

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0142

LEWIS F. JUREY

VERSUS

HARRY T. KEMP, DALLAS & MAVIS SPECIALIZED CARRIER CO., L.L.C.,
GREAT AMERICAN INSURANCE COMPANY, LIBERTY MUTUAL FIRE
INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

consolidated with

2011 CA 0143

CLARENCE E. JUREY & DOROTHY B. JUREY

VERSUS

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GREAT AMERICAN INSURANCE COMPANY, LIBERTY MUTUAL FIRE
INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Judgment Rendered: SEP 20 2011

On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. C563867 Consolidated With 564504

Honorable Timothy E. Kelley, Judge Presiding

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Welch J. dissents and assigns reasons.

ME

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* * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

This is an appeal from the granting of and denial of motions for summary judgment on the issue of insurance coverage. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 17, 2008, an automobile accident occurred between a 2002 Lincoln Town Car being driven by Lewis Jurey, one of the plaintiffs, and a 2001 Peterbilt Tractor, which was pulling a 50' flatbed trailer, being driven by Harry T. Kemp, a named defendant. At the time of the accident, Kemp was leaving Baker Metal Works where he had just picked up the flatbed trailer.

Kemp was an independent contractor with Dallas & Mavis Specialized Carrier Co., LLC (D&M). D&M, through a policy issued by Liberty Mutual Fire Insurance Company (Liberty Mutual), maintained coverage for the operation of the tractor while Kemp was engaged in performing transportation services for D&M. As an independent contractor, Kemp was responsible for maintaining non-trucking liability ("bobtail")¹ insurance for operation of the equipment outside the scope of performing transportation services for D&M. The Great American Insurance Company (Great American) provided Kemp "bobtail" coverage.

In consolidated actions, Lewis Jurey and his guest passengers, Clarence Jurey and Dorothy Jurey, filed suit, alleging that they sustained bodily injuries in the accident. They named Kemp, D&M, Liberty Mutual, and Great American, among others, as defendants.

Thereafter, Liberty Mutual filed a motion for declaratory relief, or in the alternative, a motion for summary judgment, asserting that its policy did not provide coverage because Kemp was not engaged in performing transportation services for D&M and that the bobtail policy issued by Great American should apply. D&M also filed a motion for summary judgment, asserting that Kemp was not in the course and scope of his employment at the time of the accident, and,

¹ "Bobtailing" is a term generally used in the trucking industry to describe a tractor being operated without a trailer.

as such, D&M was not vicariously liable for Kemp's negligence. In response, Great American filed a cross-motion for summary judgment, alleging that Kemp was involved in transportation services for D&M at the time of the accident such that the policy issued by Liberty Mutual, rather than its "bobtail" policy, provided coverage for the accident.

Following a hearing, the trial court granted the motions for summary judgment filed by Liberty Mutual and D&M, and denied the cross-motions filed by Great American. In so ruling, the trial court indicated that Kemp was "not making a haul for [D&M]" nor was he "on duty or under any dispatch" at the time of the accident, but rather was "on his own time." The trial court further indicated that this accident is "exactly what the bobtail [policy issued by Great American] is required to cover and what it's intended to cover."

Great American and plaintiffs (hereinafter collectively referred to as "Great American") have appealed, assigning the following errors:

- A. The Trial Court erred in granting summary judgment in favor of Liberty Mutual Fire [Insurance] Company on the basis that Kemp was not involved in transportation duties at the time of the Accident.
- B. The Trial Court erred in denying summary judgment in favor of Great American Insurance Company.
- C. The Trial Court erred in concluding that Great American Insurance Company, and not Liberty Mutual Fire [Insurance] Company, provides liability insurance with respect to the Accident in light of the numerous genuine issues of material fact.^[2]

DISCUSSION

Liberty Mutual issued an insurance policy (number AI2-791-001377-107) to Transport Industries, L.P., and pursuant to a Named Insured Endorsement, added D&M to Item 1 of the Declarations as a named insured. The Liberty Mutual policy providing coverage to D&M provides, in pertinent part:

1. Who is An Insured

² Great American has not appealed the summary judgment granted in favor of D&M. Liberty Mutual avers that because the trial court granted D&M's motion for summary judgment and found that Kemp was not performing services for D&M at the time of the accident, review of that issue is precluded on appeal pursuant to LSA-R.S. 13:4231(3) insofar as that judgment is now final. However, under the circumstances presented herein, we find it unnecessary to address this issue.

The following are "insureds":

- a. You for any covered "auto".
 - b. Anyone else while using with your express or implied³ permission a covered "auto" you own, hire or borrow, except:
 - (1) The owner, or any "employee", agent or driver of the owner, or anyone else from whom you hire or borrow a covered "auto".
 - (2) Your "employee" or agent if the covered "auto" is owned by that "employee" or agent or a member of his or her household.
- ***
- c. The owner or anyone else from whom you hire or borrow a covered "auto" that is a "trailer" while the "trailer" is connected to another covered "auto" that is a power unit, or, if not connected, is being used exclusively in your business.
 - d. The lessor of a covered "auto" that is not a "trailer" or any "employee", agent, or driver of the lessor while the "auto" is leased to you under a written agreement if the written agreement does not require the lessor to hold you harmless and then only when the leased "auto" is used in your business as a "motor carrier" for hire.
 - e. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

At the time of the accident, the parties do not dispute that Kemp's tractor was leased to D&M pursuant to a lease agreement between the parties. The parties, however, disagree as to whether the flatbed trailer was included in the lease. Even assuming that the trailer was part of the lease, in order for the Liberty Mutual policy to provide coverage, subsection (c) referenced above requires that the trailer must be connected to a "covered auto." Therefore, in determining whether Liberty Mutual afforded coverage for the accident at issue, the initial inquiry is whether the tractor was a "covered auto"—*i.e.*, whether Kemp

³ The "express or implied" language is added by the Louisiana Change endorsement.

was using the tractor in D&M's business as required under subsection (d) referenced above at the time of the accident.⁴

The language in the policy requiring that the covered auto be "used in your business" is unambiguous. Although the application of the endorsement to these facts may pose difficult questions, the difficulty of the questions does not create an ambiguity. **Mahaffey v. General Sec. Ins. Co.**, 543 F.3d 738, 741 (5th Cir. 2008).⁵ Because the language is unambiguous, the issue is properly resolved as a matter of law on a motion for summary judgment. **Id.**

At the time of the accident, Kemp was off-duty and was not in the process of performing any transportation services for D&M when he decided to pick the trailer up from Baker Metal Works in order to free up space in the shop for Baker Metal Works' owner. Kemp was not under D&M's control or on standby for any deliveries and was free to go where he pleased.⁶ In addition, Kemp was not paid for his trip to or from Baker Metal Works and did not request or seek any reimbursement or payment in connection with this trip.

Appellants contend that at the time of the accident, however, Kemp was on a trip for the business of D&M because he was having requisite maintenance performed on the trailer. Appellants note that the lease agreement required Kemp to "maintain the Equipment in proper operating condition and in full compliance with applicable governmental regulations." A few days prior to the accident, Kemp had taken the trailer to Baker Metal Works to have a door welded on the front, so it would be easier to access the wiring for the trailer's lights and air lines for the trailer's brakes. Baker Metal Works also replaced some of the decking boards on the trailer. Kemp testified that it was important for him to maintain his equipment pursuant to the terms of the lease and in order to

⁴ Similarly, we note that the bobtail policy issued to Kemp by Great American does not provide coverage if the "covered auto" was being used "for the benefit of or to further the commercial interest of [D&M]" or "while being used for the purpose of traveling to or from any location where the covered auto is regularly garaged or any terminal or facility of [D&M]."

⁵ The contractual language at issue in **Mahaffey** was "in the business of."

⁶ Kemp indicated that he had originally planned to go to a farmer's meeting, but instead chose to go to Baker Metal Works to retrieve the trailer.

maintain a good working relationship with D&M. Kemp concludes that Liberty Mutual's policy provides coverage because he was maintaining the equipment in accord with the terms of the lease agreement as required by D&M.

Several pertinent cases have addressed whether an independent truck owner/lessor was "in the business of" the motor carrier/lessee such that the liability insurance secured by a motor carrier/lessee, as opposed to the bobtail insurance secured by a truck owner/lessor, should apply. In **LeBlanc v. Bailey**, 97-0388 (La.App. 4 Cir. 10/1/97), 700 So.2d 1311, writ denied, 97-2988 (La. 2/6/98), 709 So.2d 743, the fourth circuit found that an independent trucker's drive home after completion of his deliveries for the day on behalf of the motor carrier/lessee was more of a personal nature rather than a work-related function such that bobtail insurance coverage, as opposed to the liability insurance secured by the motor carrier/lessee, was the primary policy that applied.⁷ In **Mahaffey**, 543 F.3d at 743, however, the federal court, applying Louisiana law, found that the bobtail insurance policy did not provide coverage where an independent truck driver had been asked to remain in the area of the motor carrier/lessee's business to be available to pick up a load when one became available.⁸ See also **Robinson v. Guillot**, 07-1260 (La.App. 3 Cir. 4/30/08), 980 So.2d 906 (unpublished), writ denied, 08-1162 (La. 9/19/08) 992 So.2d 943. However, we have found no Louisiana case specifically addressing the question of when having leased equipment serviced falls within the scope of the business of the carrier. Assuming, without deciding, that the trailer was included in the lease, we must determine as a matter of law whether Kemp's trip to and from Baker

⁷ The court also noted that the driver was free to go where he pleased, was not subject to the motor carrier/lessee's control or paid for his time or mileage, and was not under dispatch or standby for further deliveries. **Leblanc**, 700 So.2d at 1314.

⁸ In **Mahaffey**, the trucker was involved in an accident driving to his motel. The court noted that unlike driving home after completing deliveries as was the driver in **LeBlanc**, the driver in **Mahaffey** was "driving to a motel far from home in order to sleep to be adequately rested, when asked to remain in the area to see if a load becomes available," which the court found "is a work-related function for a commercial driver because commercial drivers are required to have a certain number of rest hours between hauls." **Mahaffey**, 543 F.3d at 743.

Metal Works to have the work performed on the trailer constituted the business of D&M. The facts here are undisputed.

In this context, the proper inquiry is whether Kemp was acting within the scope of the lease agreement with D&M. See **National Continental Ins. Co. v. Empire Fire & Marine Ins. Co.**, 157 F.3d 610, 612 (8th Cir. 1998). To the extent that Kemp was executing his contractual duties, he would be acting "in the business of" D&M. **Id.** We must therefore examine the terms of the lease to ascertain whether Kemp was fulfilling a contractual duty in having the work performed by Baker Metal Works.

The lease agreement required Kemp to "maintain the Equipment in proper operating condition and in full compliance with applicable governmental regulations." Kemp acknowledged that adding the welded door to his trailer was not required by Department of Transportation ("DOT") specifications or by D&M. He further indicated that the door provided no economic benefit to D&M, but rather was something he wanted to have done for his own benefit. Kemp also indicated that he chose to have some of the decking boards replaced, although the work was not required by DOT or by D&M. Nothing in the record explains how any of the work performed on the trailer furthered D&M's business. Moreover, Kemp acknowledged that prior to the accident, D&M was unaware that he was having any work done to the trailer. In light of the foregoing, there is no showing that the improvements were required under the terms of the lease agreement between Kemp and D&M. Rather, it appears that these improvements were merely done for the convenience of the owner. Cf. **Freed v. Travelers**, 300 F.2d 395 (7th Cir. 1962) (wherein the carrier/lessee's insurance policy applied when the independent truck driver was involved in an accident while bringing the vehicle to be serviced—when the lease agreement required the independent truck driver to maintain the tractor "in good running order and condition" and "hold (it) ready at all times for the services of the Lessee" and the carrier/lessee did not urge that the major repair to the rear of the tractor was not necessary to its continued operation) and **National Continental Ins. Co.**, 157 F.3d 610

(wherein the carrier/lessee's insurance policy applied when the service contract required the driver's tractor pass periodic inspections and comply with federal standards such that driving the vehicle to a shop for a front end alignment between dispatch orders was "in the business of" the carrier/lessee because the federal regulations required "[a]ll axles ... be in proper alignment"). Unlike the contrasted cases, under the terms of the lease agreement here, Kemp's trip to Baker Metal Works was not undertaken in the business of the employer.⁹

Appellants also urge that the Federal Motor Carrier Safety Act-90 Endorsement applies herein. See 49 USCA § 13501, et seq. However, the endorsement only applies to interstate travel and does not apply to the intrastate trip at issue herein. See 49 USCA § 13501, 1 and **Branson v. MGA Ins. Co., Inc.**, 673 So.2d 89 (Fla.App. 5 Dist.), review denied, 680 So.2d 421 (Fla. 1996).

CONCLUSION

In light of the foregoing, we conclude that the trial court did not err in granting summary judgment in favor of Liberty Mutual and denying summary judgment as to Great American. Therefore, we affirm the district court's September 17, 2010 judgment. Costs of this appeal are assessed to The Great American Insurance Company.

AFFIRMED.

⁹ Additionally, we note that the maintenance on Kemp's trailer had been completed and he was returning home at the time of the accident. Cf. Empire Fire and Marine Ins. Co. v. Liberty Mut. Ins. Co., 699 A.2d 482 (Md.App.), cert denied, 703 A.2d 148 (1997), wherein the lease agreement between the independent truck driver and the motor carrier/lessee required the truck driver to maintain "all additions, accessories, and equipment...in good safe operating and mechanical condition." **Empire Fire and Marine Ins. Co.**, 669 A.2d at 488. The court found that even if the trucker's stop at a dealership to obtain parts for a toolbox attached to the exterior of the leased tractor was in "furthering the business of the...carrier, once he purchased the parts for the toolbox, his business with the...carrier was complete. He was in the area of his 'home terminal' and heading home." 669 A.2d at 496-97.

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Jew Welch, J., dissenting.

I respectfully dissent. I believe that Kemp qualifies as an insured under an endorsement to the Liberty Mutual policy which expands the list of insured persons to include those who use any covered auto "by or for" the named insured. This endorsement is entitled "Hired Autos Specified as Covered Autos You Own," and modifies the motor carrier coverage form. It modifies the schedule's description of "auto" to include "any auto you lease, rent, or hire." It also states that any auto described in the schedule will be considered a covered auto the insured owns and not a covered auto the insured hires. It further provides:

B. CHANGES IN LIABILITY COVERAGE:

The following is added to WHO IS AN INSURED:

While any covered "auto" described in the Schedule is rented or leased to you and is being used by or for you, its owner or anyone

else from whom you rent or lease it is an “insured” but only for that covered “auto.”

For Kemp to be insured under this provision, the tractor he was driving at the time of the accident must be a “covered auto” that was leased to D&M. It is undisputed that the tractor was under lease to D&M at the time of the accident. Further, the schedule of covered autos contains two symbols designating the covered autos—72 and 73. Symbol 72 includes “owned autos used in operations other than those trucking operations that are subject to operating authority granted to the Insured by regulatory authority.” Symbol 73 describes “any auto except those described by Symbol 72.” Liability coverage extends to all autos designated by symbols 72 and 73. Reading all of the provisions together, I would find that a covered auto includes all autos owned by the named insured and all autos hired or leased by the named insured, which includes the tractor leased by D&M from Kemp.

Next, in order for Kemp to be an insured under the policy, the covered auto must have been used by him “by or for D&M.” Pursuant to the term of the lease agreement which incorporated DOT regulations, D&M had the exclusive possession, control, and use of the leased motor vehicle for the duration of the lease agreement. I would find that the leased vehicle was being used by Kemp “for” D&M whenever that use furthered D&M’s business interests and was not a purely personal use of the covered vehicle by Kemp. As D&M’s business is transportation, I would find that any use of the leased equipment that falls within the scope of D&M’s trucking business to constitute a use by Kemp “for” D&M.

In this case, the evidence showed that Kemp used his covered auto to bring his trailer to Baker Metal Works to have boards replaced on the bed of his trailer and for the installation of a metal box that would make it easier for him to access the wires and air lines that went to the trailer’s brakes and running lights. Kemp

explained that he had wanted to make the modification for some time and the situation presented itself when he had to replace the decking on the trailer. He further stated that the improvement to the trailer was done to make it easier for him to maintain the trailer because he would only have to flip the lid of the box to get to the air lines and wiring harness, whereas previously, he had to pull all of the lines and wires out of the front of the trailer, leaving him little room to work on these items if he had to. I find that the installation of boards on the deck of the trailer that holds cargo being shipped for D&M, along with the installation of an accessory to the trailer that made it easier to maintain and repair the trailer's brakes and lights is clearly trucking-related, and as such, furthered the commercial interest of D&M in keeping the leased vehicle and equipment in safe and proper running condition. The mere fact that the work done to the trailer may have made operating, repairing, and maintaining the leased vehicle more convenient to Kemp does not mean that the work did not serve D&M's business interests. The possibility that a vehicle owner's interest may coincide with those of the lessee does not diminish the benefits the lessee received from the owner's actions. See National Continental Insurance Company v. Empire Fire & Marine Insurance Company, 157 F.3d 610, 613 (8th Cir. 1998).

Moreover, even under the test employed by the majority in determining whether Kemp's activity constituted a "business use" of the vehicle, I would find Kemp to be an insured under the policy. In replacing the decking on the trailer and the installation of an accessory to house the brake's wires, Kemp was executing his contractual duty to maintain the leased equipment, and therefore, his trip to and from Baker Metal Works in his covered auto to have the work performed on the trailer constituted the business of D&M.

Pursuant to the lease agreement, Kemp was obligated to maintain the

equipment in proper operating condition. Kemp was further obligated to furnish all maintenance, repairs, and other items necessary for the safe and efficient operation of the equipment and lease agreement vests the choice of locations and persons to perform any necessary repairs solely in Kemp. The lease further stipulates that in the event the equipment leased includes a trailer, Kemp was responsible for the periodic safety inspection of the trailer and accessorial equipment furnished by him.¹ I do not believe it could fairly be said that the replacement of decking boards, which holds the transported cargo, and the installation of an accessory making it easier to perform maintenance on the leased equipment do not constitute vehicle maintenance. Because I believe that Kemp was executing his contractual duty to maintain the leased equipment, I would find that he was carrying out the business of D&M when he drove the trailer to and from Baker Metal Works for the replacement of decking boards and the installation of a box to house the trailer's electrical wires and lines.² Accordingly, I conclude that the Liberty Mutual trucking policy provides coverage for the accident sued upon.

For the above reasons, I would reverse the judgment of the trial court and deny Liberty Mutual's motion for summary judgment. I would further find that the exclusion in Great American's non-trucking bobtail policy, denying coverage when the vehicle is used for the benefit or to further the commercial interest of D&M, is applicable in this case, and I would grant Great American's motion for

¹ While National Liberty insists that the trailer was not part of the leased equipment, the undisputed facts of this case indicate otherwise. While none of the three trailers owned by Kemp are listed on the equipment schedule, the evidence on the motion for summary judgment demonstrated that Kemp's trailers, in addition to the tractor that pulled them, were leased to D&M by Kemp. Therefore, I disagree with National Liberty's attempt to bring the trailer outside the scope of the lease agreement and would find that any provision in the lease relating to the maintenance of the trailer applicable in this case.

² The mere fact that Kemp did not request reimbursement for the work performed at Baker Metal Works is of no moment as Kemp testified that he was responsible for all maintenance on his vehicle and was never reimbursed by D&M for maintenance work.

summary judgment and dismiss it from this litigation.