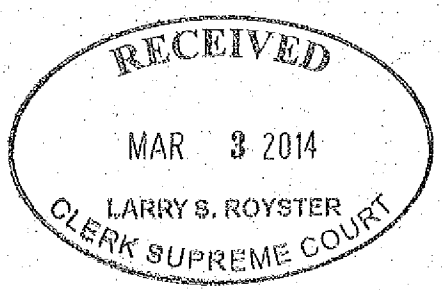
STATE OF M I C H I G A N

IN THE SUPREME COURT

MARIE HUNT, Personal Representative of the Estate of EUGENE WAYNE HUNT, Deceased,	))Supreme Court Docket No.:146433
Plaintiff/Appellant,	))Court of Appeals No.: 297825
vs	))Lower Case No. 96-3280-NI-C
DRIELICK, ET AL-Defendants	)HON. WILLIAM J. CAPRATHE)
vs	)
EMPIRE FIRE AND MARINE INSURANCE COMPANY,	)
Garnishee Defendant/Appellee.	)
BRANDON JAMES HUBER,	))Supreme Court Docket No.:146434
Plaintiff/Appellant,	))Court of Appeals No.: 297828
vs	))Lower Case No. 97-3238-NI-C
DRIELICK, ET AL-Defendants	)HON. WILLIAM J. CAPRATHE)
vs	)
EMPIRE FIRE AND MARINE INSURANCE COMPANY,	)
Garnishee Defendant/Appellee.	)
THOMAS LUCZAK and NOREEN LUCZAK,	))Supreme Court Docket No.:146435
Plaintiffs/Appellants,	))Court of Appeals No.: 297827
vs	))Lower Case No. 96-3328-NI-C
DRIELICK, ET AL-Defendants	)HON. WILLIAM J. CAPRATHE)
vs	)



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ASSIGNEE-DEFENDANT/APPELLANT AND DEFENDANT/APPELLANT'S REPLY TO GARNISHEE/APPELLEE'S RESPONSE TO BRIEF ON APPEAL

Assignee-Defendant/Appellant, Great Lakes Carriers Corp. ("GLC") and Defendant/Appellant, Sargent Trucking, Inc.("Sargent"), by and through their respective counsel of record, submit the following Reply to the Garnishee/Appellee's Response to the Brief on Appeal:

I. ARGUMENT

The Garnishee/Appellee's Response to the Brief on Appeal presents essentially three (3) arguments: (1) A lease must be implied; (2) It would have been proper for the Court of Appeals to reverse the trial court ruling using the second clause of the business use exclusion and (3) The Court of Appeals properly reversed the lower court on the first clause of the business use exclusion. The Response and the arguments stated therein are without merit and miss the mark with respect to whether a lease is implied in this case and whether the Court Appeals erred in their previous decision.

A. 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 State Law and Federal Regulations for the Motor Carrier Industry

As a preliminary matter, it is worth noting that the Garnishee/Appellee's Response alleges that there was an "oral lease" between Drielick Trucking and GLC. This distinction is relevant as the federal carrier regulations require a written lease, and applicable law establishes that the actions of the parties determine whether a lease is implied.

Despite the allegation concerning an oral lease, the result is the same as the actions of the parties clearly establish that there was no meeting of the minds for the alleged oral lease. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548, 487 NW2d 499

(1992)(holding that there must be a meeting of the minds on all material facts). The Garnishee/Appellee alleges that Bill Bateson made an oral lease with Drielick Trucking on behalf of GLC. The Garnishee/Appellee's Response however, admits that Mr. Bateson insisted that his ex-wife, Jamie Bateson, handled the paperwork for GLC leases.

The Response further admits that Mr. Bateson's testimony was vague and evasive concerning whether he believed the truck was leased to GLC. Moreover, Mr. Bateson believed that the Drielick trucks were under lease to Sargent, not GLC. Regardless of whether Drielick Trucking terminated its lease with Sargent before the accident occurred, Mr. Bateson's testimony establishes that there was no meeting of the minds concerning an oral lease with GLC. The actions of Drielick Trucking and GLC further demonstrate that no lease existed at the time of the accident.

Corey Drielick, and the 1985 Freightliner involved in the accident, first hauled brokered loads through Great Lakes Logistics ("GLL") in December, 1995. *Appendix 17*, Corey Drielick Deposition, at 264a-265a. The Garnishee/Appellee's Response alleges that at least one check, dated November 20, 1995, to Drielick Trucking was drawn on GLC's account. Jamie Bateson testified however that the November 20, 1995 check was mistakenly drawn on the GLC account. *See Appendix 25*, Jamie Bateson Deposition, at 438a. This check must correspond to a load hauled with a different Drielick vehicle because it predates the date that Corey Drielick began driving brokered loads using the 1985 Freightliner. All other checks were drawn on GLL's account, and the November check was drawn before Corey Drielick started hauling brokered loads for GLL with the 1985 Freightliner. Moreover, Jamie Bateson testified that there were no lease agreements for loads brokered by GLL, and GLC never had a lease with Drielick Trucking for even a single load. *See Appendix 25*, Jamie Bateson Deposition, at 436a.

The Garnishee/Appellee's Response relies on *Wilson v Riley Whittle, Inc*, 701 P2d 575 (AZ App 1984) for the proposition that a trip lease will be implied when no written lease exists to impute liability to the carrier. *Wilson* is distinguishable from this situation, in which Corey Drielick did not yet turn possession, control and use of the tractor to GLC. Thus, the *Wilson* facts are significantly different from those of the present case.

The Response further relies on *Bogle v Wolverine Expediting, Inc*, 193 Mich App 479, 484, 484 NW2d 728 (1992) for the proposition that Corey Drielick was a statutory employee of GLC to impose liability on it. The Response's citations to *Wilson* and *Bogle* focus on the carrier's liability, not whether a lease is implied to determine an insurer's obligations under a Non-Trucking Use policy. Neither GLC nor Sargent's liability are at issue here as the issue is whether a lease is implied to determine the Garnishee/Appellee's obligations under its policy of insurance with Drielick Trucking. *Wilson* and *Bogle* further involved written leases that did not meet the federal carrier regulations. Herein, there is no lease agreement whatsoever between Drielick Trucking and GLC when the accident occurred.

Moreover, the Garnishee/Appellee neglects to mention that *Bogle* established that Michigan's Motor Vehicle Act and its 30-day exclusive possession provision applies to determine whether a lease is implied between GLC and Drielick. *Bogle*, 193 Mich App at 488. Consequently, the Garnishee/Appellee fails to provide any evidence establishing that GLC had exclusive possession or control over the 1985 Freightliner for more than thirty (30) days when the accident occurred. Clearly, GLC had not yet received possession and control of the tractor because Corey Drielick had not yet arrived to GLC's Linwood yard to pick up the load when the accident occurred.

The Response further relies on *Zamalloa v Hart*, 31 F3d 911 (CA9, Ariz, 1994) for the

proposition that an oral lease can be formed before the driver picks up a load. *Zamalloa* is not binding on this Court, and it was undisputed that there was a lease agreement in that case even though it was not in writing. Jamie Bateson herein, testified that there was no lease with Drielick Trucking and everything that Drielick hauled was paid for through GLL. Mr. Bateson further testified that Jamie Bateson handles the lease agreements for GLC, and he could not consent to Drielick Trucking putting the GLC name and number on its trucks because Jamie would have to consent to that. *See Appendix 22*, William Bateson Deposition, at 374a.

Looking at the facts of this case and applicable law for implying a lease to impute liability to GLC or Sargent is irrelevant. What is relevant is the fact that GLC did not have a lease, written, oral or otherwise implied with Drielick Trucking on the date of the accident as GLC clearly did not have exclusive possession and control of the freightliner at issue for more than thirty (30) days when the accident occurred, and Corey Drielick was dispatched on the date of the accident by GLL not GLC. Empire has not cited a single case in which a court implied a trip lease in existence prior to surrender of exclusive use, possession and control of the equipment. Moreover, there are no cited cases supporting the proposition that a long term lease can be created in the absence of a written agreement. Therefore, no lease is implied between Drielick Trucking and GLC at the time of the accident, and the Court of Appeals must be reversed.

B. THE CASES CITED BY EMPIRE DO NOT SUPPORT THE APPLICATION OF THE SECOND CLAUSE OF THE "BUSINESS USE" EXCLUSION IN THE ABSENCE OF AN EXPRESS WRITTEN LONG TERM LEASE

Auto-Owners Ins Co v Redland Ins Co, 549 F3d 1043 (CA6 2008), is distinguishable from the present case. In that case, the driver's employer was party to a long term lease with the carrier. The driver had driven a load from Ohio to Michigan and was on his way to find a place

to sleep in anticipation of another dispatch the next morning. The policy at issue contained a very different exclusion which specifically excluded coverage when a covered vehicle "is being maintained or used ... after being dispatched by ... any trucking company or lessee of such auto." *Id,* at 1044. Thus, while the exclusion in *Auto-Owners* may have applied in the event of an implied lease to the facts of the case now before the Court based on the express language, the issue is substantially different. The Sixth Circuit merely concluded that a driver of a vehicle under a long term lease who completes his delivery is "in the business of" the lessee when he is traveling to another destination in anticipation of a dispatch.[1]

In *Greenwell v Boatwright,* 184 F3d 490 (CA6 1999), the driver did not complete his delivery because of congestion on the loading dock at the destination. He left the trailer and was involved in an accident on his way to find a motel before returning to the dock to complete his delivery. Thus, he had begun, but not completed his assignment. It appears that the truck at issue in that case was owned by motor carrier, KLLM, and was not subject to a lease. Significantly, the *Greenwell* court distinguished *Grimes v Nationwide Mut Ins Co/Nationwide Mut Fire Ins Co*, 705 SW2d 926, 931 (Ky Ct App 1985). In *Grimes*, the owner of the tractor had undertaken a load pursuant to a trip lease with a carrier other than the one to whom his tractor was under a long term lease. He was involved in an accident after he completed the delivery and was returning home. He was found to not be furthering the business of his lessee or the trip lessee for purposes of the "business use" exclusion. He completed his business under the trip lease and, thus, was no longer under that lease. *Mahaffey v General Security Ins Co,* 543 F3d 738 (CA 2008), also cited in *Auto-Owners*, involve similar facts in that the driver of a vehicle

[1]Indeed, the Sixth Circuit found that *Engle v Zurich-American Ins Group,* 215 Mich App 482; 549 NW2d 589 (1999), was inapplicable precisely because it contained only an exclusion for injuries or damage while the truck was "being used in the business of the carrier." The policy did not contain the specific enumerated exclusions as did the policy at issue in *Auto-Owners. Id,* at 1048.

under a long term lease, as opposed to an implied trip lease, completed a delivery and was told by the lessee's dispatcher to "take the rest of the night off and call ... in the morning to see if they had a load." Like the driver in *Auto-Owners,* he was involved in an accident on the way to a motel, this time under the instruction of the lessee's dispatcher. This is significantly different from the case at bar in which Corey had not yet picked up the trailer.

Republic Western Ins Co v Williams, 212 Fed Appx 235 (CA4 2007), an unpublished Fourth Circuit case again involves a vehicle under a long term written lease. The driver was involved in an accident when he was following his daily routine of reporting to the dispatch yard for the purpose of receiving an assignment. The exclusion at issue in this case is significantly different from the exclusion in the Empire policy.[2] The court found that the exclusion was applicable because the driver was "in route ... to carry property" for the lessee. Unlike the Empire policy, the Republic policy excluded liability incurred while *in route* to carry property.

In *Planet Ins Co v Transport Indemnity Co,* 823 F2d 285 (CA9 1987), the parties entered into a written trip lease on the morning of the accident which the court concluded was in effect at the time that the accident occurred when the tractor was on the way to pick up a load. Without any analysis or discussion, the court simply concluded that the accident took place while the tractor was being used in the business of the lessee after noting that exclusive possession was delivered to the motor carrier prior to the accident. *Id,* at 287.

Although Empire cites *Hartford Ins Co v Occidental Fire & Cas Co of NC,* 908 F2d 235 (CA7 1990) in support of its argument that virtually any activity conducted while a vehicle is

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[2]The Republic policy states:

> No Liability Coverage is afforded when described vehicles ... [are] used to carry property in any business *or in route for such purpose.*

Id, at 239, Emphasis added.

under lease is excluded, the case actually supports the contrary position. In *Hartford,* the leased tractor was used to haul a load of orange juice from Dade City, Florida to Fort Wayne, Indiana. The buyer in Fort Wayne rejected the load because it was too warm, due to a freon valve malfunction. The driver was instructed by the lessee to take the orange juice to a cold-storage facility and await instruction. Once the valve on the trailer was repaired, he was on his way to pick up the trailer when he was involved in an accident. The court rejected the bobtail insurer's argument that any accident that occurs while under lease is an accident that occurred while being used in the business of the lessee. Such a finding would render the coverage a virtual nullity. The court concluded, however, that because the lessor had begun, but not completed, delivery and was on his way to pick up the trailer from the repair facility, he was engaged in the business of the lessee. *Liberty Mutual Ins Co v Connecticut Indemnity Co,* 55 F3d 1333 (CA7 1995) is similar to *Hartford,* and indeed relies upon it. The accident in that case took place when the driver was returning from spending the weekend at home to the trailer that was parked at a nearby truckstop, where it was parked by the driver after beginning his delivery. In *St Paul Fire & Marine Ins Co v Frankart,* 69 Ill2d 209; 370 NE2d 1058 (1977), the tractor and trailer at issue were the subject of a written long term lease between the owner operator and the motor carrier. The accident at issue took place while the lessor was detouring from the most direct return route from a delivery, pulling an empty trailer in order to purchase fuel at a lower price in East Peoria, Illinois. As required by the motor carrier regulations, and as distinct from the case before this court, the lessor ceded "exclusive possession, control, responsibility and use" of the tractor-trailer to the motor carrier in the written lease. The motor carrier agreed that the driver must make the return trip to the point of origin with an empty trailer if no load is available for the return trip. Thus, because the lessor had to return without a return load and was free to choose

his own route, he was using the equipment in the business of the motor carrier. Significantly, the *Frankart* court's interpretation of "used in the business" of the lessee was rejected by the Michigan Court of Appeals in *Engle v Zurich-American Group*, 216 Mich App 482.

Engle is another case in which the issue was whether the lessor was operating in the business of the lease under a written long term lease *after* the lessor completed his delivery. In this case, the driver completed his delivery and was bob-tailing in the leased tractor to pick up his personal vehicle at the dispatch yard. His business for the lessee was completed and the exclusion did not apply, thus reaching the opposite conclusion of *Frankart.*

Finally, *MGM Transport Corp v Cain,* 128 NC App 428 (1998), relied upon North Carolina *respondeat superior* principles to conclude that the lessor under a written long term lease was engaged in the business of the lessee when en route to the terminal to pick up a shipment. Unlike the present case, however, the driver was *required* by the lessee to keep the tractor at his home, was *required* to be ready to pick up loads during specified "on-call" periods, and was required to perform pre-trip inspections and maintenance of the tractor. Thus, unlike the present case in which Corey merely was requested to go to the yard to pick up a load, MGM Transport actually exercised complete control over its drivers with respect to their on-call and pre-trip activities.

In short, there is not a single case in which a driver operating under an implied trip lease was found to be operating in the business of the lessee at any time prior to surrendering possession, use and control to the lessee.

C. THE FIRST CLAUSE OF THE EXCLUSION WHICH EXCLUDES COVERAGE FOR BODILY INJURY "WHILE A COVERED 'AUTO' IS USED TO CARRY PROPERTY IN ANY BUSINESS" IS INAPPLICABLE

Once again, Empire fails to acknowledge that the wording of its exclusion applies only

while the covered auto *is* used to carry property, not while the covered auto is *on its way* to carry property. "While" is a conjunction, meaning "during the time that." It is without question that Corey was not using the tractor "during the time that" he was carrying property for Great Lakes, or anyone else. Empire again fails to acknowledge that *Empire Fire and Marine Ins Co v Brantley Trucking Inc*, 220 F3d 679 (CA5 2000) relied on the second clause of its exclusion, which requires the existence of a lease. The second clause is not limited to situations in which the insured *is carrying* property.

Empire also continues to ignore that *Carriers Ins Co v Griffie,* 347 F Supp 441 (WD Pa 1973) involved a long term written lease that required the lessor to perform certain tasks, including performing pre-trip inspections. The injury took place during one of these required inspections. Besides being distinguishable, *Griffie* is an outlier to the extent that its dicta implies that the plain language of the Empire exclusion requires anything less than that the tractor actually be carrying property.

Empire also chooses to ignore the fact that at least one other court expressly declined to follow *Griffie. Connecticut Indem Co v Stringfellow*, 956 F Supp 553 (MD PA 1997).

II. CONCLUSION

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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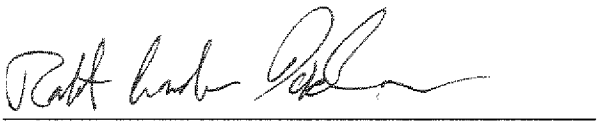
By: 

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