IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

MARIE HUNT, Personal Representative of the Estate of EUGENE WAYNE HUNT, Deceased,
Plaintiff/Appellant,
vs
DRIELICK, et al
Defendants,
vs
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
Garnishee Defendant/Appellee.

Docket No. 146433

BRANDON JAMES HUBER,
Plaintiff/Appellant,
vs
DRIELICK, et al
Defendants,
vs
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
Garnishee Defendant/Appellee.

Docket No. 146434

THOMAS LUCZAK and NOREEN LUCZAK,
Plaintiffs/Appellants,
vs
DRIELICK, et al
Defendants
vs
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
Garnishee Defendant/Appellee.

Docket No. 146435

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Brief on Appeal - Appellants
ORAL ARGUMENT REQUESTED

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STATEMENT IDENTIFYING OPINION APPEALED FROM AND RELIEF SOUGHT

This case involves a unique issue that is before this Court for the first time. Defendants/Appellants are appealing the November 20, 2012 final Order of the Michigan Court of Appeals that reversed the trial court's order quashing the Garnishee/Appellee Empire Fire and Marine Insurance Company's objection to a writ of garnishment.

At issue in this case is the application of the "business use" exclusion contained in a "Bobtail" insurance policy. Bobtail coverage is commonly used in the trucking industry to provide protection when a trucker is driving a cab that is not attached to a trailer, and thus not insured by a motor carrier's policy.

We respectfully request that this Honorable Court reverse the Court of Appeals and hold that neither clause of the "business use" exclusion in Garnishee Defendant/Appellee's policy applies, and that this Court reinstate the trial court's order of garnishment against Garnishee/Appellee, Empire Fire and Marine Insurance Company.

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER A LEASE AGREEMENT IS LEGALLY IMPLIED BETWEEN ROGER DRIELICK TRUCKING, AND GREAT LAKES CARRIERS CORPORATION UNDER THE FACTS OF THE CASE AND UNDER APPLICABLE FEDERAL REGULATION FOR THE MOTOR CARRIER INDUSTRY?

The Garnishee /Appellee Empire Fire and Marine Insurance Company states, "yes."
The Defendants/Appellants, state, "no."
The Court of Appeals did not address this issue

II. IF SO, WHETHER THE COURT OF APPEALS ERRED IN RESOLVING THIS CASE ON THE BASIS OF THE FIRST CLAUSE OF THE BUSINESS USE EXCLUSION IN THE NON-TRUCKING (BOBTAIL) POLICY ISSUED BY DEFENDANT/APPELLEE EMPIRE FIRE AND MARINE INSURANCE COMPANY, INSTEAD OF ON THE BASIS OF THE SECOND CLAUSE, WHICH EXCLUDES COVERAGE FOR "'[B]ODILY INJURY' OR 'PROPERTY DAMAGE' . . . WHILE A COVERED 'AUTO' IS USED IN THE BUSINESS OF ANYONE TO WHOM THE 'AUTO' IS LEASED OR RENTED"?

The Garnishee /Appellee Empire Fire and Marine Insurance Company states, "no."
The Defendants/Appellants, state, "yes."
The Trial Court states, "yes."

Assignee-Defendant/Appellant Great Lakes Carriers Corporation (GLC) and Defendant/Appellant Sargent Trucking, Inc. (Sargent) submit the following Brief on Appeal:

INTRODUCTION

This case involves an issue of first impression in the state of Michigan concerning the interpretation of the two (2) clauses of the "business use" exclusion in a Non Trucking Use (bobtail) insurance policy. Pursuant to this Court's order granting GLC and Sargent's Application for Leave to Appeal the November 20, 2012 judgment of the Court of Appeals, this Court requested that the parties address the following issues:

> (1) Whether a lease agreement is legally implied between Roger Drielick Trucking and GLC under the facts of the case and under applicable federal regulation of the motor carrier industry; and
>
> (2) if so, whether the Court of Appeals erred in resolving this case on the basis of the first clause of the business use exclusion in the non-trucking (bobtail) policy issued by Empire Fire and Marine Insurance Company, instead of on the basis of the second clause, which excludes coverage for "'[b]odily injury' or 'property damage' . . . while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented."

See, Michigan Supreme Court Order Granting Defendants/Appellants' Application for Leave to Appeal, Dated September 18, 2013. (Appendix 28 at 544a et seq).

GLC and Sargent respectfully submit that no lease agreement is implied between Roger Drielick d/b/a Roger Drielick Trucking (Drielick Trucking) and GLC at the time of the accident at issue in this matter. The facts of this case show that there is no lease of the tractor, express or implied, under either the federal regulations governing the motor carrier industry, including but not limited to, 49 CFR 376.11-12, or under Michigan principles of tort, contract or agency law, including Michigan's Vehicle Code, MCL 257.1 *et seq.*

As there is no implied lease, GLC and Sargent further respectfully submit that the Court of Appeals failed to correctly apply the plain language of the "business use" exclusion's two (2) clauses in Garnishee Defendant/Appellee Empire Fire and Marine Insurance Company's (Empire) insurance policy and erred by not affirming the ruling of the trial court that neither clause applies.

Corey Drielick (Corey) was driving a 1985 Freightliner semi-tractor without an attached trailer when he was involved in an accident with the plaintiffs. See *Appendix 12, Hunt v Drielick,* Court of Appeals Docket Nos. 299405, 299406, 299407, November 20, 2012 (*Hunt* II) at 89a. Plaintiffs Marie Hunt (Hunt), Brandon Hueber (Hueber) and Thomas and Noreen Luczak (Luczak) filed separate lawsuits, later consolidated, against Corey and Drielick Trucking, Sargent and GLC. See *Appendix 12, Hunt II* at 89a. All plaintiffs settled with GLC and Sargent. See *Appendix 1, Hunt II* at 89a-90a. Plaintiffs entered into consent judgments with Corey and Drielick Trucking. See *Appendix 12, Hunt II* at 89a-90a. Corey and Drielick Trucking assigned their rights under Empire's policy to plaintiffs, GLC and Sargent. See *Appendix 12, Hunt II* at 89a-90a.

GLC filed writs of garnishment with the plaintiffs' consent against Empire for the amounts of the consent judgments. See *Appendix 12, Hunt II* at 90a. Empire responded by filing a motion to quash the writs arguing that GLC and Sargent lacked standing to seek the writs, and that it properly denied coverage based on the policy exclusions. See *Appendix 12, Hunt II* at 90a. The trial court denied the motion, finding that Empire improperly denied coverage under its policy and entered judgments against Empire in favor of the plaintiffs. See *Appendix 12, Hunt II* at 90a; and *Appendix 8, Hunt v. Drielick*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket Nos. 246366, 246367, 246368) (*Hunt I*) at 52a-53a.

Empire appealed the trial court's garnishment ruling. *See Appendix 8, Hunt I.* The Court of Appeals reversed in part, remanding the case to the trial court for further ruling on the "business use" exclusion. *See Appendix 8, Hunt I* at 55a. On remand, the trial court again overruled Empire's objections to the garnishments. *See Appendix 12, Hunt II* at 91a. Empire again appealed. In reversing the trial court, the Court of Appeals ruled that the first clause of the "business use" exclusion was applicable despite the fact that Corey was not using the insured tractor to carry a load and did not even have a trailer attached. In so ruling, the Court of Appeals tortured the language of the exclusion in other to conclude that the accident occurred "while [Corey] was carrying property in any business." *See Appendix 12, Hunt II* at 92a.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

This litigation arises out of a multiple vehicle accident that took place on January 12, 1996 on M-13 in Bay County. *See Appendix 17*, Corey Drielick Deposition at 253a. Plaintiffs Luczak, Hunt and Huber filed lawsuits alleging personal injuries against Drielick Trucking, Corey, GLC, Great Lakes Logistics & Services, Inc. (GLL) and Sargent.

Corey was operating the 1985 Freightliner tractor without a trailer attached at the time of the accident. This is known as "bobtailing." *See Appendix 17*, Corey Drielick Deposition, at 247a and 253a. Corey was on his way to Linwood to pick up a trailer and load to be hauled to Cheboygan. *See Appendix 17*, Corey Drielick Deposition, at 250a. He was assigned the load by William Bateson on behalf of GLL. *See Appendix 17*, Corey Drielick deposition, at 250a. He started hauling brokered loads for GLL in mid December 1995 using the 1985 Freightliner tractor. *See Appendix 25*, Jamie Bateson Deposition, at 434a-437a. and *Appendix 17*, Corey Drielick Deposition, at 264a-265a, 284a-285a.

A prior contract between Drielick Trucking and Sargent had been terminated prior to December 1995. *See Appendix 18,* Roger Drielick Deposition, 297a.

GLC never received payment for any of the loads that Drielick Trucking hauled as payment for everything that Drielick hauled was through GLL not GLC. *See Appendix 25*, Jamie Bateson Deposition, at 441a-442a. There was no written lease between Drielick Trucking and GLC. *See Appendix 18*, Roger Drielick Deposition, at 301a-302a. There is no evidence that GLC insured the Drielick tractor as it would in the normal course of leasing vehicles. GLC did not pay for or authorize the decals that were used on the subject Drielick Trucking tractor. *See Appendix 23*, Roger Drielick Deposition dated February 15, 1999, at 393a-394a and *Appendix 22*, William Bateson Deposition, at 374a-375.

Drielick Trucking never had a Michigan apportioned registration card with GLC's name on it. *See Appendix 18*, Roger Drielick Deposition dated July 30, 1998, at 295a. The lack of cab card further evidences that GLC did not have plates on the Drielick tractor as Drielick would not have obtained the cab card in the regular course of business unless GLC put plates on the tractor. *See Appendix 19*, Roger Drielick Deposition dated July 30, 1998, at 321a. Drielick Trucking did not receive any insurance papers from GLC. *See Appendix 18*, Roger Drielick Deposition dated July 30, 1998, at 298a and 307a. Drielick Trucking admitted that there were no documents which would evidence any relationship between GLC and Drielick Trucking. *See Appendix 18*, Roger Drielick Deposition dated July 30, 1998, p. 298a.

Drielick Trucking initially submitted invoices to GLC for loads brokered by GLL, but was notified that invoices were to be submitted to GLL. GLL is an authorized broker not a carrier. Drielick Trucking began submitting invoices to GLL before the date of the accident. Drielick Trucking's bookkeeper, Delynn Drielick, testified that she received checks from GLL.

See Appendix 19, Delynn Drielick Deposition, at 321a-323a. Drielick Trucking did not keep its trucks at GLC's yard. GLC did not put the lettering on the truck involved in the accident; rather, Roger Drielick took it upon himself to have the lettering placed on the truck. *See Appendix 23*, Roger Drielick Deposition dated February 15, 1999, at 393a-394a.

Empire insured the Drielick Trucking vehicle under a Non Trucking Use Policy. Corey, Roger Drielick and Drielick Trucking notified Empire, of the lawsuits. Empire disclaimed any duty to defend or indemnify on the policy.

After Empire denied coverage, the underlying action proceeded through discovery and was ultimately settled. During discovery, the parties learned that the 1985 Freightliner had been under lease to Sargent, another authorized and licensed trucking company. However, Drielick terminated its lease with Sargent prior to the accident. *See Appendix 18,* Roger Drielick Deposition, 297a.

The broker, GLL, also was named as a defendant. GLL is not a motor carrier and does not have any carrier authority. GLL brokers loads between authorized carriers such as GLC, Sargent and others. *See Appendix 25,* Jamie Bateson Deposition at 430a-431a.

Corey was deposed on May 22, 1998 and testified that did not use the 1985 Freightliner to haul loads exclusively for GLL. He testified that he used the tractor to haul loads for David Stanley as well as for GLL. *See Appendix 17*, Corey Drielick Deposition, at 248a. This fact alone negates any finding that the 1985 Freightliner was under the exclusion possession and control of GLL, let alone GLC.

Drielick Trucking received payment from GLL, not GLC, for brokered loads. *See Appendix 24*, Roger Drielick Deposition dated on May 24, 2001, at 421a and *Appendix 17,*

Appendix 25, Jamie Bateson Deposition, at 438a, and *Appendix 19*, DeLynn Drielick, Deposition, at 321a-322a.

After the accident, Officer Thiel, the Motor Carrier Officer who investigated this accident did not receive a cab card or any documentation evidencing that GLC was the carrier or otherwise lessee of the vehicle. *See Appendix 20*, Officer Larry Thiel Deposition, at 334a-336a. He could not recall whether he was shown a written lease, but that the lease should be in the vehicle if in fact it is leased. *See Appendix 20*, Officer Larry Thiel Deposition, at 337a.

Another Officer, Trooper Joseph LaBelle did not receive a cab card or any document with respect to the vehicle from Corey Drielick. *See Appendix 21*, Trooper Joseph Labelle Deposition, at 361a.

Settlement of Plaintiffs' Cases

Following extensive settlement negotiations, all plaintiffs settled with GLC and Sargent. As part of the settlement, the parties entered into consent judgments with Corey and Drielick Trucking. *See Appendix 12, Hunt II*, at 88a-90a.

The settlement agreement provided that all plaintiffs and defendants were free to proceed against Empire. *See Appendix 12, Hunt II*, at 88a-90a. The parties agreed to an "Assignment, Trust and Indemnification Agreement" pursuant to which Corey and Drielick Trucking assigned to plaintiffs, GLC and Sargent their rights to execute on the Empire policy. *See Appendix 12, Hunt II*, at 88a-90a. GLC and Sargent agreed to assist in the enforcement of the consent judgments and to intervene in any collection action filed by plaintiffs. *See Appendix 12, Hunt II*, at 90a. GLC filed writs of garnishment, with plaintiffs' consent, against Empire for the amounts of the consent judgments, and plaintiffs agreed to share in the proceeds with Great Lakes and Sargent in exchange for their collection efforts. *See Appendix 12, Hunt II*, at 89a-90a.

Empire's Motion to Quash Writs of Garnishment

Empire filed a motion to quash the writs, arguing that GLC and Sargent lacked standing and that certain policy exclusions applied. *See Appendix 12, Hunt II*, at 89a. The trial court denied the motion finding that coverage was improperly denied under Empire's policy. *See Appendix 2, Order Denying Motion to Quash,* at 7a-9a and *Appendix 12, Hunt II*, at 90a. Specifically, the trial court stated that Empire's named driver exclusion was invalid under MCL 500.3009(2) and that Empire's business use exclusion was ambiguous. The trial entered judgments against Empire in favor of the plaintiffs. *See Appendices 3-5,* Judgments of Writs of Garnishment, at 13a-27a.

First Appeal to the Michigan Court of Appeals (Hunt I)

Empire appealed the trial court's ruling to the Court of Appeals claiming that the named driver exclusion and the business use exclusion justified denial of coverage. *See Appendix 8, Hunt I*, at 49a et. seq. The Court of Appeals agreed with the trial court that that the named driver exclusion was invalid. The Court of Appeals, however, held that the business use exclusion was not ambiguous and that further factual development was needed to allow the trial court to determine if the exclusion applies. *See Appendix 8, Hunt I*, at 49a et. seq.

Trial Court Decision on Remand from the Michigan Court of Appeals

On remand, the trial court again overruled Empire's objections to the writs of garnishment, concluding that both clauses of the business use exclusion were inapplicable. *See Appendices 10 and 11,* at 63a et. seq. and 79a et. seq. The trial court noted that Corey had not picked up the trailer at the time of the accident and that Corey was not under orders to be at GLC's yard at any particular time on the day of the accident. *See Appendix 12, Hunt II*, at 90a-91a. The trial court also noted that Corey was free to complete any personal business before

arriving at the yard and that there was an oral agreement that Corey would not be paid until the cab was coupled with the trailer. The trial court concluded that the lack of written lease and lack of a state identification card from Great Lakes suggested that the truck was not being used in the business of anyone who had leased the truck. *See Appendix 12, Hunt II,* at 90a-91a.

Decision of the Michigan Court of Appeals After Remand (*Hunt II*)

In a consolidated appeal from the trial court rulings after remand, Empire appealed the trial court's order overruling Empire's objections to the garnishment. The only issue on appeal was whether the business use exclusion applied. The Court of Appeals held that the first clause of the exclusion was applicable and reversed the trial court's order overruling Empire's objection to the garnishments. *See Appendix 12, Hunt II,* at 90a-91a.

In its opinion, the Court of Appeals addressed only the first prong of Empire's business use exclusion. The provision relied upon the Court of Appeals excludes coverage for:

> 'Bodily injury' or 'property damage' while a covered 'auto' is used to carry property in any business ...

Because the Court of Appeals concluded that the first clause was applicable, it did not consider the second clause in the exclusion, which excludes coverage:

> while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented.

See Appendix 12, Hunt II, at 93a.

In interpreting the first clause of the exclusion, the Court of Appeals determined that the phrase "while a covered 'auto' is used to carry property in any business" did not require the covered auto to actually be carrying any property in order for the exclusion to apply. *See Appendix 12, Hunt II,* pp. 91a-92a. The Court reached this conclusion by incorrectly utilizing a

definition afforded to "while" as a noun, instead of as a conjunction. See *Appendix 12, Hunt II,* at 92a. This resulted in the Court of Appeals erroneously interpreting the exclusion.

GLC and Sargent sought leave to appeal to this Court based upon the Court of Appeals' erroneous interpretation of the first clause of the exclusion. This Court granted leave, requesting the parties to address whether GLC and Drielick Trucking entered into an implied lease of the 1985 Freightliner tractor and, if so, what effect this would have on the application of the business use exclusion.

GLC and Sargent respectfully submit that GLC and Drielick Trucking did not enter into any lease, express or implied, and that therefore the second clause of the exclusion is inapplicable. Further, for the reasons set forth in their Application, GLC and Sargent submit that the first clause of the exclusion is inapplicable as well. Moreover, even if an implied lease is found to exist, a premise to which GLC and Sargent do not subscribe, the vehicle was not being used in GLC's business at the time of the accident. For these reasons, GLC and Sargent respectfully request that this Honorable Court reverse the Court of Appeals and hold that neither clause of the business use exclusion in Empire's policy applies. GLC and Sargent further request that this Court reinstate the trial court's order of garnishment against Empire.

LAW AND ARGUMENT

I. NO LEASE AGREEMENT IS LEGALLY IMPLIED BETWEEN DRIELICK TRUCKING AND GREAT LAKES CARRIERS CORPORATION, UNDER THE FACTS OF THE CASE UNDER APPLICABLE FEDERAL REGULATION FOR THE MOTOR CARRIER INDUSTRY OR UNDER STATE LAW

A. Standard of Review

Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are reviewed *de novo*. See *McDonald v Farm Bureau Ins Co*, 480 Mich. 191, 197; 747 NW2d 811 (2008). The construction, interpretation, and application of an unambiguous insurance contract is a question of law for the Court that is reviewed *de novo*. See *Henderson v State Farm Fire & Casualty Co*, 460 Mich. 348; 596 NW2d (1990).

B. Discussion

The substance of the relationship and agreement between Drielick Trucking and GLC demonstrate that no lease was implied pursuant to the federal regulations and applicable state law at the time of the accident. Corey used the tractor to haul loads for carriers other than GLC. Additionally, GLC did not maintain exclusive possession or control over the tractor for any period of time when the accident occurred as Corey had not delivered the tractor to GLC's yard and coupled it with the trailer. As such, the vehicle in question could not be under lease to GLC pursuant to the applicable federal regulations for the motor carrier industry. There was no written lease and without GLC did not have "exclusive possession, control and use" of said vehicle.

1. Applicable Federal Regulations

As a preliminary matter, a summary of the applicable federal regulations and the legislative intent behind the same is necessary to sufficiently address the instant issue for this Honorable Court.

Federal regulations for the motor carrier industry require that any lease, whether a long term lease or a "trip lease," must be in writing. *See* 49 CFR 376.11(a). 49 CFR 376.11(a) states as follows:

> (A) Lease. There shall be a **written lease** granting the use of the equipment and meeting the requirements contained in §376.12. (Emphasis added).

49 CFR 376.12 sets forth the written lease requirements with respect to identification of parties, equipment, and duration. Applicable lease requirements include the following:

> (a) *Parties*. The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.
> (b) *Duration to be specific*. The lease shall specify the time and date or the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by §376.11(b).
> (c) *Exclusive possession and responsibilities*. The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of 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.
> (d) *Compensation to be specified*. The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or authorized addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor may accept these documents.
>
> ***
>
> (j) *Insurance*. The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to FMCSA regulations under 49 U.S.C. 13906. The lease

> shall further specify who is responsible for providing any other insurance coverage for the operation of leased equipment, such as bobtail insurance.
>
> ***
>
> (l) *Copies of the lease.* An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in §376.11(c)(2) is carried on the equipment instead. The owner of the equipment shall keep the other copy of the lease.

See 49 CRF 376.12.

Prior to the enactment of these regulations, some carriers utilized leased or borrowed vehicles in order to avoid safety rules and regulation of drivers and equipment. The absence of these regulations also created confusion and uncertainty as to who was financially responsible for accidents caused by those vehicles. *See, Bogle v Wolverine Expediting, Inc*, 193 Mich App 479, 484, 484 NW2d 728 (1992) (*citing Empire Fire & Marine Ins Co v Guaranty National Ins Co*, 868 F2d 375, 362 (CA 10, 1989)). Congress amended the Interstate Commerce Act to allow the Interstate Commerce Commission ("ICC") to prescribe regulations to address these abuses. *See, Bogle, supra,* 193 Mich App at 484-485. The ICC then promulgated the above-referenced regulations requiring that every lease entered into by an authorized ICC carrier enters into must be in writing and every written lease must contain provisions requiring that the carrier maintains "exclusive possession, control, and use of the equipment for the duration of the lease" and "assume complete responsibility for the operation of the equipment for the duration of the lease." *See, Bogle*, 193 Mich App at 485; *see also* 49 CFR 376.12(c)(1).

Some courts relied on these ICC regulations as the basis to analyze a carrier's potential liability when using non-owned equipment under the so called "logo liability" or "lease liability" rules. As a result of these cases, the ICC issued guidance in 1986 disavowing the reasoning in these cases, stating that:

> [t]he Commission did not intend that its leasing regulations would supersede otherwise applicable principles of State tort, contract, and agency law and create carrier liability where none would otherwise exist. Our regulations should have no bearing on this subject. Application of State law will produce appropriate results.

See Ex Parte No MC-43 (Sub-No 16), Lease and Interchange of Vehicles (Identification Devices), 3 ICC2d 92, 93 (1986); Bogle, 193 Mich App at 485; *Jett v Van Eerden Trucking Company, Inc*, 2012 U.S. Dist. LEXIS 2688.

The ICC further reinforced its view by its 1992 amendment of 49 CFR 376.12 to add the following subsection:

> (4) [n]othing in the provisions required by paragraph (c)(1) of this section is intended to affect whether this lessor or driver provided by the lessor is an independent contractor or an employee of the authorized contract carrier. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. § 14102 and attendant administrative requirements.

See 49 CFR 376.12(c)(4). Additionally, enforcement of the above-referenced federal regulations has been largely transferred from the ICC to the Secretary of Transportation. *See* 49 U.S.C. §14102; *see also Jett, supra,* 2012 U.S. Dist. LEXIS 2688 at FN 7. The unambiguous language of written lease requirements in 49 CFR 376.11-12 does not state that a lease is implied to satisfy these requirements when no written lease exists. *See* 49 CFR 376.11; 49 CFR 376.12. Therefore, no lease existed between Roger Drielick Trucking and GLC under the applicable federal regulations of the motor carrier industry.

2. No Lease Agreement Existed Between Roger Drielick Trucking and GLC, Either in Writing or by Implication at the Time of the Accident Under the Facts of This Case and the Applicable Federal Regulations for the Motor Carrier Industry

The "bobtail" policy underwritten by Empire serves the purpose of protecting the public from uninsured liability from independent truckers that are operating their tractors prior to surrendering exclusive possession, control and use of the vehicles to their lessees under a trip lease or long term written lease. See, *Prestige Casualty Company v Michigan Mutual Insurance Company*, 99 F3d 1340, 1343-44 (CA6 1996). The facts herein clearly show that there is no written, oral or implied lease between Roger Drielick Trucking and GLC at the time of the accident.

Empire cannot point to a single case in which a court has implied a long term lease, or even a trip lease, pursuant to the above-referenced federal regulations when the actions of the parties and any accompanying agreements do not demonstrate that the authorized carrier was granted exclusive possession, control and use of the vehicle. See, e.g., *Wilson v Riley Whittle, Inc*, 701 P2d 575 (AZ App 1984)[1].

Pursuant to 49 C.F.R. 376.12(a), the lease must be made between the authorized carrier and the owner of the tractor. Stated *supra*, Corey started hauling brokered loads for GLL in mid-December 1995 using the 1985 Freightliner tractor. GLL is not an authorized carrier and merely brokers loads for authorized carriers, like GLC. See *Appendix 22*, William Bateson Deposition, at 369a. Corey was assigned the load on the date of the accident by William Bateson on behalf of GLL not GLC. See *Appendix 17*, Corey Drielick deposition at 250a. GLC further did not

[1] In *Wilson*, it was undisputed that a written lease existed and that the trucker was already transporting the load for the defendant motor carrier. See *Wilson*, 701 P2d at 318. The implied lease issue merely arose because defendant motor carrier instructed the defendant trucker to have the trip lease signed before driving to pick up the load, which the trucker failed to do. See *Wilson*, 701 P2d at 318. This case however, is not binding on this Court, and the Michigan Court of Appeals, in *Bogle*, declined to follow *Wilson*. Moreover, this case was decided before the applicable federal regulations became law.

control Corey or the tractor, nor did it have authority to control Corey. GLC could only assert control over the tractor hauling the load after the trailer was attached and the load left its Linwood yard.

In *Jett v Van Eerden Trucking Company, Inc*, 2012 US Dist LEXIS 2688, the U.S. District Court for the Western District of Oklahoma declined to imply a lease in determining the motor carrier's liability under the federal regulations. See, *Jett*, 2012 US Dist LEXIS 2688 at 10. The court held that "there is no explicit 'lease' by which Van Erden (Sic) [motor carrier] leased the tractor and/or driver from Hughston." *Id.* The court further stated that "[t]o the extent Van Eerden and Hughston characterize their relationship at all, they did not call it a lease." *Id*, at 10-11. Of course, the substance of the relationship and the various agreements between the parties determine whether a lease was involved. *Id*, at 11. In short, the *Jett* Court reasoned that because the federal regulations do not authorize a lease that is not in writing, it would not impose vicarious liability on the motor carrier under an implied lease or "statutory employee" theory under the federal regulations based merely upon the fact that the motor carriers load was being hauled by a non-owned tractor by a non-employee driver.

The *Bogle* Court, further referenced the ICC guidance and stated that "state law is the appropriate law to consider, with due reference to the duties imposed and the relationships created by the federal regulations." See *Bogle*, 193 Mich App at 488. Thus, analyzing the lease requirements in 49 CFR 376.11 and 49 CFR 376.12, in light of Michigan state law, clearly shows that there is no implied lease between Roger Drielick Trucking and Plaintiff/Appellant, GLC.

A lease under the federal regulations requires that the lessee maintain exclusive possession, control and use of the tractor for the duration of the lease. See 49 CFR 376.12(c).

Empire, cannot identify any documentation and/or agreement granting GLC exclusive possession, control and use of the tractor at the time of the accident.

The Michigan Court of Appeals in *Bogle*, held that Michigan's Vehicle Code is the applicable state law to determine the relationships and duties imposed by the above-referenced federal regulations. See, *Bogle*, 193 Mich App at 488. Garnishee/Appellee, Empire, further admits that the Michigan Motor Vehicle Code is the appropriate state law for determining whether a lease is present. See, *Appendix 27*, Empire's Response to Application for Leave to Appeal to Supreme Court of Michigan, at 534a. Pursuant to MCL 257.1 *et seq*, an "owner" of a motor vehicle is defined as "any person, firm, association, or corporation renting a motor vehicle or having **exclusive** use thereof, under a lease or otherwise for a period more than 30 days." See MCL 257.37; MCL 257.401(3) (emphasis added).

In *Bogle*, there was a written lease granting the authorized carrier "exclusive supervision and control over the operation" of the tractor for the duration of the lease. See, *Bogle*, 193 Mich App at 482. The lease also made the defendant carrier "responsible for all claims of damages, or otherwise, arising out of the operations of this equipment during the full period of the lease." *Id.* The Michigan Court of Appeals held that the lease agreement demonstrated that the defendant carrier had exclusive possession of the tractor for a period of not less than thirty (30) days.

Unlike *Bogle* and *Wilson*, there is no lease or other evidence to tending to show that GLC had exclusive possession of the tractor at the time of the accident. Jamie Bateson, the President and sole owner of GLC testified that Drielick Trucking was not on lease to GLC. See *Appendix 25*, Jamie Bateson Deposition, at 429a. Roger Drielick further admitted that there were no documents which would evidence any lessor/lessee relationship between GLC and Drielick Trucking. See *Appendix 18*, Roger Drielick Deposition dated July 30, 1998, at 298a. Moreover,

GLC was not in the business of leasing vehicles for its operations, and vehicles that were leased were generally purchased by Jamie Bateson and leased to GLC or leased from an employee of GLC.[2] *See Appendix 25,* Jamie Bateson Deposition, at 429a. Jamie Bateson further testified that neither Roger nor Corey Drielick were employed by GLC. *See Appendix 25*, at 429a. As such, there is no documentation or testimony from which a lease agreement can be implied.

In fact, the trial court in *Hunt II* found that there was an oral agreement that Corey would not be paid until the cab was coupled with the trailer. *See Appendix 12, Hunt II*, at 90a. This demonstrates that the parties did not intend that any lease had been established. If anything, no "agreement" or relationship of any kind would exist until *after* Corey delivered the tractor to GLC and coupled the tractor with the trailer. *See Planet Insurance Co v Transport Indemnity Co*, 823 F2d 285, 287 (CA9 1987) ("We conclude that the lease term began when the tractor was delivered into the lessee's possession.").

Pursuant to MCL 257.1 *et. seq.* GLC further did not have exclusive possession, control and/or use of the tractor at the time of the accident because Drielick Trucking never kept the tractor at GLC's yard for any period of time, much less 30 days or more. *See Appendix 18*, Roger Drielick Deposition July 30, 1998, at 302a; *Appendix 17,* Corey Drielick, Deposition, at 250a. Corey further testified that he was not using the tractor exclusively for GLC, as he also he hauled for David Stanley on occasion. *See Appendix 17*, Corey Drielick Deposition, at 248a and 259a. It also is undisputed that Corey did not deliver the tractor to GLC or pick up the trailer from GLC when the accident occurred. *See Appendix 12, Hunt II*, at 90a.

Simply put, no lease was implied at the time of the accident because GLC did not maintain exclusive possession of the tractor for more than 30 days, and Drielick Trucking had

[2] Jamie Bateson testified that GLC may have leased one vehicle from a dealership instead of buying it, but this arrangement would have involved a lease with a dealership, not with an owner-operator. *See Appendix 25,* Jamie Bateson Deposition, at 429a.

not started any job or delivered the tractor to GLC's exclusive possession or control when the accident occurred. There also are no agreements showing that GLC's obligations under the federal regulations began before Corey delivered the tractor to GLC's exclusive possession at its Linwood yard. Had a lease been implied before Drielick delivered the tractor at the Linwood yard, any agreements and/or actions of Drielick Trucking and GLC would have demonstrated that it was granted exclusive possession, control and use of the tractor as the alleged lessee pursuant to 49 CFR 376.12(c) and MCL 257.1 *et. seq.*

Moreover, the facts and evidence demonstrate that GLC never "assumed complete responsibility for the operation of the equipment" pursuant to 49 CFR 376.12(c). It is clear that GLC did not assume responsibility for the operation of the tractor for the duration of any alleged lease at the time of the accident because there is no evidence that GLC ever added the Drielick tractor to its insurance policy as it would in the normal course of leasing vehicles pursuant to 49 C.F.R. 376.11 and 376.12

Drielick Trucking further did not receive any insurance papers from GLC. *See Appendix 18*, Roger Drielick Deposition dated July 30, 1998, at 298a. On the contrary, it is undisputed that Corey and Drielick Trucking notified Empire of the lawsuits as they believed that the accident occurred before the tractor was being used for any business pursuant to their Non Trucking Use Policy with Empire.

Although the *Bogle* court found that the defendant carrier's failure to remove its placards, and its failure to request a return receipt for surrender of the tractor before the accident occurred demonstrated that the defendant carrier was liable as the owner of the vehicle, that vehicle was already the subject of a long term written lease. *See, Bogle*, 193 Mich App at 489. Thus, the lease in that case, which was already in effect, was not cancelled or terminated. This contrasts

with the present case in which no lease was ever effectuated. See *Prestige Casualty Company v Michigan Mutual Insurance Company*, 99 F3d 1340, 1344 (CA6 1996).

Conversely, Corey never delivered the tractor to GLC's exclusive possession at the time accident, so there was no return receipt of surrender to request. Moreover, any identifying placards, which were used on the subject tractor, were placed on the tractor at the request of Drielick Trucking. See *Appendix 23*, Roger Drielick Deposition dated February 15, 1999, at 393a-394a.

Pursuant to 49 C.F.R. 376.11(c), GLC as an authorized carrier, is the party charged with the duty to identify leased equipment. GLC did not pay for or authorize the placement of the decals on the tractor. See *Appendix 23*, Roger Drielick Deposition dated February 15, 1999, at 393a-394a and *Appendix 22*, William Bateson Deposition, pp. at 374a-375a and 382a. In fact, Roger Drielick had a friend that owed him a favor put them on at no charge. See *Appendix* 23 Roger Drielick Deposition February 15, 1999, at 393a; *Appendix 24*, Roger Drielick Deposition May 24, 2001, at 413a.

GLC also did not have plates on the tractor. See *Appendix 18*, Roger Drielick Deposition dated July 30, 1998, at 295a. The officers that investigated the accident further testified that they did not receive any document or cab card evidencing that that the tractor was under lease to GLC. See *Appendix 20,* Officer Larry Thiel Deposition, at 336a; See *Appendix 21*, Trooper Joseph Labelle Deposition, at 361a. Roger Drielick further testified that he never had a Michigan apportioned registration card with GLC's name on it. See *Appendix 18*, Roger Drielick Deposition dated July 30, 1998, at 295a.

There is no implied lease herein because GLC never obtained exclusive possession, control and use of the tractor pursuant 49 CFR 376.11 *et. seq.* and MCL 257.1 *et. seq.*

Moreover, GLC did not assume insurance for the tractor at the time of the accident as it would for a leased vehicle under the applicable federal regulations. GLL, who arranged for Corey to haul the trailer for GLC is merely a broker and not an authorized carrier. Therefore, no lease is implied between Drielick Trucking and GLC under the facts herein and the federal regulations for motor carriers. As there is no lease, written or otherwise implied the second clause of the business use exclusion cannot apply.

II. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING EMPIRE FIRE AND MARINE INSURANCE COMPANY'S OBJECTIONS TO THE GARNISHMENT BY APPLYING THE FIRST CLAUSE OF THE "BUSINESS USE" EXCLUSION.

A. Standard of Review

Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are reviewed *de novo*. *McDonald v. Farm Bureau Ins. Co.*, 480 Mich. 191, 197; 747 NW2d 811 (2008). The construction, interpretation, and application of an unambiguous insurance contract is a question of law for the Court that is reviewed *de novo*. *Henderson v. State Farm Fire & Casualty Co.*, 460 Mich. 348; 596 NW2d (1990).

B. Discussion

Regardless of whether there was an implied lease between Drielick Trucking and GLC, the first clause of the business use exclusion is inapplicable and thus, the Court of Appeals erred in applying the first clause of the exclusion. The "business use" exclusion in the Empire policy states as follows:

> This insurance does not apply to any of the following:
>
> 13. Business Use
>
> "Bodily injury" or "property damage" while a covered "auto" is used to carry property in any business or while a covered "auto" is

used in the business of anyone to whom the "auto" is leased or rented.

See, *Appendix 26,* Empire's Policy, at 458a.

Thus, the exclusion is applicable if either of the two clauses is satisfied. Specifically, did the accident occur while the covered auto was used to carry property or did the accident occur while the covered auto was used in the business of anyone to whom it was leased or rented.

As set forth above, the tractor was not under a lease, express or implied, between Drielick and GLC. Therefore, the second clause of the exclusion cannot be applicable as the vehicle was not used in the business of anyone to whom it was leased.

Without a lease, therefore, the only issue is whether the first clause of the exclusion applies.

Although the Court of Appeals correctly relied on this Court's precedent that the plain language of Empire's business use exclusion must be applied as written, the Court of Appeals disregarded this precedent in application when it misinterpreted the exclusion by utilizing the definition of "while" as the wrong part of speech, incorrectly utilizing the definition of "while" as a noun rather than as a conjunction. While the Court certainly can and should use dictionary definitions to determine the meaning of common words, the Court of Appeals was not free to use a definition for the use of a word as a noun when it is clear from the context of the sentence that the word is being used as a conjunction.

This grammatical error resulted in the Court of Appeals re-writing the exclusion to extend the scope of the exclusion beyond its plain language.

Specifically, the term "while" used correctly in this instance as a conjunction means "during the time that." *Websters Collegiate Dictionary.* Thus, the first clause of the exclusion should be interpreted as excluding from coverage liability for bodily injury sustained "[during

the time that] a covered 'auto' is used to carry property in any business." The Court of Appeals on the contrary, used the definition of "while" as a noun; i.e., "a period of time." This simply does not make sense grammatically in this context. For example if we substitute a specific period of time in place of "while", the exclusion would read, for example:

> "Bodily injury" or "property damage" [five minutes] a covered "auto" is used to carry property in any business...

Defendants/Appellants agree with the Court of Appeals that the law of contract governs the interpretation of Empire's policy. See *Eghotz v Creech*, 365 Mich 527, 530 (1962). The insurance contract should be viewed from the standpoint of the insured. *Fresard v Michigan Miller's Ins Co.*, 414 Mich 686, 694 (1982); *reh den*, 417 Mich 1103 (1983). The Court must attempt to determine the intent of the parties and effectuate that intent when reviewing the contract language. *Auto-Owners v Churchman*, 440 Mich 560, 567 (1992); and *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 630 (1994). The contract terms should be applied as written. *Churchman*, supra at 567.

The entire policy must be read as a whole in order to determine the meaning of the provisions. *Id.* See also, *Boyd v General Motors Acceptance Corp*, 162 Mich App 446 91987); and *Barrish v Paul Revere Life Ins Co*, 103 Mich App 95 (1981). Exclusionary clauses in insurance policies are strictly construed in favor of the insured. *Churchman*, supra at 566-567. The insurer has the burden of proof with respect to exclusions to coverage. See *Fresard*, supra, 414 Mich at 694; and *Ramon v Farm Bureau Ins*, 184 Mich App 54, 61 (1990).

In reviewing the insurance contract, the Court must apply the terms set forth in the contract. When the terms of the contract are not defined, the Court must give the terms definitions that are in accord with the common usage of the term. *Marzonie*, supra, 447 Mich at 631; *Henderson v State Farm Fire & Casualty Co*, 335 Mich App 703, 709 (1997); *GAF Sakes*

and Service, Inc v Hastings Mutual Ins Co, 224 Mich App 259, 261 (1997); and *Cavalier Mfg Co v Employers Ins of Wausau*, 222 Mich App 89, 94 (1997).

Drielick Trucking insured its vehicles for "non-trucking use" under the Empire policy. The policy provides liability coverage as follows:

A. COVERAGE

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

See Appendix 26, Empire Policy, at 458a.

The trial court and Court of Appeals agree that Corey was insured under this policy at the time of the accident. The policy defines "bodily injury" and "accident" in Section V Definitions at page 10. "Auto" is defined to include any "land motor vehicle, trainer or semi-trailer designed for travel on public roads. . ." *See Appendix 26,* Empire Policy at 462a.

In the opinion at issue here, the Court of Appeals agreed with Empire that coverage was properly denied under the first clause of the "business use" exclusion; i.e., that the accident took place "while a covered 'auto' is used to carry property in any business."

In the instant matter, it is undisputed that Corey was driving the cab of the truck (the bobtail) and did not have a trailer attached and was not carrying any property at the time the accident occurred.

Empire argues because placards identifying GLC were on the truck and Corey was en route to pick up a trailer allegedly dispatched by GLC, (although it is clear it was a brokered load through GLL), that at the time of the accident, Corey was on the business of GLC. Before a load has been picked up and after it has been dropped off, the cab of the truck is not operating under the authority of any motor carrier.

It is undisputed that Corey was not carrying property of anyone at the time of the accident. Despite Empire's argument to the contrary, there is no evidence that Drielick Trucking was under lease with GLC or anyone else at the time of the accident. However, for the first clause of the exclusion, the existence of a lease is irrelevant. The clause only applies if Corey was operating the tractor *while* it was used to carry property in any business. He was driving a tractor not attached to a trailer. Thus, he could not have been carrying any property in any business.

In support of its argument that Corey was carrying property within meaning of the policy, Empire cites two cases. In *Engle v Zurich-American Insurance Group*, 216 Mich App 482 (1996) the Court held that the business use exclusion in a bobtail policy did not apply when the driver of a tractor was involved in an accident after he completed his assigned deliveries. As with the present case, the tractor was not carrying any property. It is also important to note that the tractor in *Engle* was under lease with a motor carrier at the time of the accident and, thus, it was an exclusion akin to the second clause of Empire's exclusion that was at issue, not the first clause.

In *Empire Fire and Marine Insurance Company v Brantley Trucking Inc*, 220 F3d 679 (CA5 2000), the Court actually concluded that the first prong of the "Business Use" exclusion did not apply. This case involved the identical exclusion as that now before this Court.

Although Empire argues that the *Brantley* case stands for the proposition that the vehicle need not be carrying property in order for the first clause of the exclusion to apply, *Brantley* does not reach that conclusion. To the contrary, the *Brantley* Court held that the first clause of the exclusion did not apply:

> The portion of the exclusion which we are concerned with in this case 'while the covered "auto" is used in the business of anyone to

> whom the "auto is leased or rented" – clearly refers to occasions when the truck is being used to further the commercial interests of the lessee.
>
> * * *
>
> As for the portion of the "Business Use" exclusion which does not apply in this case, "'Bodily injury' or 'property damage' while it covered 'auto' is used to carry property in any business..."

Brantley at page 682.

If Empire intended that this policy exclusion to apply in situations where the subject vehicle was not used to carry property it should have written it as such. The first clause of the business use exclusion clearly does not apply to the facts at issue.

The Court of Appeals agreed with Empire and analogized the exclusionary clause and facts of *Carriers Ins Co v Griffie* to determine that the first clause of Empire's exclusion applies. See Court of App Op at 6-7 (citing *Carriers Ins Co v Griffie*, 357 F Supp 441, 442 (WD Pa 1973) Exhibit [ ]. In *Griffie*, the driver was driving the tractor to pick up a load, but consistent with the carrier's policy, the driver first drove to have the truck inspected. *Carriers Ins Co* 357 F Supp at 442. During the inspection, the driver drove over the victim's foot. *Id.* The court in *Griffie* held that the policy applied because the truck was regularly used to carry property. *Id.*

The present case is distinguishable from *Griffie* because the tractor at issue in *Griffie* was subject to a three year lease at the time of the accident and the Court concluded that a clause identical to the second clause in the Empire exclusion was applicable. Its discussion of a different exclusion similar to the first clause of the Empire exclusion, therefore, was *dicta.*

Even if the *Griffie* court's discussion of the "while used to carry property" exclusion is not dicta, however, the case is distinguishable. In *Griffie,* the inspection was part the business performed for the carrier. In this case, to the contrary, Corey was merely on his way to obtain his assigned load. He had not yet actually performed any act in furtherance of GLC's business.

The Court of Appeals stated that Corey was driving to the yard to pick up a load when the accident occurred, but Corey did not have a specific time that he needed to be there and there was no trailer attached. *See Appendix 12, Hunt II,* at 92a. Corey left from his mother's house located at 1407 Sheridan Road, Montrose, Michigan at around 11:30 A.M. to drive to the yard in Linwood. *See Appendix 17,* Deposition of Corey Drielick, at 250a. The first officer at the scene was dispatched shortly after the accident occurred between 1:50 and 2 p.m.. *See Appendix 21,* Deposition of Trooper Joseph LaBelle at pg 348a. Door-to-door the yard is around 40 miles away from Corey's mother's house and the accident occurred near the yard's location. *See Appendix 17,* Deposition of Corey Drielick at 250a.

Also, it only takes Corey about an hour to drive from his mother's house to the yard, which is shorter than the amount of time it took Corey to get to the yard's vicinity the day of the accident, about 2 hours. *See Appendix 17,* Deposition of Corey Drielick, at 250a. Thus, Corey may not have been driving aimlessly, but he certainly did not drive straight to the yard on a specific pick-up schedule.

Moreover, the Court of Appeals failed to adequately distinguish cases directly on point, which state that exclusionary clauses denying coverage "while carrying property of any business" do not apply when the truck has no trailer attached or is otherwise not carrying property.

GLC and Sargent cited *Brantley* supra in their appellate brief to the Court of Appeals but the Court of Appeals failed to explain why *Brantley* does not guide the interpretation and application of the business use exclusion. *Brantley* interpreted Empire's same policy and specifically stated that the first clause of their business use exclusion did not apply to a driver

involved in an accident while bobtailing to get the oil changed. *Brantley* at 682. *Brantley* was decided in 2000, which is substantially more recent than the 1973 precedent in *Griffie*.

Connecticut Indem Co v Stingfellow, 956 F Supp 553 (MD PA 1997) also supports the conclusion that the first clause of Empire's policy does not apply. In *Stringfellow*, the court interpreted a policy that "excludes coverage 'while' the vehicle is being 'used to carry property in any business,'" to mean that the truck must actually carry property to bar coverage. *Stringfellow* at 558. The court also stated "[w]e respectfully disagree with *Griffie* and decline to follow it." *Id.* The Court of Appeals quickly disregards this case in a footnote and never accounts for the fact that *Stringfellow* expressly declined to follow *Griffie's* interpretation of a similar policy exclusion. The *Stringfellow* court reasoned as follows:

> Hartford's exclusion c, like plaintiff's exclusion a specifically excludes coverage "while" the vehicle is being "used to carry property in any business." It follows that if the covered vehicle or vehicles are not being used to carry property, the exclusion does not apply and cannot be relied upon to deny coverage. In our view, the analysis in *Griffie* alters the meaning of the exclusion so that it would apply if the vehicle was regularly used to carry property in the lessee's business as a trucker, a significant alteration of the actual language.

956 F Supp at 558.

Contrary to the *Stringfellow* court's interpretation of the plain language as written, the Court of Appeals expanded the first clause Empire's policy by supplying its own definition to the policy's terms. *Appendix 12, Hunt II* at 92a. The Court of Appeals defined the terms "while" and "used" and held that if the parties intended the policy to only apply when the truck is physically carrying property, then it would have stated that. However, *Stringfellow* correctly defined these same terms and determined that "while" and "used" require that the truck actually carry property to bar coverage. *Stringfellow* at 558.

Thus, because there was no lease, express or implied, the first clause of the "business use" exclusion is inapplicable.

III. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING EMPIRE'S OBJECTIONS TO THE GARNISMENT BECAUSE THE SECOND CLAUSE OF THE BUSINESS USE EXCLUSION DOES NOT APPLY

Moreover, even if there were an implied lease, the same rationale holds true. The tractor was not attached to a trailer at the time of the accident. The tractor was not being used to carry any property at the time of the accident, and thus, no bodily injury took place "while" the tractor was used to carry property for another. See, *Brantley, supra*, 220 F3d at 682.

Thus, if the court finds that there was an implied lease, the facts must be analyzed under the second clause of the "business use" exclusion. Specifically, the issue is whether the accident took place while the tractor was being used in the business of the lessee.

The Court of Appeals did not address the second clause of the exclusion because it erroneously decided that the first clause applied despite the absence of any applicable controlling case law. However, even if there is an implied lease, a premise to which Defendants/Appellants do not subscribe, the accident did not occur while the 1985 Freightliner was used in the business of the lessee. The trial court painstakingly analyzed all of the cases presented to it in its Opinion and Order After Remand. *Appendix 10, 68a-76a.*

Hartford Ins Co v Occidental Fire & Cas Co, 908 F2d 235 (CA7 1990) is premised not only on the written lease agreement, but on the fact that the accident took place while the delivery was still in progress. The driver picked up the load, but, while en route, had to take the trailer to a repair facility. He was on the way back to the facility to pick up the trailer at the time of the accident.

Similarly, in *Liberty Mut Ins Co v Connecticut Indem Co*, 55 F3d 1333 (CA7 1995), the driver began the delivery before uncoupling the tractor from the trailer before completing the delivery. As with *Hartford,* the driver was returning to the trailer when the accident occurred.

In *Engle v Zurich American Group*, 230 Mich App 105; 583 NW2d 484 (1996), the Michigan Court of Appeals determined that the bobtail policy did not exclude coverage for a driver that completed his delivery before uncoupling and driving the tractor to dinner before an accident taking place en route to the dispatch yard to pick up his own vehicle. The only difference between *Engle* and the present case is that the driver in *Engle* had completed his delivery rather than having yet to begin the delivery.

In *Brantley, supra,* the owner of the truck that was under lease to the motor carrier had the truck serviced before returning to the dispatch yard. The Court concluded that the act of servicing the truck was an act that was done in furtherance of the lessee's business. The same cannot be said for merely driving to the yard from home to pick up a trailer. Appellee has not cited a single case that stands for such a proposition.

In short, there is no authority, either in Michigan or elsewhere, that stands for the proposition that merely driving from one's home to a dispatch yard to pick up a load for a lessee constitutes "use" of a covered auto "in the business" of the lessee. In every case in which the driver was operating the tractor without a trailer, he had already obtained the load and began the delivery.

RELIEF REQUESTED

WHERERFORE, GLC and Sargent respectfully request that this Honorable Court reverse the Court of Appeals and hold that neither clause of the business use exclusion in Empire's policy applies and further request that this Court reinstate the trial court's order of garnishment against Empire.

Respectfully submitted,

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