" is defined as the "upkeep or preservation of condition of property, including cost of ordinary repairs necessary and proper from time to time for that purpose." *Id.* at 953.

In *Wall, supra,* the Fourth Circuit considered whether auto maintenance qualified as the use of an auto in connection with the insured's business. The plaintiff, an automobile mechanic for a Chevrolet dealer, was working with another mechanic making adjustments on a new pickup truck to be delivered to a customer of the dealer. The plaintiff was under the hood working on the engine while his co-worker was inside the cab fine-tuning the instrument panel and dashboard. The plaintiff asked his co-worker to start the engine. The co-worker complied, but was unaware that the truck was in gear. The truck moved forward and pinned the plaintiff's right leg between a work bench and the front bumper.

The plaintiff sued Allstate, the co-worker's automobile insurer. Allstate's policy provided coverage for damages arising out of the "ownership, maintenance or use" of the insured automobile or any non-owned vehicle. *Id.* at 538. Allstate denied coverage based on an exclusion in the automobile policy providing that coverage does not apply to a "non-owned automobile while used (1) in the automobile business by the insured . . .." Allstate argued that the exclusion applied because its insured did not own the truck and at the time of the accident, the insured was using the truck in an automobile business. The Fourth Circuit held that the exclusion did

not defeat coverage because the insured's maintenance of the nonowned auto did not constitute the use of the auto:

> The insuring clauses of the contract protect the insured from liability arising out of the 'ownership, Maintenance or use' of the owned or non-owned automobile, and the three terms employed in the policy setting forth the conditions under which the insurer was to be liable must be given effect, each of which, 'ownership,' 'maintenance' or 'use," is general in nature and covers a situation different from the others. In Webster's New International Dictionary, Second Edition, one of the definitions of the word "maintenance" is: '3. The upkeep of property, machinery, equipment, etc.' One definition of the word 'use' as appears in the same authority is: '2. To convert to one's service; to avail oneself of; to employ; as, to Use a plow, a chair, a book; an artist Uses a model or an author Uses a neighbor as a character in his story.'
>
> The truck was not being used by Windmann when plaintiff's injuries occurred, but Windmann's activity in making adjustments thereto in order to ready it for delivery to the purchaser would constitute maintenance, and defendant's liability to plaintiff for damages by reason of Windmann's 'maintenance' of the non-owned automobile is certain.
>
> *Id.* at 539.

Furthermore, in *Chase v. Dunbar, supra,* the court discussed the distinction between maintenance and use in considering whether mechanics were insureds under a liability policy. The policy covered damages arising out of the ownership, maintenance or use of an owned automobile. It further defined insureds as the named insured, as well as "any other person using such automobile with the permission of any named insured provided his actual operation or (if he is not operating) his actual use thereof is within the scope of such permission." At the time of the incident, two mechanics were attempting to help the insured start his vehicle that had stalled. One mechanic was attempting to start the vehicle, while the other mechanic was refilling the vehicle with gasoline by pouring gas in the carburetor. During this process, the gasoline in the can ignited and the mechanic threw the burning can aside. The gas can hit the plaintiff causing him to suffer

injuries.

The plaintiff argued the mechanics were insureds. However, the appellate court noted that ownership, maintenance or use were distinct terms under the policy, and that the definition of an insured only included a person using the vehicle. The court further found that the mechanics' attempt to start the vehicle constituted maintenance of the vehicle as opposed to use. *Id.* Therefore, the mechanics were not insureds under the policy. *Id.*

Based on the forgoing, I believe the trial court erred in finding the trailer was used in connection with Arabie Trucking's business. The trial court and the majority opinion fail to recognize that plaintiffs seek to establish coverage under Hallmark's policy based on Arabie Trucking's alleged liability for damages resulting from its maintenance of the trailer. The terms "maintenance" and "use" are distinct terms under the policy. Just as in *Wall* and *Chase*, I believe Arabie Trucking's maintenance of the trailer did not constitute the use of the trailer in connection with its business. The clear and concise language of the policy does not include coverage for the maintenance of a nonowned auto.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **JUNE 14, 2016** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

16-CA-61

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