No. _____

In The
Supreme Court of the United States

ACCEPTANCE CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

GREAT WEST CASUALTY COMPANY, RONALD SMITH, JOHN ZEVERINO, TAYLOR TRUCK LINE, INC., ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, AUSTIN MUTUAL INSURANCE COMPANY AND HEALTH PARTNERS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a Lease Agreement drafted by Taylor Truck Line which gives Taylor the exclusive use of John Zeverino's tractor, contractually obligates Zeverino to maintain the tractor "in the state of repair required by all applicable regulations" and when 49 CFR § 396.3(a)(1) requires that "parts and accessories shall be in safe and proper operating condition at all times" and 49 CFR § 396.7(a) prohibits operating a vehicle "in such a condition as to likely cause an accident or a breakdown of the vehicle" was the use of Zeverino's tractor on the way to obtain repairs to the tractor's grille which was "already starting to fall apart and fall off on the highway" and because Zeverino "needed to have the repairs done in order to have his tractor the way he needed it to operate as an owner/operator for Taylor" being operated "in the business of" Taylor who, by the terms of its Lease Agreement assumes "complete responsibility to the public" for the operation of the tractor.

2. At the time of the accident, was Zeverino's tractor being operated en route to a business purpose when he was on his way to have repairs done to his tractor as is required by Taylor's Lease that obligates Zeverino to satisfy regulatory equipment and safety requirements by maintaining his tractor in the proper state of repair thereby excluding coverage under Exclusion 14(a) of the Acceptance policy which excludes coverage when a tractor is "being operated, maintained, or used to carry property in any business or en route to or from such business purpose."

PARTIES TO THE PROCEEDING

Petitioner, Acceptance Casualty Insurance Company ("Acceptance"), provided a policy of Non-Trucking Use Insurance to Respondent John Zeverino ("Zeverino") as an owner/operator of Respondent Taylor Truck Line, Inc. ("Taylor Truck Line"). Respondent Great West Casualty Company ("Great West"), provided a policy of Trucking Liability Insurance to Respondent Taylor Truck Line. Both insurers' policies were in effect on February 27, 2009 when a four vehicle accident occurred on Interstate 94 near Menomonie, Wisconsin.

Respondent, Brian Casey ("Casey"), has brought a claim for personal injuries arising from that accident. Casey has sued Respondent Ronald Smith ("Smith") and his insurer, Respondent Allstate Property and Casualty Insurance Company ("Allstate"), Respondent Austin Mutual Insurance Company ("Austin Mutual"), Casey's auto insurer, Respondent Health Partners, Casey's health insurer, Zeverino, Taylor, Great West and Acceptance.

Acceptance and Great West brought cross motions for summary judgment to resolve the issue of which insurer's policy affords coverage for the accident. None of the other Respondents have participated in either the summary judgment motions or the appeals that have followed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Acceptance discloses that the parent corporation of Acceptance Casualty Insurance Company is Acceptance Indemnity Insurance Company. There is no publicly held company owning 10% or more of Acceptance's stock.

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PETITION FOR CERTIORARI

Acceptance respectfully requests the Court to grant its petition for a writ of certiorari so that the Court may correct a decision by the Wisconsin Supreme Court that involves the interpretation of 49 CFR § 396.3 and 49 CFR § 396.7 and is in conflict with decisions of other state courts of last resort and in conflict with decisions of United States courts of appeals.

More specifically, the decision of the Wisconsin Supreme Court, in making an insurance coverage determination, construes 49 CFR § 396.3(a)(1) and 49 CFR § 396.7(a) in a manner that in effect holds that as long as a truck is capable of hauling a load, it is in full compliance with the safety requirements of 49 CFR § 693.3(a)(1) and 49 CFR § 396.7(a), even if the truck's grille is "starting to fall apart and fall off on the highway." The decision creates dangerous public policy safety concerns for users of the country's roads and highways. The decision creates these safety issues by focusing only on whether the tractor can carry loads, rather than focusing on whether the tractor can carry loads SAFELY.

The decision of the Wisconsin Supreme Court inserts an additional requirement that repairs must be "necessary to allow the semi-tractor to continue to accept and complete hauls for the lessee," *Casey v. Smith*, 846 N.W.2d 791, 797 (Wis. 2014), in order for repairs to be seen as "furthering the commercial interest of the lessee." This additional threshold

requirement not only conflicts with decisions of other states and Federal Circuits but will likely also create problems for the insurance and trucking industries regarding the calculation of insurance premiums for Non-Trucking Use Insurance and Trucking Liability Insurance for trucks operating throughout the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 2014 WI 20, 353 Wis.2d 354, 846 N.W.2d 791 (Wis. 2014). It is included in the Appendix at App. 1.

The opinion of the Wisconsin Court of Appeals is reported at 2013 WI App. 24, 346 Wis.2d 111, 827 N.W.2d 917 (Wis. App. 2013). It is included in the Appendix at App. 25.

The Findings of Fact, Conclusions of Law and Order of Dunn County Circuit Court are not reported. They are included in the Appendix at App. 44.

The Order of the Supreme Court of Wisconsin denying Acceptance's Motion for Reconsideration is reported at 848 N.W.2d 861 (Wis. 2014). It is included in the Appendix at App. 54.

JURISDICTION

The Wisconsin Supreme Court filed its opinion on April 18, 2014, and entered an Order Denying Petitioner's Motion for Reconsideration on June 12, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the Supreme Court of Wisconsin's decision on a Writ of Certiorari.

STATUTES AND REGULATIONS INVOLVED

49 CFR § 376.12 Written lease requirements.

> Except as provided in the exemptions set forth in subpart C of this part, the written lease required under § 376.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.
>
> . . .
>
> (c) *Exclusive Possession and Responsibilities.* (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

49 CFR § 395.2 Definitions. As used in this part, the following words and terms are construed to mean:

. . .

Driving time means all time spent at the driving controls of a commercial motor vehicle in operation.

. . .

On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. *On duty time* shall include: . . .

(2) all time inspecting, servicing, or conditioning any commercial motor vehicle at any time;

. . .

(6) all time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle; . . . .

49 CFR § 396.3 Inspection, repair and maintenance.

(a) *General*. Every motor carrier . . . must systematically inspect, repair, and maintain or cause to be systematically inspected, repaired and maintained, all motor vehicles . . . subject to its control.

(1) Parts and accessories shall be in safe and proper operating condition at all times. These include those specified in part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, including but not limited to, frame and frame assemblies, suspension systems, axels

and attaching parts, wheels and rims, and steering systems . . . .

49 CFR § 396.7 Unsafe operation forbidden.

(a) *General*. A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle.

CONCISE STATEMENT OF THE CASE

This Petition seeks review of an opinion and order of the Supreme Court of Wisconsin that affirmed an earlier decision of the Wisconsin Court of Appeals. The Federal questions sought to be reviewed involve the interpretation of 49 CFR § 396.3(a)(1) and 49 CFR § 396.7(a) in conjunction with 49 CFR § 376.12(c) and 49 CFR § 395.2. Petitioner first raised these issues in its March 18, 2011 Memorandum in Opposition to Great West's Motion for Summary Judgment. Great West first raised these issues in its February 18, 2011 Memorandum of Law in Support of its Motion for Summary Judgment. The Findings of Fact, Conclusions of Law and Order of Dunn County Circuit Court dated and filed February 13, 2012 make no reference to the Code of Federal Regulations.

Petitioner briefed these issues to the Wisconsin Court of Appeals in its brief dated June 11, 2012. Great West briefed these issues in its brief to the Court of Appeals dated July 13, 2012. The Wisconsin Court of Appeals cites these regulations in its opinion dated January 15, 2013.

Petitioner briefed these issues to the Wisconsin Supreme Court in its brief dated November 21, 2013, Great West briefed these issues to the Wisconsin Supreme Court in its brief dated December 13, 2013. The Wisconsin Supreme Court discusses these issues in its opinion dated April 18, 2014.

This action arises out of a four vehicle accident that occurred on February 27, 2009 on Interstate 94 near Menomonie, Wisconsin. On that date, John Zeverino was driving his Freightliner tractor from his home in Prescott, Wisconsin to Eau Claire, Wisconsin for the *sole* purpose of having a new grille and a new oil filler tube installed on his tractor in Eau Claire. He did not have a trailer attached to his tractor nor was he hauling any freight.

On February 27, 2009, John Zeverino and Taylor Truck Line, Inc. were parties to a Long Term Lease Agreement that had been drafted by Taylor.

As required by 49 CFR § 376.12(c), the Lease provides that Taylor has the exclusive possession, control and use of Zeverino's tractor and that Taylor assumes complete responsibility to the public for the operation of Zeverino's tractor. Zeverino is prohibited from using his tractor for anyone other than Taylor without the advance permission of Taylor.

The Lease provides that Zeverino is responsible for all expenses of repairing and maintaining his tractor. Zeverino is responsible to Taylor for satisfying all regulatory requirements and safety requirements by maintaining his tractor as required by the Code of

Federal Regulations. Zeverino is even required to provide Taylor with monthly maintenance reports.

Brian Casey has brought a claim for personal injuries arising from an accident that occurred when Casey was hit from the rear by Zeverino's tractor and a Dodge Durango driven by Ronald Smith.

Approximately one month before the accident, Zeverino had taken the tractor to FABCO in Eau Claire, for repairs to the ECM (Engine Control Module). At his deposition, Mr. Zeverino provided the following testimony:

> Q. And what does the engine control module do?
>
> A. That runs the truck, tells the truck what to do.
>
> Q. And had you been having trouble with the truck before that with the ECM unit?
>
> A. No.

The invoice from FABCO reflects that the ECM was adjusted and its timing calibrated.

While performing those repairs, FABCO damaged the tractor's grille such that repairs were needed. Zeverino did not have a scheduled appointment with FABCO but was to return to have the grille replaced whenever he could get to it. Zeverino also had ordered an oil filler tube which he intended to install at home but which FABCO agreed to install.

Zeverino had not been placed out of service, including after the accident, on February 27, 2009. Following the accident, a DOT Inspector found no deficiencies with regard to Zeverino or the tractor.

After the accident Zeverino continued to Eau Claire, where he had a new grille and oil filler tube installed on his tractor.

John Zeverino provided the following deposition testimony with respect to the repairs to be done to his tractor:

Q. So at the time the accident occurred you were driving your tractor en route to getting the maintenance and repair work done on it, correct?

A. I was getting repair work done on the tractor. To me that was not a routine maintenance, but it was a repair that they had broken, they had to replace.

Q. Right, but you wanted – **you needed to get it repaired?**

A. **Oh, yes, I needed to get it repaired because it was already starting to fall apart and fall off on the highway.**

Q. **And so you needed to have that done in order to have your tractor the way you needed it to –**

A. **Yes, sir**.

Q. **– operate as an owner, operator for Taylor Truck Line?**

A. **Correct**.

(Emphasis added).

John Zeverino also provided the following deposition testimony:

Q. You testified that you could have taken a load on the day that the accident occurred without having service done that very day on the grille or without being serviced that day on your oil filler tube.

Eventually you were going to have to get that repaired to be able to continue to do business, correct?

A. **Correct. No. I'd have to get it repaired to have the truck right**, but DOT clarified that I did not have to be out of service. I could take a load that day if I needed to.

Q. **But this was something that was part of the ongoing maintenance –**

A. **Right.**

Q. **– of your tractor so that it would perform for you?**

A. **Correct.**

(Emphasis added).

John Zeverino owned the tractor but Mr. Zeverino (d/b/a Jack and Sheryl's Construction, Inc.) leased it to Taylor Truck Line.

The Lease Agreement was not drafted by John Zeverino. It was drafted by or at the request of Taylor Truck Line.

The Lease Agreement provides as follows with respect to possession, control and responsibility of the equipment:

> 7. EXCLUSIVE POSSESSION, CONTROL AND RESPONSIBILITY.
>
> A) **Carrier [Taylor] shall**, throughout the existence of this lease, **have exclusive possession, control and use of the equipment and shall assume complete responsibility to the public for the operation of said equipment.** Contractor [Zeverino] shall not at any time during the existence of this contract use the equipment leased herein for the performance of any transportation service, compensated or otherwise, for any person or entity other than carrier without advance permission or instruction from carrier, and such other use shall by definition terminate the operation of this agreement.

(Emphasis added).

The Lease Agreement also provides as follows:

> 8. RESPONSIBILITY FOR OPERATING EXPENSES. **Contractor shall bear all**

> **expenses to the operation of the equipment, including**, but not limited to, the following unless provided otherwise herein or in an addendum to this contract: . . .
>
> C) **Repairs and maintenance**. . . . (Emphasis added).

The Lease Agreement provides as follows with respect to compliance with safety rules and maintenance:

> 23. COMPLIANCE WITH SAFETY RULES OF GOVERNING AGENCIES/INSURANCE COMPANY AND CARRIER. Contractor recognizes that carrier's business of providing motor carrier transportation services to the public is subject to regulation by the federal government acting through the Federal Highway Administration and the Department of Transportation, and by various state and local governments. **The contractor shall have the responsibility to carrier of satisfying various agency regulatory requirements, and safety requirements of carrier and/or the insurance company, by:**
>
> **A) Maintaining the equipment in the state of repair required by all applicable regulations.**
>
> B) Operating the equipment in accordance with all applicable regulations. . . .
>
> **D) Furnishing the carrier the exclusive possession, control and use of**

> **the equipment for the duration of this agreement. . . .**
>
> **G) Providing carrier with copies of Monthly Maintenance Reports and copies of lubrication and repair records for the equipment, including copies of parts purchased. . . .** (Emphasis added).

Under the Lease Agreement, Taylor agreed to provide liability insurance as required by Federal law and Zeverino agreed to obtain "bobtail liability insurance."

Acceptance issued a policy of Non-Trucking Use Insurance to the Sponsor, "Association of Independent Drivers of America," which provides Non-Trucking Use coverage to the Sponsor's Certificate Holders, in this case "Owner/Operators of Taylor Truck Line, Inc. [Zeverino]."

The Acceptance policy includes a Non-Trucking Automobile Coverage Form that contains the following exclusions from coverage:

> **B. Exclusions**
>
> This insurance does not apply to any of the following: . . .
>
> **14. Trucking**
>
> **A covered "auto":**
>
> **a. While being operated, maintained or used to carry property in any business or en route to or from such business purpose;**

> **b. While being used in the business of anyone to whom the "auto" is rented;**
>
> c. While under the direction, dispatch or control of a motor carrier;
>
> d. While not under "permanent lease" with a motor carrier.
>
> (Emphasis added).

Great West issued a policy of Trucking Liability Insurance to Taylor.

Both the Acceptance policy and the Great West policy provide a $1,000,000 limit of liability coverage.

The policy of Non-Trucking Use Insurance issued by Acceptance which provides Non-Trucking Use Insurance to John Zeverino was purchased at a cost of $25.00 per month for each of the 64 tractors owned by the owner/operators of Taylor Truck Line, Inc. at the time of this accident.

The policy of Commercial Auto/Trucking Use Insurance sold by Great West to Taylor Truck Line, Inc. contains an estimated annual premium of $1,032,300 for the "covered autos" of Taylor Truck Line, Inc.

REASONS FOR GRANTING THE PETITION

In its opinion, the Wisconsin Supreme Court misconstrues and misapplies the clear and unambiguous provisions of 49 CFR § 396.3 and 49 CFR § 396.7 in making its insurance coverage determination. The misconstruction and misapplication of these two regulations creates dangerous public policy. The construction of these regulations by the Wisconsin Supreme Court inserts a threshold requirement that is not part of the language of the regulations. In effect, the holding of the Wisconsin Supreme Court says that as long as a truck is capable of hauling a load, it is in compliance with the safety requirements of 49 CFR § 396.3 and 49 CFR § 396.7.

In its opinion, the Wisconsin Supreme Court adopts the Seventh Circuit's interpretation of the phrase "in the business of" as set forth in *Hartford Ins. Co. v. Occidental Fire and Casualty Co.*, 908 F.2d 235 (7th Cir. 1990). In *Hartford*, the Seventh Circuit explained that "in the business of" an organization to whom a tractor is leased clearly refers to occasions when the truck is "being used to further the commercial interests of the lessee."

The Wisconsin Supreme Court, while adopting *Hartford*'s interpretation of the phrase "in the business of" adds a further requirement that the repairs must be "necessary to allow the semi-tractor to continue to accept and complete hauls for the lessee," *Casey*, 846 N.W.2d at 797, in order for the repairs to be seen as "furthering the commercial interest of the

lessee." Here, Zeverino was on his way to obtain repairs to a tractor bearing Taylor's name and logo when the tractor's grille was "starting to fall apart and fall off on the highway." Zeverino also testified that he needed to have the repairs done in order to have his tractor the way he needed it to operate as an owner/operator for Taylor Truck Line.

The Wisconsin Supreme Court also concluded that repairs may also be in furtherance of a lessee's commercial interest when they are being done to comply with the lessee's orders or the lessor's contractual duties. Here, the repairs were specifically required as a result of the contractual duties imposed by Taylor's Lease.

Both Acceptance and Great West agree that the *Hartford* test does apply. The Wisconsin Supreme Court recognizes that fact and goes on to state that whether a repair is in furtherance of a carrier's commercial interest depends on the totality of the circumstances that requires a fact-intensive inquiry. The court goes on to state that, "relevant considerations include the terms of the lease agreement, any instructions from the lessee, and the nature and extent of the repairs."

49 CFR § 396.3(a) requires that all parts and accessories on a commercial motor vehicle be in a safe and proper operating condition. 49 CFR § 396.7(a) prohibits commercial motor vehicles from being operated in a condition likely to cause an accident or breakdown.

Here, the lease which was drafted by Taylor, not by Zeverino, requires that Zeverino "maintain the equipment in the state of repair required by all applicable regulations." It even goes so far as to require that Zeverino must provide Taylor with copies of monthly maintenance reports and copies of lubrication and repair records for the equipment, including copies of parts purchased. The lease imposes on Zeverino the responsibility to Taylor of satisfying the regulatory and safety requirements of the Federal Regulations.

While it is unquestioned that the Federal Regulations cited above have been enacted to keep America's roads and highways safe for all users of those roads and highways, the Wisconsin Supreme Court somehow concludes that, "[c]ontrary to Acceptance's assertions, the undisputed facts in the record establish that the repairs to the grille and oil filler tube were not required to comply with the federal regulations." *Casey*, 846 N.W.2d at 799.

In order to come to that conclusion, the Wisconsin Supreme Court has totally ignored the testimony of John Zeverino.

At his deposition, Mr. Zeverino testified that he was on his way to getting repair work done on his tractor at the time of the accident. When asked whether he needed to get the repairs done, he testified as follows: **"Oh yes, I needed to get it repaired because it was already starting to fall apart and fall off on the highway."** He then

acknowledged that **he needed to have the repairs done in order to have his tractor the way he needed it to operate as an owner/operator for Taylor Truck Line**. He also testified that he would have to get the repairs done "to have the truck right." While he acknowledged that he could have taken a load on the day the accident occurred, he also testified that the repairs he was on his way to obtaining were something that was part of the ongoing maintenance of his tractor so that it would perform for him.

The Wisconsin Supreme Court's holding that "the repairs to the grille and oil filler tube were not required to comply with the federal regulations," *Casey*, 846 N.W.2d at 799, creates very significant public policy safety concerns when the undisputed facts in the record establish that the grille on John Zeverino's tractor was "starting to fall apart and fall off on the highway" and that he needed to have the repairs done in order to have his tractor the way he needed it to operate as an owner/operator for Taylor Truck Line. A tractor that is being driven with its grille starting to fall apart and fall off on the highway cannot be seen to be in compliance with the safety regulations set forth in the Code of Federal Regulations, by any stretch of the imagination.

Further explaining its decision, the Wisconsin Supreme Court states that "[t]he facts also demonstrate that Zeverino was not acting pursuant to orders from Taylor Truck Line at the time of the accident." *Id.* The court goes on to state that "[i]t is undisputed that Taylor Truck Line had not ordered

him to have the repairs done and that Taylor Truck Line was unaware that he was doing so." *Id.* While it is undisputed that Taylor was not aware that Zeverino was en route to obtain the needed repairs to his tractor at the time of the accident, it is very clear from the terms of the lease drafted by Taylor that the lease itself requires and orders Zeverino to obtain repairs to his tractor in a situation where the tractor's grille was "starting to fall apart and fall off on the highway." Zeverino clearly cannot refuse to comply with the Federal Regulations and the lease requirements that Taylor imposed upon him. Zeverino is clearly required to follow the Federal Regulations and Taylor's lease requirements or face the possibility of losing his license and ability to earn an income.

The Wisconsin Supreme Court also states that it is not persuaded that the repairs were necessary to enable the semi-tractor to continue service for Taylor Truck Line due to the fact that the parts being repaired were its grille and an oil filler tube. The court states that "[b]oth repairs were completed in approximately an hour." *Id.* at 800. From a public policy standpoint, the focus should not be on how long it takes to complete the repairs. For example, replacing a tire that is on the verge of blowing out can easily be done in less than an hour. However, continuing to operate with a tractor tire in such a condition presents a great safety risk which clearly violates the Code of Federal Regulations. Likewise, the court's focus should not be merely on whether or not the repairs enable the tractor to continue hauling loads.

While a tractor could continue to be operated with its grille "starting to fall apart and fall off on the highway," and could even haul loads in such condition, it is very poor public policy to encourage the continued operation of a tractor until it ultimately does break down or causes an accident. Unfortunately, such conduct is encouraged by not recognizing that obtaining repairs that will avoid such an accident or breakdown does not "further the commercial interest of the lessee." Such conduct clearly violates provisions of 49 CFR § 396.3(a)(1) that require that all parts and accessories shall be in safe and proper operating condition at all times. It also violates the provisions of 49 CFR § 396.7(a) which prohibit operation of a vehicle "in such condition as to likely cause an accident or breakdown of the vehicle."

It is undisputed that at the time of the accident, Zeverino's tractor was placarded with Taylor's name and logo. Only if Taylor actually expects and wants its equipment to be operated while the tractor grilles are "starting to fall apart and fall off on the highway," and only if the court condones such expectations and behavior, can it seriously be contended the repairs that Zeverino was on his way to obtain were not being done to "further the commercial interest" of Taylor.

In *Martinez v. Jefferson Insurance*, 225 Wis.2d 544, 593 N.W.2d 475 (Wis. App. 1999), review denied, the court in upholding a coverage exclusion in a Non-Trucking Use Policy stated that it was immaterial whether a driver was or was not ordered to do something, if the activity was something that would have

to be done at some point. *Martinez*, 593 N.W.2d at 477. Here, Zeverino testified that fixing the grille on his tractor would have to be done at some point so that he could continue as an owner/operator for Taylor. It is immaterial that Taylor did not order that the needed repairs to Zeverino's tractor had to be done the very day of the accident.

The underlying basis for the Wisconsin Supreme Court's opinion is its belief that the repairs were not necessary to allow the tractor to carry property. The court states, "[i]t is undisputed that the semi-tractor could still carry loads without the repairs. Thus the repairs were not necessary to allow the semi-tractor to carry property and the exclusion in section 14(a) of Acceptance's policy does not apply." *Casey*, 846 N.W.2d at 801.

Such an interpretation creates dangerous safety issues by focusing on whether the tractor can still carry loads, rather than focusing on whether the tractor can carry loads **SAFELY**. Such an interpretation is not intended by the Code of Federal Regulations.

In addition to creating public policy that is both dangerous and poorly considered, the decision of the Wisconsin Supreme Court is at odds with decisions of other states and decisions of Federal Circuits.

Many jurisdictions follow the rule set forth in *Hartford* that "in the business of" a carrier to whom a tractor is leased refers to occasions when the truck is "being used to further the commercial interests of the

lessee." *See Empire Fire and Marine Ins. Co. v. Brantley Trucking, Inc.*, 220 F.3d 679 (5th Cir. 2000); *National Continental Ins. Co. v. Empire Fire and Marine Ins. Co.*, 157 F.3d 610 (8th Cir. 1998); *Planet Ins. Co. v. Anglo American Ins. Co., Ltd.*, 711 A.2d 899 (N.J. App. Div. 1998); *Empire Fire and Marine Ins. Co. v. Liberty Mutual Ins. Co.*, 699 A.2d 482 (Md. Ct. Spec. App. 1997); *Lime City Mutual Insurance Ass'n v. Mullins*, 615 N.E.2d 305 (Ohio Ct. App. 1992); *Ehlers v. Automobile Liability Company*, 169 Wis. 494, 173 N.W. 325 (Wis. 1919); *Freed v. Travelers*, 300 F.2d 295 (7th Cir. 1962); *Carriers Ins. Co. v. Griffie*, 357 F. Supp. 441 (W. D. Pa. 1973); *Steele v. Great West Casualty Co.*, 540 N.W.2d 886 (Minn. Ct. App. 1995); *Great West Casualty Co. v. Carolina Casualty Ins. Co.*, 2006 WL 1704125 (Minn. Ct. App. 2006); *Reeves v. B and P Motor Lines, Inc.*, 346 S.E.2d 673 (N.C. App. 1986); *Liberty Mutual Ins. Co. v. Connecticut Indemnity Co.*, 55 F.3d 1333 (7th Cir. 1995); *Occidental Fire and Casualty Co. of North Carolina v. Soczynski*, 2013 WL 101877 (D. Minn. Jan. 8, 2013).

The vast majority of these cases find coverage for situations similar to this not under the Non-Trucking Liability Policy but, rather, under the Trucking Liability Policy. Several of the cases, including *Great West Casualty Co. v. Carolina Casualty Co. Ins.*, 2006 WL 1704125 (Minn. Ct. App. 2006) and *Reeves v. B and P Motor Lines, Inc.*, 346 S.E.2d 673 (N.C. App. 1986), recognize the fact that Non-Trucking Liability policies only afford coverage in very limited circumstances is also evidenced by the much lower

premiums charged for such coverage. This is due to the fact that such coverage applies only in very limited circumstances. Here, the Wisconsin Supreme Court declined to consider this argument.

Some of the cases provide examples of repairs and maintenance that do not "further the commercial interest of the lessee." An excellent analysis of when a Non-Trucking Use Policy does apply in a maintenance/repair scenario is set forth in *Occidental Fire and Casualty Co. of North Carolina v. Soczynski*, 2013 WL 101877 (D. Minn. Jan. 8, 2013). The facts set forth in *Soczynski* clearly provide an example of repairs and maintenance that do not further the commercial interest of the lessee. However, the facts underlying the repairs and maintenance in the *Soczynski* case are *markedly* different that the facts underlying the repairs and maintenance in the present case.

Several of the cases give examples of situations in which the Non-Trucking Use insurance applies such as the driver or lessor enjoying "a night on the town," a lessor who drove his mother home in the truck, an off-duty driver driving his tractor to go to a movie or an off-duty driver driving his tractor to go to a restaurant. These examples clearly illustrate the nature and purpose of Non-Trucking Use Coverage. As the court in *Planet* recognized, non-trucking use insurance is a safeguard for **"rare situations"** where the tractor's owner was using the tractor for **"wholly personal reasons completely unrelated to business."**

This is clearly not the case here.

The focus of the Wisconsin Supreme Court *solely* on whether the tractor can still transport loads, rather than focusing on whether the tractor can transport loads **SAFELY** is clearly at odds with decisions of other states and decisions of the Federal Circuits. It adds an additional requirement not contained in the Code of Federal Regulations and undercuts the safety reasons behind the enactment of the Federal Regulations.

CONCLUSION

For the reasons stated above, this Court should grant Acceptance's Petition for Writ of Certiorari.

Respectfully submitted,

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2014 WI 20

No. 2012AP667
(L.C. No. 2010CF295)

STATE OF WISCONSIN : IN SUPREME COURT

Brian Casey,

Plaintiff,

v.

Ronald Smith, John Zeverino, Taylor Truck Line, Inc., Allstate Property and Casualty Insurance Company, Austin Mutual Insurance Company and Health Partners,

Defendants,

Acceptance Casualty Insurance Company,

Defendant-Appellant-Petitioner,

Great West Casualty Company,

Defendant-Respondent.

(Filed Apr. 18, 2014)

REVIEW of a decision of the Court of Appeals. *Affirmed*.

¶1 ANN WALSH BRADLEY, J. Defendant Acceptance Casualty Insurance Company (Acceptance) seeks review of a published decision of the court of appeals affirming the circuit court's grant of summary

judgment in favor of Great West Casualty Company (Great West).[1] Both Acceptance and Great West issued liability insurance policies for a semi-tractor that was owned by John Zeverino and leased to Taylor Truck Line. Acceptance provided a non-trucking use policy and Great West provided a commercial truckers' policy.

¶2 Both parties agree that the accident is covered by insurance, but disagree as to which of the two policies provides the coverage. Each insurer filed a summary judgment motion asserting the other was responsible for coverage. Both the circuit court and the court of appeals concluded that of the two policies, the Acceptance policy provided coverage for the multi-vehicle accident.

¶3 Acceptance asserts that its policy provides no coverage because it contains two exclusions which preclude coverage. It primarily focuses on 14(b) that excludes coverage when a semi-tractor is being used "in the business of" a lessee. Acceptance contends that because the accident occurred while the semi-tractor's driver, John Zeverino, was on his way to a maintenance facility for repairs to the grille and oil filler tube, the semi-tractor was being used in the business of Taylor Truck Line at the time of the accident.

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[1] *Casey v. Smith*, 2013 WI App 24, 346 Wis. 2d 111, 827 N.W.2d 917 (affirming judgment of the circuit court for Dunn County, Rod W. Smeltzer, Judge).

¶4 Alternatively, it advances that 14(a) excludes coverage when a semi-tractor is "en route to" a "business purpose" and that obtaining maintenance is a business purpose. Acceptance argues that because obtaining repairs constitutes a business purpose, there is no coverage under its non-trucking use policy.

¶5 We determine that neither of the exclusions in Acceptance's policy precludes coverage. The facts of record do not support the application of exclusion 14(b). Zeverino was not using the semi-tractor "in the business of" Taylor Truck Line because the repairs here did not further Taylor's commercial interests. There is nothing in the record that shows the repairs were required by the lease. Additionally, the repairs were not done pursuant to orders from Taylor Truck Line, and they were not necessary for the semi-tractor to continue its service.

¶6 Further, Acceptance's argument that coverage is excluded because Zeverino was en route to the business purpose of obtaining maintenance reflects an overly expansive interpretation of the text of exclusion 14(a). Like the court of appeals, we are concerned that its interpretation may render coverage illusory. Instead, in examining the text of exclusion 14(a) we determine that it refers to maintenance necessary to allow the semi-tractor to carry property. It is undisputed that the semi-tractor could and did carry loads without the repairs to the grille and oil filler tube.

¶7 Because the exclusions in Acceptance's policy do not apply, we conclude that its non-trucking use policy provides coverage for the accident. Accordingly, we affirm the court of appeals.

I.

¶8 The parties repeatedly asserted that the facts in this case are not in dispute. Zeverino owned a 2003 Freightliner semi-tractor which he leased to Taylor Truck Line, Inc. Under the terms of the lease Zeverino agreed to provide a driver and use his semi-tractor exclusively for Taylor Truck Line. The lease also provided that Zeverino would "bear all expenses to the operation to the equipment, including . . . [r]epairs and maintenance" and "[m]aintain[ ] the equipment in a state of repair required by all applicable regulations."[2] The lease further required Taylor Truck Line to obtain insurance as required by federal law[3]

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[2] Section 23 of the lease states:

> The contractor shall have the responsibility to carrier of satisfying various regulatory requirements, and safety requirements of carrier and/or insurance company, by:
>
> A) Maintaining the equipment in the state of repair required by all applicable regulations.
>
> B)

[3] Section 17(A) of the lease provides:

> *LIABILITY-PROPERTY DAMAGE INSURANCE*. During the existence of this agreement, carrier will provide and maintain insurance coverage for the protection of the public from damage to persons and property,

(Continued on following page)

and Zeverino to obtain "bobtail liability insurance"[4] to cover the semi-tractor "when not used in performance under this agreement."

¶9 Pursuant to the lease, Zeverino obtained an insurance policy for non-trucking use coverage from Acceptance. An exclusion in section 14(a) of the policy states that it does not cover the semi-tractor "[w]hile being operated, maintained or used to carry property in any business or en route to or from such business purpose." Section 14(b) of the policy sets forth another exclusion that states that it does not cover the semi-tractor "[w]hile used in the business of anyone to whom the 'auto' is rented."

¶10 Taylor Truck Line obtained a commercial truckers' insurance policy from Great West. The policy provides coverage for:

> [t]he owner or anyone else from whom you lease, for more than 30 consecutive days, a covered "auto" with a driver that is not a "trailer" while the covered "auto":
>
> (1) Is being used exclusively in your business as a "trucker."

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pursuant to its statutory obligations under 49 U.S.C. 10927.

[4] "A bobtail is the popular term for a tractor (cab) without an attached trailer. Since a trucker who is 'bobtailing' is generally not using the vehicle for trucking purposes, non-trucking-use insurance is often called bobtail insurance." *Royal Indem. Co. v. Providence Wash. Ins. Co.*, 707 N.E.2d 425, 426 n.1 (N.Y. 1998).

The policy defines a "trucker" as "any person or organization engaged in the business of transporting property by 'auto' for hire."

¶11 In January 2009, Zeverino took the semi-tractor to FABCO, a truck maintenance facility in Eau Claire, to have its engine control module recalibrated. While the semi-tractor was there, FABCO inadvertently damaged its grille. FABCO ordered a new one and called Zeverino when it arrived. Instead of making an appointment to replace the grille, Zeverino was to return to FABCO to have the grille replaced whenever it was convenient for him. In addition, Zeverino had previously ordered a new oil filler tube which he had intended to install himself. FABCO offered to install the new tube at the same time it replaced the grille.

¶12 The damaged grille did not put the truck out of service or prevent Zeverino from completing or accepting new loads to haul. Zeverino indicated that he was on duty several hours from February 20 through February 25, 2009. He testified that having the grille replaced "was not a routine maintenance, but it was a repair that they had broken, they had to replace." He agreed that he needed to have the repair work done "to have [the] tractor the way [he] needed it to . . . operate as an owner, operator for Taylor Truck Line."

¶13 On February 27, 2009, approximately a month after the grille was broken, Zeverino left his home in Prescott and headed to Eau Claire to have

the grille replaced. Zeverino was off-duty at the time. Taylor Truck Line did not know he was going to Eau Claire that day and he was not under any order or instruction from Taylor Truck Line to do so. Zeverino stated in his deposition that he did not consider himself to be "in the business of Taylor Truck Line at the time." Although he indicated that the grille was "starting to fall apart and fall off on the highway," Zeverino also testified that he could have taken a load that day without service to his grille or oil filler tube.

¶14 While en route to Eau Claire, Zeverino's tractor was involved in a multi-vehicle accident that included vehicles driven by Ronald Smith and Brian Casey. Zeverino wrote in his Driver's Daily Log that he was "driving" at the time of the accident and "on duty" while at the scene of the accident. While there, Zeverino filled out an accident report which indicated that there was nothing wrong with the semi-tractor prior to the accident. A Wisconsin state trooper who arrived at the scene conducted a Level 1 DOT inspection of Zeverino's semi-tractor, apparently the most comprehensive type of post-accident inspection. The trooper also completed a "Driver/Vehicle Examination Report" and noted that no violations were discovered during the inspection. Thereafter, the trooper permitted Zeverino to continue on to Eau Claire, where FABCO replaced the grille and oil filler tube. Together the repairs took approximately an hour.

¶15 Casey filed a complaint on June 29, 2010, seeking recovery for injuries he sustained in the

accident. He included Zeverino, Taylor Truck Line, Acceptance, and Great West as named defendants.

¶16 Both insurance companies filed cross motions for summary judgment on April 6, 2011. Acceptance pointed to two relevant exclusions in its non-trucking policy, section 14(a) and section 14(b). It asserted that at the time of the accident the semi-tractor was being used "in the business of" Taylor Truck Line. Additionally, it argued that because the accident occurred while Zeverino was "en route" to have maintenance done on the semi-tractor, it was being used for a "business purpose" of the lessee. Acceptance contended that the exclusions precluded coverage.

¶17 Great West asserted that Zeverino was not using the semi-tractor in the business of the lessee because the repairs were not needed to make the semi-tractor safe or available for Taylor Truck Line's use, and Taylor Truck Line had not directed Zeverino to have the repairs done. Great West argued that it was not responsible for providing coverage for the accident because its policy afforded coverage only while the semi-tractor was "being used exclusively in [Taylor's] business."

¶18 The circuit court issued an order denying both motions. It determined that there was a triable issue of fact as to whether Zeverino was performing in furtherance of the business or commercial interests of Taylor Truck Line.

¶19 Upon a motion for reconsideration, together with supplemental memoranda of law and supplemental affidavits, the circuit court granted summary judgment in favor of Great West. It found that Zeverino was having non-essential repairs done on his own time. Accordingly, the circuit court determined that Zeverino was not involved in furthering the business of Taylor Truck Line at the time of the accident.

¶20 The court of appeals affirmed. *Casey v. Smith*, 2013 WI App 24, 346 Wis. 2d 111, 827 N.W.2d 917. It noted the parties' agreement that one of their policies afforded coverage for the accident and that resolution of which policy applied depended on whether Zeverino was operating the semi-tractor "in the business of" Taylor Truck Line. *Id.*, ¶10.

¶21 The court considered first the exclusion set forth in section 14(b) of Acceptance's policy. Quoting the Seventh Circuit Court of Appeals, the court stated that a tractor is being operated "in the business of" the lessee when "the truck is being used to further the commercial interests of the lessee." *Id.*, ¶17 (quoting *Hartford Ins. Co. v. Occidental Fire & Cas. Co.*, 908 F.2d 235, 237 n.5, 239 (7th Cir. 1990)). The court noted Zeverino's testimony that the defects did not prevent him from hauling loads and his concession that the semi-tractor was never taken out of service. *Id.*, ¶23. Consequently, the court determined that the repairs to the semi-tractor's grille and oil filler tube were not necessary for Zeverino to continue operating in Taylor Truck Line's business. *Id.* Therefore, it

concluded that "the repairs did not further Taylor's commercial interests and Zeverino was not acting 'in the business of' Taylor at the time of the accident." *Id.*

¶22 Next, the court considered the exclusion set forth in section 14(a) of Acceptance's policy. It recounted Acceptance's contention that the exception lists three activities that qualify as "business purposes:" (1) operation, (2) maintenance, and (3) being used to carry property in any business. *Id.*, ¶31. The court determined that such an interpretation "produces absurd results" as it would mean "the mere operation of the tractor, for any reason, would be a business purpose." *Id.*, ¶32. Accordingly, the court rejected Acceptance's interpretation of section 14(a). It concluded that the business purposes referred to in section 14(a) were: (1) operation to carry property in any business, (2) maintenance to carry property in any business, and (3) use to carry property in any business. *Id.*, ¶33.

II.

¶23 In this case, we are called upon to review the circuit court's grant of summary judgment to Great West. We review grants of summary judgment independently of the determinations rendered by the circuit court and the court of appeals, but we apply the same methodology as the circuit court. *Park Bank v. Westburg*, 2013 WI 57, ¶36, 348 Wis. 2d 409, 832 N.W.2d 539. Summary judgment is appropriate where

"there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).

¶24 Here, the parties agree that there are no material facts in dispute. At issue is the interpretation of Acceptance's and Great West's policies. The interpretation of an insurance policy is a question of law that we review independently of the decisions rendered by the circuit court and the court of appeals. *Schinner v. Gundrum*, 2013 WI 71, ¶35, 349 Wis. 2d 529, 833 N.W.2d 685.

¶25 This court has a well-established methodology for determining insurance coverage. First, we look to a policy's initial grant of coverage. *Wadzinski v. Auto-Owners Ins. Co.*, 2012 WI 75, ¶14, 342 Wis. 2d 311, 818 N.W.2d 819. Second, if there is an initial grant of coverage, the court will examine whether any exclusions withdraw coverage from a claim. *Id.* Third, if an exclusion applies, the court will then consider whether there are any exceptions to the exclusion that reinstate coverage. *Id.*

¶26 Our inquiry is also guided by the canons of construction applicable to insurance policies. "[W]e interpret policy language according to its plain and ordinary meaning as understood by a reasonable person in the position of the insured." *Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WI 20, ¶22, 338 Wis. 2d 761, 809 N.W.2d 529. Ambiguities in the policy language are construed against the insurer. *Marlowe v. IDS Prop. Cas. Ins. Co.*, 2013 WI 29, ¶48, 346 Wis. 2d

450, 828 N.W.2d 812. Further, polices should be construed to avoid absurd or unreasonable results. *McPhee v. American Motorists Ins. Co.*, 57 Wis. 2d 669, 679, 205 N.W.2d 152 (1973).

III.

¶27 We turn first to Acceptance's policy. It is undisputed that Acceptance's non-trucking use policy makes an initial grant of coverage for the accident. Accordingly, we look to the policy exclusions to determine if any remove the accident from coverage.

¶28 Central to this inquiry is exclusion 14(b) of Acceptance's policy, which provides: "[t]his insurance does not apply to any of the following: . . . [a] covered 'auto' . . . [w]hile used in the business of anyone to whom the 'auto' is rented." The parties disagree about whether Zeverino was using the semi-tractor "in the business of" Taylor Truck Line at the time of the accident.

¶29 The Seventh Circuit has articulated how the phrase "in the business of" is to be interpreted in the context of a non-trucking use insurance policy. *Hartford Ins. Co. v. Occidental Fire & Casualty Co.*, 908 F.2d 235 (7th Cir. 1990). In *Hartford* a tractor owner leased its truck and a driver to an interstate carrier. *Id.* at 236. The carrier dispatched the driver from Florida to Indiana to deliver frozen orange juice. *Id.* Before the driver left Florida, the owner instructed him to have a faulty Freon valve repaired after he delivered his load in Indiana. *Id.* The trailer leaked

Freon throughout the trip and the buyer refused to accept the orange juice because it was too warm. *Id.*

¶30 After the driver informed the carrier of the refusal, it instructed him to take the juice to a cold-storage facility. *Id.* Complying with those instructions, the driver placed the juice in storage. Then, the driver took the trailer to have the Freon valve repaired. *Id.* The next day the driver got into an accident while on his way to pick up the trailer. *Id.* Thereafter, pursuant to the carrier's instructions, the driver made another attempt to deliver the orange juice and returned to Florida with it after the juice was refused. *Id.* at 236-37.

¶31 At issue in *Hartford* was whether the truck's non-trucking insurer was required to indemnify the other insurer. The non-trucking insurance policy contained a clause excluding coverage when the truck was "being used in the business of any person or organization to whom the automobile is rented." *Id.* at 237. Applying Wisconsin law, the court determined that this language was unambiguous. *Id.* at 238.

¶32 The *Hartford* court explained that "'in the business of an . . . organization to whom an automobile is rented' clearly refers to occasions when the truck is being used to further the commercial interests of the lessee." *Id.* at 239. Because the truck driver had not completed his delivery for the carrier and was on his way to pick up his trailer for delivery, the court concluded that the truck was being used to

further the business interest of the carrier and thus the exclusion in the non-trucking policy applied. *Id.*

¶33 The Wisconsin Court of Appeals applied the *Hartford* test in *Martinez v. Jefferson Ins.*, 225 Wis. 2d 544, 550, 593 N.W.2d 475 (Ct. App. 1999). It determined that a driver was acting in furtherance of a lessee when he was on his way to return a billing ticket to the office as required by the lessee. *Id.* at 549-50. Accordingly, the driver was acting in the business of the lessee for purposes of insurance coverage. *Id.*

¶34 A number of other jurisdictions also follow the rule espoused by *Hartford*. *See*, *e.g.*, *Empire Fire & Marine Ins. Co. v. Brantley Trucking, Inc.*, 220 F.3d 679, 682 (5th Cir. 2000); *National Continental Ins. Co. v. Empire Fire & Marine Ins. Co.*, 157 F.3d 610, 612 (8th Cir. 1998); *Planet Ins. Co. v. Anglo American Ins. Co., Ltd.*, 711 A.2d 899, 902 (N.J. App. Div. 1998); *Empire Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 699 A.2d 482, 495 (Md. Ct. Spec. App. 1997); *Lime City Mut. Ins. Ass'n v. Mullins*, 615 N.E.2d 305, 308 (Ohio Ct. App. 1992). Likewise, we adopt *Hartford*'s interpretation of the phrase "in the business of" as it presents a clear rule that is consistent with the plain language of the exclusion.

¶35 Not all repairs and maintenance to a leased semi-tractor further the commercial interest of the lessee. *Hartford* demonstrates that repairs are in furtherance of a lessee's commercial interests when they are necessary to allow the semi-tractor to continue to

accept and complete hauls for the lessee. In *Hartford*, the broken Freon valve hampered the trucker's ability to deliver the orange juice, causing the buyer to reject the orange juice because it was too warm. *Hartford*, 908 F.2d at 240. Accordingly, the court rejected the argument that the repair was not necessary for the lessee's business. *Id.*

¶36 The principle that obtaining necessary repairs is in furtherance of a lessee's business is also illustrated in *Ehlers v. Automobile Liability Co.*, 169 Wis. 494, 173 N.W. 325 (1919). In that case, the driver was not on his route, had quit for the day and was driving to a repair shop when he was involved in an accident. *Id.* at 498. The vehicle was covered by an indemnity bond, which provided coverage "while said motor vehicle is being operated in the service of a common carrier." *Id.* at 495. The court determined that the coverage applied because the vehicle was "running to a repair shop to receive the repairs necessary to enable it to continue its service as a common carrier." *Id.* at 498.

¶37 Repairs may also be in furtherance of a lessee's commercial interest when they are being done to comply with the lessee's orders or the lessor's contractual duties.[5] *See Freed v. Travelers*, 300 F.2d

[5] We acknowledge that not all jurisdictions agree that a lessor is acting in the interests of the lessee when it is fulfilling its contractual duties. For example, in *Neal v. St. Paul Fire & Marine Ins. Co.*, 250 N.W.2d 648 (Neb. 1977), the Nebraska Supreme Court determined that bobtail coverage did not apply

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395 (7th Cir. 1962) (driver's trip to a repair shop was part of the lessee's business when the lease required the driver to keep the tractor ready at all times for the use of the lessee); *National Continental Ins. Co.*, 157 F.3d at 612 ("To the extent that [lessor] was executing his contractual duties, he was clearly acting 'in the business of' [the lessee] and thus outside the scope of [non-trucking insurance] coverage."); *Carriers Ins. Co. v. Griffie*, 357 F. Supp. 441, 442 (W.D. Pa. 1973) (truck was being "used in the business" of lessee when the lessee requested that lessor get equipment inspected at a certain inspection station selected by the lessee and an accident occurred while at that station); *Planet Ins. Co.*, 711 A.2d at 903 (tractor was being used in furtherance of lessee when it was on its way home after obtaining "repair[s] pursuant to the terms of the lease so that it could be used in [lessee's] business").

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when the owner was getting maintenance work done on the truck pursuant to its contractual duties. It explained:

> While the carrier derived some benefit from the fact that the plaintiff attended to the maintenance of the tractor between trips, since that was essential to the continued use of the tractor in hauling commodities, the servicing and maintenance of the tractor was the responsibility of the plaintiff. The maintenance of the tractor was the "business" of the plaintiff, not that of the carrier.

Id. at 650. We find this reasoning unpersuasive as it is based on a narrower construction of the term "in the business of" than the one we adopt from *Hartford*.

¶38 In essence, both parties agree that the *Hartford* test applies. They disagree about how the facts here apply to that standard. As illustrated by the cases discussed above, whether a repair is in furtherance of a carrier's commercial interest depends on the totality of the circumstances. It is a fact-intensive inquiry that will not always be amenable to summary judgment. *See*, *e.g.*, *Martinez*, 225 Wis. 2d at 548 (noting that the issue of whether the truck was being operated for the lessee's business at the time of the accident required a factual conclusion). Relevant considerations include the terms of the lease agreement, any instructions from the lessee, and the nature and extent of the repairs.

¶39 Here, the lease required that the lessor "[m]aintain[ ] the equipment in the state of repair required by all applicable regulations." Acceptance asserts that the repairs were necessary to comply with 49 C.F.R. § 396.3(a), which requires all parts and accessories to be in a safe and proper operating condition, and 49 C.F.R. § 396.7(a), which prohibits commercial motor vehicles from being operated in a condition likely to cause an accident or breakdown.

¶40 Contrary to Acceptance's assertions, the undisputed facts in the record establish that the repairs to the grille and oil filler tube were not required to comply with the federal regulations. The record contains the report of the state trooper who inspected the semi-tractor after the accident. Federal regulations require the trooper to mark the semi-tractor out-of-service if the condition of the vehicle or

equipment would likely cause an accident or a breakdown. 49 C.F.R. § 396.9(c). Rather than marking the semi-tractor out-of-service, the trooper indicated in his inspection report that there were no violations and permitted Zeverino to continue on to Eau Claire. Because there is no evidence in the record which indicates that the repairs were necessary to comply with federal regulations, there is no support for the argument that the repairs were necessary to fulfill Zeverino's contractual duties.

¶41 Acceptance further contends that because the lease gave exclusive possession, control, and use of the semi-tractor to Taylor Truck Line, that Zeverino's actions were necessarily in the business of Taylor Truck Line. Again, we disagree.

¶42 That language in the lease is required by federal regulations governing motor carriers. 49 C.F.R. § 376.12(c) (formerly 49 C.F.R. § 1057.12) (requiring the lease to provide that "the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease."). As the Seventh Circuit explained in *Hartford*, the requirement was intended "to safeguard the public by preventing authorized carriers from circumventing applicable regulations by leasing the equipment and services of independent contractors exempt from federal regulation." 908 F.2d at 238. However, it does not prevent indemnification of the lessee by the lessor. *Id.* (citing *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 40 (1975)).

¶43 When a lease includes a clause requiring the lessor to obtain bobtail coverage, it clearly contemplated a situation where the vehicle, "though rented, would not be engaged 'in the business' of another." *Hartford*, 908 F.2d at 231. Accordingly, the fact that the lease gave Taylor Truck Line exclusive possession, control, and use of the semi-tractor is not dispositive of whether the semi-tractor was operating in Taylor Truck Line's business at the time of the accident.[6]

¶44 The facts also demonstrate that Zeverino was not acting pursuant to orders from Taylor Truck Line at the time of the accident. Zeverino testified that he was not on duty on the day of the accident. It is undisputed that Taylor Truck Line had not ordered him to have the repairs done and that Taylor Truck Line was unaware that he was doing so.

¶45 Acceptance references the fact that Zeverino had indicated in his Daily Trip Log that he was "driving" prior to the accident and "on duty" at the scene of the accident, to suggest that Zeverino was working on behalf of Taylor Truck Line while he was on his way to obtain the repairs. These references are not persuasive. Federal regulations require

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[6] Acceptance also advances the argument that the differing amounts which the two insurance companies charged for their premiums demonstrate that its policy was intended to have very limited coverage. We decline to consider this argument as the record is silent on the methods and considerations employed in setting the premiums.

drivers to keep daily logs of their driving status. 49 C.F.R. § 395.8. Under the regulations, "driving" means "all time spent at the driving controls of a commercial motor vehicle in operation." 49 C.F.R. § 395.2. It does not indicate whether the driving is being done for personal or business reasons.

¶46 Likewise, under the federal regulations the notation of "on duty" in a log book is appropriate for "[a]ll time inspecting, servicing, or conditioning any commercial motor vehicle at any time" and "[a]ll time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle." 49 C.F.R. § 395.2. It does not indicate whether those functions are necessary or being done on behalf of a business. Accordingly, we reject Acceptance's argument that the log book indicates that Zeverino was acting in the business of Taylor Truck Line at the time of the accident.

¶47 Finally, we are not persuaded that the repairs were necessary to enable the semi-tractor to continue service for Taylor Truck Line. The parts being repaired on the semi-tractor were its grille and an oil filler tube. Both repairs were completed in approximately an hour.

¶48 The damaged grille did not put the semi-tractor out of service or prevent Zeverino from accepting or completing hauls for Taylor Truck Line. The record reflects that Zeverino had been doing so for over a month during the time between the damage to the grille and its repair. Acceptance asserts that

Zeverino's testimony that the grille was starting to fall apart indicates that it would need to be repaired at some point. However, Zeverino's testimony on this point was vague and he did not provide further details. The inspection of the semi-tractor after the accident revealed no violations and placed no limitations on the continued operation of the vehicle.

¶49 In sum, because the repairs were not required by the lease agreement, were not done pursuant to orders by Taylor Truck Line, and were not necessary for the semi-tractor to continue its service, we conclude that Zeverino was not acting in furtherance of Taylor Truck Line's commercial interest at the time of the accident. Accordingly, the accident does not fall within the exclusion in section 14(b) of Acceptance's policy.

IV.

¶50 Acceptance also points to section 14(a) of its policy as a clause excluding coverage. That exclusion provides that the policy does not cover the semi-tractor "[w]hile being operated, maintained or used to carry property in any business or en route to or from such business purpose."

¶51 Acceptance reads section 14(a) as excluding the semi-tractor from coverage when it is being "operated, maintained, or used . . . or en route to or from such business purpose. Acceptance contends that the phrase "such business purpose" refers back

to maintenance, indicating that maintenance is a business purpose.

¶52 However, under Acceptance's interpretation of section 14(a), operation and use would also constitute business purposes. As recognized by the court of appeals, if that were the case, Acceptance's policy would not cover any situations in which the semi-tractor was being driven. *Casey*, 346 Wis. 2d 111, ¶32. Indeed, it is unclear that Acceptance's policy would ever apply if we were to adopt the interpretation it suggests. Wisconsin has a strong public policy against illusory coverage. *Meyer v. Classified Ins. Co.*, 192 Wis. 2d 463, 468-69, 531 N.W.2d 416 (Ct. App. 1995).

¶53 In contrast, Great West asserts that section 14(a) should be read to exclude the semi-tractor from coverage when it is being operated to carry property, maintained to carry property, or used to carry property, or when it is en route to or from those activities. In other words, 14(a) would exclude the semi-tractor from coverage when it is en route to obtain maintenance if that maintenance is necessary to allow the semi-tractor to carry property.

¶54 We agree with Great West's interpretation of section 14(a). It comports with the plain language of the policy and affords the insured some coverage. To the extent that section 14(a) is ambiguous, we construe ambiguity against the insurer, Acceptance. *Marlowe*, 346 Wis. 2d 450, ¶48.

¶55 Applying section 14(a) to the facts of this case, we conclude that it does not exclude coverage.

Here, Zeverino was on his way to have the grille and oil filler tube on the semi-tractor replaced when the accident occurred. It is undisputed that the semi-tractor could still carry loads without the repairs. Thus, the repairs were not necessary to allow the semi-tractor to carry property and the exclusion in section 14(a) of Acceptance's policy does not apply.

¶56 Acceptance has identified no other possible exclusions that would apply to preclude coverage. As it has conceded that there was an initial grant of coverage, we conclude that Acceptance is responsible for providing coverage for the claims resulting from the accident.

¶57 Finally, we turn to address Great West's insurance policy. The parties agree that the Great West policy provides coverage for the accident only if Zeverino was acting in the business of Taylor Truck Line at the time that the accident occurred. As discussed above, we have determined that he was not. Therefore, we conclude that the Great West policy provides no coverage for the claims resulting from the accident.

V.

¶58 We determine that neither of the exclusions in Acceptance's policy precludes coverage. The facts of record do not support the application of exclusion 14(b). Zeverino was not using the semi-tractor "in the business of" Taylor Truck Line because the repairs here did not further Taylor's commercial interests.

There is nothing in the record that shows the repairs were required by the lease. Additionally, the repairs were not done pursuant to orders from Taylor Truck Line, and they were not necessary for the semi-tractor to continue its service.

¶59 Further, Acceptance's argument that coverage is excluded because Zeverino was en route to the business purpose of obtaining maintenance reflects an overly expansive interpretation of the text of exclusion 14(a). Like the court of appeals, we are concerned that its interpretation may render coverage illusory. Instead, in examining the text of exclusion 14(a) we determine that it refers to maintenance necessary to allow the semi-tractor to carry property. It is undisputed that the semi-tractor could and did carry loads without the repairs to the grille and oil filler tube.

¶60 Because the exclusions in Acceptance's policy do not apply, we conclude that its non-trucking use policy provides coverage for the accident. Accordingly, we affirm the court of appeals.

By the Court. – The decision of the court of appeals is affirmed.

2013 WI App 24

COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP667 Cir. Ct. No. 2010CV295

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT III**

BRIAN CASEY,

PLAINTIFF,

V.

RONALD SMITH, JOHN ZEVERINO, TAYLOR TRUCK LINE, INC., ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, AUSTIN MUTUAL INSURANCE COMPANY AND HEALTH PARTNERS,

DEFENDANTS,

ACCEPTANCE CASUALTY INSURANCE COMPANY,

DEFENDANT-APPELLANT,

GREAT WEST CASUALTY COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 CANE, J. This case involves an insurance coverage dispute arising out of a multi-vehicle accident that took place on February 27, 2009. One of the vehicles involved was a semi-tractor owned and operated by John Zeverino, but leased to Taylor Truck Line, Inc. Taylor had a commercial automobile policy through Great West Casualty Company, and Zeverino had a non-trucking use automobile policy through Acceptance Casualty Insurance Company. The circuit court determined the Acceptance policy provided coverage for claims stemming from the accident, and the Great West policy did not, because Zeverino was not acting "in the business of" Taylor at the time of the accident. We agree, and therefore affirm the summary judgment in favor of Great West.

BACKGROUND[1]

¶2 On October 10, 2006, Zeverino leased a Freightliner semi-tractor he owned to Taylor, pursuant to an "Independent Contractor Equipment Lease Agreement." The agreement provided that Zeverino

[1] Great West's brief contains no citations to the record; instead, Great West cites only to Acceptance's appendix. We admonish Great West that WIS. STAT. RULES 809.19(1)(d) and (e) require appropriate citations to the record on appeal, and references to a brief's appendix are not in conformity with the rules. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

would use the tractor "to transport, load and unload on behalf of [Taylor] . . . such traffic as [Taylor] may from time to time make available to [Zeverino.]" The agreement further specified that Taylor would have "exclusive possession, control and use" of the tractor and would "assume complete responsibility to the public for the operation of [the tractor]" during the term of the lease. It also provided that Zeverino would be responsible for "[m]aintaining the [tractor] in the state of repair required by all regulations" and would bear all repair and maintenance expenses.

¶3 In addition, Taylor and Zeverino each agreed to maintain certain insurance, which was to provide coverage for the tractor depending on how it was being used. Taylor agreed "to provide and maintain insurance coverage for the protection of the public from damage to persons and property[.]" However, Taylor's insurance would be in effect only when the tractor was "being operated in the exclusive service of [Taylor] and while actually engaged in transportation for [Taylor.]"

¶4 Zeverino, in turn, agreed to "indemnify and hold [Taylor] harmless from all claims relating to [Zeverino's] bobtailing of the equipment[.]" In trucking industry parlance, "bobtailing" means driving a tractor without an attached trailer. *See* ***Continental Cas. Co. v. Transport Indem. Co.***, 16 Wis. 2d 189, 192, 114 N.W.2d 137 (1962). Zeverino also agreed to carry "so-called bobtail liability insurance coverage with respect to public liability or property damage . . . as concerns all equipment hereunder when not used

in performance of a trip under this agreement." Bobtail insurance is another name for non-trucking use insurance, which generally covers a tractor when it is not being used for trucking purposes. *See* ***Royal Indem. Co. v. Providence Washington Ins. Co.***, 707 N.E.2d 425, 426 n.1 (N.Y. 1998).

¶5 In accordance with the lease agreement, Taylor obtained a commercial automobile policy from Great West, which provided $1,000,000 in liability coverage. Zeverino obtained a non-trucking use policy from Acceptance, which also had a $1,000,000 liability limit.

¶6 In January 2009, Zeverino drove the tractor to FABCO, a Caterpillar dealership in Eau Claire, Wisconsin, to have its electronic control module adjusted. While performing the adjustment, FABCO damaged the tractor's grille. FABCO ordered a new grille, and called Zeverino when it arrived. Instead of making an appointment to replace the grille, FABCO instructed Zeverino to stop by whenever it was convenient. In addition, Zeverino had previously ordered a new oil filler tube for the tractor after the existing tube broke off at the engine block. FABCO offered to install the new tube at the same time it replaced the grille.

¶7 On February 27, 2009, Zeverino had the day off work. He set out from his home and began driving his tractor to FABCO to have the grille replaced. He planned to return home after FABCO completed the work. No one from Taylor knew that he was going to

FABCO, and he was not doing so pursuant to any orders or instructions from Taylor. He did not consider himself to be acting "in the business of Taylor" at the time, and he was not pulling a trailer or any other freight. However, while driving to FABCO, Zeverino's daily driver's log reflected that he was "driving," rather than "off duty."

¶8 At his deposition, Zeverino testified he "needed to get [the grille] repaired" because it was "already starting to fall apart and fall off on the highway." He stated the repairs were necessary for the tractor to operate "the way [he] needed it to . . . as an owner, operator for [Taylor.]" However, he conceded the broken grille and oil filler tube did not prevent him from hauling loads on Taylor's behalf. He also admitted the tractor was never placed out of service because of these defects.

¶9 On the way to FABCO, Zeverino was involved in an accident with three other vehicles, including one driven by Brian Casey. At the accident scene, a Wisconsin state trooper conducted a "Level I" inspection of Zeverino's tractor, the most comprehensive type of post-accident inspection, and completed a "Driver/Vehicle Examination Report." The report noted that no violations were discovered during the inspection of the tractor. The trooper crossed off the portion of the form requiring certification that "all Out of Service defects . . . have been repaired and the vehicle has been restored to safe operating condition." At the accident scene, Zeverino logged himself as "on duty (not driving)" on his driver's daily log. Following

the accident, he drove the tractor to FABCO, where the grille and oil filler tube were replaced as planned.

¶10 Casey subsequently sued Zeverino and several other defendants, asserting personal injury claims. A dispute arose between Great West and Acceptance as to which of their policies covered Casey's claims. Both insurers agreed that one, but not both, of their policies afforded coverage. They also agreed that resolution of the coverage issue turned on whether Zeverino was operating the tractor "in the business of" Taylor at the time of the accident. If so, Great West's commercial automobile policy provided coverage; if not, there was coverage under Acceptance's non-trucking use policy.

¶11 The matter was submitted to the circuit court on cross-motions for summary judgment. The circuit court agreed with Great West that Zeverino was not acting "in the business of" Taylor at the time of the accident. As a result, the court concluded the Acceptance policy, not the Great West policy, provided coverage. The court granted Great West summary judgment, and Acceptance now appeals.

DISCUSSION

¶12 We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment is appropriate where there is no genuine issue of material fact and the moving

party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2]

¶13 Here, the facts are undisputed, but the parties disagree as to which insurance policy affords coverage under the facts presented. Interpretation of an insurance policy presents a question of law subject to our independent review. ***Greene v. General Cas. Co.***, 216 Wis. 2d 152, 157, 576 N.W.2d 56 (Ct. App. 1997). Our goal in interpreting an insurance policy is to give effect to the parties' intent. ***Folkman v. Quamme***, 2003 WI 116, ¶16, 264 Wis. 2d 617, 665 N.W.2d 857. If the policy language is unambiguous, we simply enforce it as written. ***Marnholtz v. Church Mut. Ins. Co.***, 2012 WI App 53, ¶10, 341 Wis. 2d 478, 815 N.W.2d 708. However, we construe ambiguous policy language against the insurer and in favor of coverage. ***Id.*** Policy language is ambiguous if it is susceptible to more than one reasonable interpretation. ***Folkman***, 264 Wis. 2d 617, ¶13.

¶14 When we interpret an insurance policy, we first examine the policy's insuring agreement to determine whether it makes an initial grant of coverage for the plaintiff's claim. *See* ***Olson v. Farrar***, 2012 WI 3, ¶41, 338 Wis. 2d 215, 809 N.W.2d 1. If so, we then determine whether any of the policy's exclusions preclude coverage. *See* ***id.*** "[E]xclusions are narrowly construed against the insurer." ***Link v.***

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[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

General Cas. Co. of Wis., 185 Wis. 2d 394, 399, 518 N.W.2d 261 (Ct. App. 1994). Finally, we determine whether an exception to an exclusion reinstates coverage. *See* ***Olson***, 338 Wis. 2d 215, ¶41.

I. The Acceptance Policy

¶15 Acceptance does not dispute that the non-trucking use policy it issued to Zeverino makes an initial grant of coverage for Casey's claims. However, Acceptance argues two of the policy's exclusions apply. We examine each exclusion in turn.

A. Exclusion 14(b)

¶16 Acceptance first contends Exclusion 14(b) precludes coverage for Casey's claims. Exclusion 14(b) states that the insurance provided by the policy does not apply to "a covered 'auto' . . . [w]hile used in the business of anyone to whom the 'auto' is rented[.]" It is undisputed that Zeverino's tractor constitutes a "covered 'auto'" under the policy and that the tractor was rented to Taylor. Thus, the dispositive issue is whether the tractor was being used "in the business of" Taylor at the time of the accident.

¶17 The Seventh Circuit Court of Appeals, applying Wisconsin law, has concluded that a tractor is being operated "in the business of" the lessee when "the truck is being used to further the commercial interests of the lessee." ***Hartford Ins. Co. v. Occidental Fire & Cas. Co.***, 908 F.2d 235, 237 n.5, 239

(7th Cir. 1990). Acceptance argues Zeverino's tractor was being used to further Taylor's commercial interests because Zeverino was taking the tractor in for repairs at the time of the accident. Acceptance cites a number of cases in which courts have found that tractors being driven to and from repair sites were being operated in the business of their lessees. However, these cases do not stand for the proposition that every trip made for the purpose of repairing a tractor is in the business of the tractor's lessee. Instead, the repairs must further the lessee's commercial interests by allowing the owner/operator to continue using the trailer in the lessee's business. If the owner/operator could have continued hauling loads for the lessee without obtaining the repairs, then the repairs did not further the lessee's commercial interests.

¶18 In ***Hartford***, Lykes Transport, a motor carrier, dispatched a tractor owned by Rich Transport to deliver a load of frozen orange juice concentrate from Dade City, Florida to Fort Wayne, Indiana. ***Id.*** at 236. Before leaving Dade City, the tractor's driver was instructed to have a faulty freon valve on the trailer repaired after he delivered the orange juice. ***Id.*** However, the trailer leaked so much freon during the trip that the driver had to stop along the way to replenish its supply. ***Id.*** When the tractor reached Fort Wayne, the customer refused to accept the orange juice because it was too warm. ***Id.*** Lykes instructed the driver to take the trailer to a nearby cold-storage facility, where the freon valve would be repaired. ***Id.*** When driving the tractor back to the

cold-storage facility the next day to retrieve the trailer, the driver was involved in an accident. ***Id.***

¶19 The issue on appeal was whether Rich's non-trucking use policy covered claims stemming from the accident. The policy excluded coverage "[w]hile the automobile is being used in the business of any person or organization to whom the automobile is rented." ***Id.*** at 238. The Seventh Circuit concluded this exclusion applied because the tractor was being used "in the business of" Lykes at the time of the accident. ***Id.*** The court rejected Lykes' insurer's argument that the trip to repair the freon leak did not further Lykes' commercial interests because it was "not necessary to the continued operation of . . . [Lykes'] business[.]" ***Id.*** at 240. Instead, the court cited the customer's rejection of the too-warm orange juice as evidence that Lykes' commercial interests would have suffered without the repair. ***Id.***

¶20 Notably, the ***Hartford*** court did not consider it dispositive that the accident occurred while the driver was on his way to retrieve a trailer that had been repaired. Rather, the court assessed whether those repairs were necessary to allow Lykes to continue using the trailer in its business. Because the repairs were necessary, the driver's trip to pick up the trailer furthered Lykes' commercial interests, and the driver was therefore acting "in the business of" Lykes.

¶21 Acceptance cites ***Freed v. Travelers***, 300 F.2d 395, 396-97, 399 (7th Cir. 1962), which involved

an accident that took place while a driver was driving his tractor to a garage for repairs. The Seventh Circuit concluded the driver was acting "in the business of" the motor carrier at the time. In ***Freed***, however, it was undisputed that "the major repair work done on the tractor was . . . necessary to its continued operation in [the carrier's] business." ***Id.*** at 398. Thus, ***Freed*** does not stand for the proposition that any and all repairs to a tractor are automatically "in the business of" the carrier.

¶22 Our supreme court addressed a similar issue in ***Ehlers v. Gold***, 169 Wis. 494, 173 N.W. 325 (1919). There, a car licensed as a common carrier in the city of Milwaukee was involved in an accident after it had ceased carrying passengers for the day and was on its way to a repair shop. ***Id.*** at 495, 498. The car was covered by an indemnity bond, which provided coverage "while said motor vehicle is being operated in the service of a common carrier." ***Id.*** at 495. On appeal, the liability company that issued the bond claimed the car was not being operated "in the service of a common carrier" at the time of the accident. ***Id.*** at 498. The court rejected this argument, noting that the car was "running to a repair shop to receive the repairs *necessary* to enable it to continue its service as a common carrier." ***Id.*** (emphasis added). Accordingly, ***Ehlers*** supports the proposition that repairs are "in the business of" a carrier only when they are necessary to allow the vehicle to continue operating in the carrier's business.

¶23 In this case, the facts establish that the repairs to the tractor's grille and oil filler tube were not necessary for Zeverino to continue operating the tractor in Taylor's business. Admittedly, Zeverino testified that he "needed to get [the grille] repaired" because it was "already starting to fall apart and fall off on the highway[,]" and that the oil filler tube was broken off at the engine block. However, he also admitted these defects did not prevent him from hauling loads on Taylor's behalf. He conceded the tractor was never taken out of service because of the broken grille and oil filler tube. Furthermore, a state trooper conducted a thorough examination of the tractor after the accident and noted no violations or repairs that needed to be made for the tractor to be restored to safe operating condition. These facts establish that Zeverino could have continued operating his tractor in Taylor's business without first repairing the grille and oil filler tube. Consequently, the repairs did not further Taylor's commercial interests, and Zeverino was not acting "in the business of" Taylor at the time of the accident.

¶24 Additionally, as Great West points out, courts asked to determine whether a tractor was being operated "in the business of" a motor carrier often consider whether the driver was acting pursuant to the carrier's orders or instructions. *See*, *e.g.*, ***Liberty Mut. Ins. Co. v. Connecticut Indem. Co.***, 55 F.3d 1333, 1337 (7th Cir. 1995) (driver was acting in the business of a motor carrier because he was "under instructions from [the carrier] regarding a specific delivery" and did not "have the freedom to

drive his semi-tractor hither and yon in search of other fulfillment"); ***Acceptance Ins. Co. v. Canter***, 927 F.2d 1026, 1028 (8th Cir. 1991) (driver was not acting in the business of a motor carrier when he was driving home with no load to deliver, had no instructions to proceed to a particular destination, and was "off-duty and free to spend the weekend as he wished"). Here, Zeverino admitted he did not drive to FABCO pursuant to any orders or instructions from Taylor, and, in fact, no one from Taylor even knew he was going there. Rather, on his day off, he chose to use his free time to take his tractor in for repairs, which were not necessary to make the tractor available for Taylor's use. Based on these facts, we agree with Great West that Zeverino was not "acting in the business of Taylor" at the time of the accident. Consequently, Exclusion 14(b) in Acceptance's policy does not preclude coverage.

¶25 Acceptance emphasizes the fact that, pursuant to the lease agreement, Taylor had "exclusive possession, control and use" of the tractor. However, this language is not unique to Taylor and Zeverino's relationship. Instead, it is required by the federal regulations governing motor carriers. *See* 49 C.F.R. § 376.12(1)(c) (written lease must provide that lessee "shall have exclusive possession, control, and use of the equipment for the duration of the lease.").[3]

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[3] All references to the Code of Federal Regulations are to the 2012 version.

¶26 Moreover, the fact that a motor carrier is given exclusive possession, control, and use of a tractor does not mean the tractor is necessarily operating in the business of the carrier at all times. The Seventh Circuit squarely rejected this argument in ***Hartford***, 908 F.2d at 238. The court reasoned that, if the exclusive possession and control clause meant the tractor was always operating in the carrier's business, there would be no reason for a lease agreement to require the owner to purchase bobtail coverage. ***Id.*** The present case is no different. The lease agreement required Zeverino to obtain bobtail insurance, and therefore clearly recognized there would be occasions when his tractor was not being used in Taylor's business. Thus, that Taylor had exclusive possession, control, and use of the tractor does not mean the tractor was necessarily operating in Taylor's business at the time of the accident.

¶27 Acceptance also argues Zeverino must have been acting "in the business of" Taylor when he drove to FABCO because the lease agreement imposed a contractual duty on him to maintain the tractor in the state of repair required by all applicable regulations. Acceptance then cites 49 C.F.R. § 396.3(a)(1), which requires that "[p]arts and accessories shall be in safe and proper operating condition at all times[,]" and 49 C.F.R. § 396.7(a), which prohibits operation of a vehicle "in such condition as to likely cause an accident or breakdown of the vehicle." However, we agree with Great West that there is no evidence

Zeverino needed to have the grille and oil filler tube repaired to comply with these regulations.

¶28 To the contrary, the evidence shows that Zeverino had been using the tractor without any problems, despite the broken grille and oil filler tube, and that the tractor was never placed out of service because of these defects. Furthermore, the state trooper who inspected the tractor after the accident noted no violations, and Taylor was not required to have the tractor repaired before putting it back into service. Presumably, if the officer believed the tractor was in an unsafe condition or violated federal safety regulations, he would have noted as much on the inspection form.

¶29 Acceptance also argues Zeverino was acting "in the business of" Taylor because he was logged as "driving," rather than "off duty," at the time of the accident and as "on duty (not driving)" at the accident scene. However, Acceptance cites no authority for the proposition that a driver's duty status on his daily log is dispositive as to whether he was acting "in the business of" a motor carrier. In fact, in ***Liberty Mutual***, 55 F.3d at 1334-35, 1338, the court found a driver was acting "in the business of" a motor carrier even though he was logged as "off duty" when the accident occurred. By the same token, that Zeverino was logged as "driving" does not necessarily mean he was acting "in the business of" Taylor when the accident took place. Instead, we must look to whether Zeverino's trip furthered Taylor's commercial interests, and, as discussed above, we conclude it did not.

¶30 Finally, Acceptance points out that the non-trucking use policy it issued to Zeverino cost only $25 per month, while the Great West Policy cost Taylor $1,032,300 per year for all of its "covered autos." Acceptance argues "the premiums charged by Great West and Acceptance clearly evidence the fact that Acceptance's non-trucking use policy only affords coverage in very limited circumstances." While that may be true, it does not necessarily follow that this case falls outside the "very limited circumstances" in which Acceptance's policy provides coverage. Instead, like the circuit court, we conclude Exclusion 14(b) does not preclude coverage of Casey's claims.

B. Exclusion 14(a)

¶31 Acceptance next contends coverage is barred by Exclusion 14(a), which provides that the insurance does not apply to a "a covered 'auto' . . . [w]hile being operated, maintained or used to carry property in any business or en route to or from such business purpose[.]" Acceptance contends this exclusion lists three activities, each of which qualifies as a "business purpose": (1) operation; (2) maintenance; and (3) being used to carry property in any business. Acceptance then notes the exclusion precludes coverage when a covered auto is "en route to" a business purpose. Consequently, Acceptance contends there is no coverage for Casey's claims because the accident occurred while Zeverino was on his way to have the tractor maintained, and maintenance is a business purpose.

¶32 Acceptance's proposed interpretation of Exclusion 14(a) produces absurd results. Under Acceptance's interpretation, the mere operation of the tractor, for any reason, would be a business purpose. Consequently, the non-trucking use policy would never provide coverage for claims that arose when the tractor was being driven. Clearly, such a broad interpretation of the exclusion is illogical. Even Acceptance recognizes that there are circumstances in which operation of the tractor would not constitute a business purpose under the policy – for instance, if the owner drove the tractor to a movie theater on his night off. Accordingly, something more than mere operation or maintenance must be necessary for the exclusion to apply.

¶33 In contrast, Great West argues Exclusion 14(a) precludes coverage if the tractor is being: (1) operated to carry property in any business; (2) maintained to carry property in any business; or (3) used to carry property in any business. Thus, Great West contends the exclusion does not apply in this case because the tractor was not being operated, maintained, or used *to carry property* at the time of the accident, and was not en route to any of those business purposes. Specifically, while the tractor was en route to being maintained, the maintenance was not necessary to allow the tractor to carry property. *See supra*, ¶23.

¶34 We agree with Great West's interpretation. Moreover, even if we found the exclusion ambiguous, we would nevertheless construe it against Acceptance

and accept the construction suggested by Great West. *See* ***Marnholtz***, 341 Wis. 2d 478, ¶10 (ambiguous policy language construed against the drafter); ***Link***, 185 Wis. 2d 394 at 399 (exclusions narrowly construed against the insurer); ***Day v. Allstate Indem. Co.***, 2011 WI 24, ¶26, 332 Wis. 2d 571, 798 N.W.2d 199 (once initial grant of coverage is shown, insurer has burden to establish that an exclusion applies). Consequently, Exclusion 14(a) does not bar coverage of Casey's claims. Because Acceptance does not argue that any other exclusion applies, we agree with the circuit court that Casey's claims are covered under the Acceptance policy.

II. The Great West Policy

¶35 In addition to determining that Casey's claims were covered under the Acceptance policy, the circuit court also concluded the Great West policy did not provide coverage. We agree with the court's determination.

¶36 The Great West policy states that Great West will "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies[.]" The term "insured" includes:

> e. The owner or anyone else from whom you [Taylor] lease, for more than 30 consecutive days, a covered "auto" with a driver while the covered "auto":

> (1) Is being used exclusively in your business as a "trucker"; and
>
> (2) Is being used pursuant to operating rights granted to you by a public authority.

The parties agree that, under this definition, Zeverino qualifies as an insured only if he was acting in Taylor's business at the time of the accident. We have already determined that Zeverino was not acting in the business of Taylor when the accident occurred. *See supra*, ¶¶23-24. Consequently, Zeverino is not an insured under the Great West policy, and the policy does not make an initial grant of coverage for Casey's claims. As a result, those claims are not covered under the Great West policy.

By the Court. – Judgment affirmed.

Recommended for publication in the official reports.

FEB 15 2012

STATE OF WISCONSIN	CIRCUIT COURT	DUNN COUNTY

BRIAN CASEY,

Plaintiff,

vs.

RONALD SMITH, et. al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

(Filed Feb. 13, 2012)

Case No. 10CV295

This matter last came before Branch II of Dunn County Circuit Courts on November 15, 2011. The Court received the opinion of the Wisconsin Court of Appeals, District III, denying the motion to appeal and held a scheduling conference subsequent to the appellate court's determination. Following the filing of the Remittitur on November 07, 2011, Great West Casualty Company filed a supplemental memorandum of law on November 30, 2011 with supporting affidavit. Defendant Acceptance Casualty Insurance Company filed a Supplemental Memorandum of its Motion for Summary Judgment with supporting affidavit on November 30, 2011. Defendant Acceptance Casualty Insurance Company also filed a reply to Great West Casualty Company's Supplemental Memorandum of law on December 15, 2011. Based on the record before the Court, including the oral and written arguments of the parties, the Court makes the following determination as to the issue of insurance coverage:

FINDINGS OF FACT

1. The parties have "expressed both to this Court and the Court of Appeals that they are in agreement at least as to one thing – that there are no factual issues precluding summary judgment for one of them". Further, " . . . they agree that John Zeverino is entitled to coverage from either Acceptance's bobtail insurance policy or Great West's trucking policy and that the coverage under both policies is the same amount of $1,000,000." This has not been controverted by either party.

2. On February 27, 2009, an accident occurred during the course of John Zeverino's trip from Prescott, Wisconsin, to Eau Claire, Wisconsin, for the purpose of having a new grille put on the front of his 1993 Freightliner Columbia tractor.

3. Mr. Zeverino was traveling east on Interstate 94 and did not have a trailer attached to his tractor nor hauling any freight. This is commonly referred to as "bobtailing".

4. The accident involved Mr. Zeverino's tractor, a Dodge Durango driven by Ronald Smith, a Toyota driven by Brian Casey, and a fourth vehicle driven by Carl Tinsman.

5. Approximately one month before the accident, Mr. Zeverino had taken the tractor to FABCO for repairs to the ECM (Engine Control Module). At his deposition, Mr. Zeverino provided the following relevant testimony:

> Q. And what does the engine control module do?
>
> A. That runs the truck, tells the truck what to do.
>
> Q. And had you been having trouble with the truck before that with the ECM unit?
>
> A. No.

Affidavit of Tamara L. Novotny; Exhibit 7, p15, ln16-23 (filed February 22, 2010).

6. While performing those repairs, FABCO damaged the tractor's grille such that repairs were needed. Mr. Zeverino did not have a scheduled appointment with FABCO but was to return to have the grille replaced whenever he could get to it. Mr. Zeverino also had ordered an oil filler tube which he intended to install at home but which FABCO agreed to install.

7. The ECM was not replaced nor was Zeverinio [sic] having any problems with the truck due to the ECM. *Affidavit of Tamara L. Novotny*; Exhibit 7, p15 (filed February 22, 2011).

8. The invoice from FABCO reflects that the ECM was adjusted and its timing calibrated. *Third Supplemental Affidavit of Tamara L. Novotny*; Exhibit 1 (filed November 30, 2011).

9. Mr. Zeverino had never been placed out of service, including after the accident, on February 27, 2009. Following the accident, the DOT Inspector found no deficiencies with regard to Mr. Zeverino or the tractor.

10. After the accident Mr. Zeverino continued to Eau Claire, Wisconsin, where he had a new grille and oil filler tube installed on his tractor.

11. Mr. Zeverino owned the tractor but Mr. Zeverino (d/b/a Jack and Sheryl's Construction, Inc.) leased the 2003 Freightliner to Taylor Truck Line, Inc.

12. At the time of the accident, there was in effect an Independent Contractor Equipment Lease Agreement – Long Term, as between Taylor Truck Line, Inc. and Mr. Zeverino (d/b/a Jack and Sheryl's Construction), dated October 10, 2006. The Independent Contractor Equipment Lease Agreement – Long Term – requires Mr. Zeverino to maintain and repair his tractor as part of his business agreement with Taylor Truck Line, Inc. *Affidavit of Charles J. Noel*; Exhibit G (filed February 24, 2011).

13. The Independent Contractor Equipment Lease Agreement – Long Term – gives exclusive possession, control, responsibility, and use to Taylor Truck Line, Inc., of Mr. Zeverino's tractor, and requires that Taylor Truck Line, Inc., "assume complete responsibility to the public for the operation of said equipment".

14. Acceptance Indemnity Insurance Company issued a policy of Non-Trucking Liability Insurance to the Sponsor, "Association of Independent Drivers of America," which provides Non-Trucking Use coverage to the Sponsor's Certificate Holders, in this case "Owner/Operator of Taylor Truck Line, Inc." through policy and Certificate of Insurance (#CA00022623-54277). *Affidavit of Charles Noel*; Exhibits H and I (filed February 24, 2011).

15. The Acceptance policy #CA00022623 contains a Non-Trucking Automobile Coverage Form which excludes coverage for a covered auto which includes the following pertinent exclusions from coverage:

B. Exclusions

This insurance does not apply to any of the following:

. . .

14. Trucking

A covered "auto":

a. While being operated, maintained or used to carry property in any business or en route to or from such business purpose;

b. While used in the business of anyone to whom the "auto" is rented;

c. While under the direction, dispatch or control of a motor carrier;

d. While not under "permanent lease" with a motor carrier.

Affidavit of Charles J. Noel; Exhibit H, Form AA 22 61 05 08 (filed February 24, 2011).

16. Great West Casualty Company ("Great West") had issued a policy of Trucking Liability Insurance to Taylor Truck Line, Inc., bearing policy number CLP05698U. The Great West policy CLP05968U defines an "insured" for liability purposes to include:

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

. . .

(6) Anyone described in paragraphs c., d. or e. below.

. . .

e. The owner or anyone else from whom you lease, for more than 30 consecutive days, a covered "auto" with a driver while the covered "auto":

(1) Is being used exclusively in your business as a "trucker"; and

(2) Is being used pursuant to operating rights granted to you by a public authority.

Affidavit of Tamara L. Novotny; Exhibit 5, CA 10 22 02 07 (filed February 22, 2010).

17. "Trucker" is defined in the Great West policy to mean "any person or organization engaged in the business of transporting property by "auto" for hire. *Id*.

18. Under the Independent Contractor Equipment Lease Agreement, Mr. Zeverino agreed " . . . to carry at its expense so-called bobtail liability insurance coverage with respect to public liability and property damage with a combined single limit of one million doll ($1,000,000) or more . . . " to cover the 2003 Freightliner tractor " . . .when not used in performance of a trip under this agreement." *Affidavit of Tamara L. Novotny*; Exhibit 2, pp6-7 (filed February 22, 2010).

19. Mr. Zeverino was not having any problems with the truck due to the ECM *Affidavit of Tamara L. Novotny*; Exhibit 7, p15 (filed February 22, 2011). The invoice from FABCO reflects that the ECM was simply adjusted and its timing calibrated. *Third Supplemental Affidavit of Tamara L. Novotny*, Exhibit 1 (filed November 30, 2011). While the grille needed to be replaced in order to make the tractor "right" as Zeverino testified, the replacement was not necessary in order to make the tractor safe or operations reflected by Zeverino's deposition testimony as well as by the tractor never placed out-of-service because of it.

20. Nonessential repairs performed on the truck on Mr. Zeverino's own time did not in any way further Taylor Truck Line's commercial interests since the record reflects that Zeverino could have continued to accept loads without having the repairs done.

CONCLUSIONS OF LAW

1. Under Wis. Stat. §§ 802.08(1) and (2) a party may move for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . , show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

2. Summary judgment is not a matter of right but rests in the discretion of the court. *Cranston v. Bluhm*, 42 Wis.2d 425 (1969).

3. Summary judgment does not lie when there are arguably ambiguous provisions in contract and intent of parties to contract is disputed. *Riley Const Co., Inc. v. Schillmoeller & Krofl Co*., 70 Wis.2d 900 (1975).

4. Three questions relative to insurance coverage are: 1.) Is there a grant of coverage under the insurance comparing facts to the claim? 2.) If so, do any exclusions apply? and 3.) If so, are there any exceptions to any exclusions? *American Family Mut. Ins. Co. v. American Girl, Inc*., 268 Wis.2d 16, 673 N.W.2d 65 (2004).

5. The issue to be resolved by way of the cross-motions for summary judgment is which insurers' policies afford coverage for the February 27, 2009 accident. The critical question, and ultimate factual determination, is whether Mr. Zeverino was, at the time of the accident, operating the tractor " . . . in the business of . . . " Taylor or whether he was engaged in a non-trucking activity. Great West's policy grants coverage if Mr. Zeverino was using the tractor in Taylor's business, while Acceptance policy provides coverage if Mr. Zeverino was not using the tractor in furtherance of Taylor's business.

6. The term " . . . in the business of . . . " can be described as " . . . occasion when the truck is being used to further the commercial interests of the lessee . . . " versus non-trucking business which " . . . applies only when the truck is being used for purposes unrelated to trucking." *Hartford Ins. Co. v. Occidental Fire & Cas. Co.*, 908 F.2d 235, 239 (7th Cir. 1990).

7. As to the necessary factual determination as to whether Mr. Zeverino was performing in furtherance of "business" or "commercial" interests it is clear that nonessential repairs done on Zeverino's own time did not in any way further Taylor Truck Line's commercial interests.

8. The Court finds that at the time of the accident, Mr. Zeverino was not involved with furthering the business of Taylor Truck, Inc.

Based on satisfactory resolution of questions of fact regarding the ECM, the Court finds that the Acceptance Policy is applicable. Under the Acceptance Policy, there are no exclusions or exceptions which would deny coverage based on the record before the Court.

ORDER

The Court finds that summary judgment shall be granted in favor of Great West Casualty Company and that Acceptance's Policy shall bare the responsibility of coverage, if any.

ORDERED this 13th day of February, 2012.

BY THE COURT:

/s/ Rod W. Smeltzer
Hon. Rod W. Smeltzer
Circuit court Judge, Branch II
Dunn County, Wisconsin

THIS IS A FINAL ORDER/JUDGMENT FOR PURPOSES OF APPEAL

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The court has entered the following order:

District: 3
Appeal No. 2012AP000667

Brian Casey v. Ronald Smith

Date: June 12, 2014

Circuit Court Case No. 2010CV000295

The court having considered the **Motion for Reconsideration** filed in the above matter,

IT IS ORDERED that the Motion for Reconsideration is denied, with $50.00 costs.

Diane M. Fremgen
Clerk of Supreme Court