

## George v. Suarez

Court of Appeal of Louisiana, First Circuit

January 10, 2019, Judgment Rendered

2018 CA 0484

### Reporter

2019 La. App. Unpub. LEXIS 8 \*; 2018 0484 (La.App. 1 Cir. 01/10/19);; 2019 WL 168526

STACEY GEORGE VERSUS JORGE SUAREZ,  
PROGRESSIVE SECURITY INSURANCE COMPANY,  
TRIMAC TRANSPORTATION, INC. AND GREAT WEST  
CASUALTY COMPANY

**Opinion by:** HOLDRIDGE

### Opinion

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**Notice:** NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE LOUISIANA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** [\*1] On Appeal from the Nineteenth Judicial District Court. In and for the Parish of East Baton Rouge State of Louisiana. No. C648189 Sec. 27. The Honorable Todd Hernandez, Judge Presiding.

**Disposition:** AFFIRMED.

**Counsel:** James M. Dill, Lafayette, LA, Attorney for Defendants/ Appellants Jorge Suarez, Trimac Transportation Inc., and Great West Casualty.

William C. Helm, Stephen F. Butterfield, Baton Rouge, LA, Attorneys for Defendant/Appellee Progressive Security Insurance Company.

**Judges:** BEFORE: MCDONALD, CRAIN, AND HOLDRIDGE, JJ.

[Pg 2] **HOLDRIDGE, J.**

Appellants, Great West Casualty Company, Trimac Transportation, Inc., and Jorge Suarez appeal a summary judgment rendered in favor of Progressive Security Insurance Company, finding that the Progressive non-trucking liability policy excluded coverage for a vehicular accident. We affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

Most of the facts forming the basis of this appeal are undisputed and were submitted by the parties in support of and in opposition to the motion for summary judgment. Mr. Suarez owned a 2005 Peterbilt tractor that he leased to Trimac Transportation, Inc. (Trimac) pursuant to an Independent Contractor Service Agreement executed by Mr. Suarez and Trimac. [\*2] The Independent Contractor Service Agreement required Mr. Suarez to obtain at his expense "non-trucking liability coverage" to cover losses and expenses related to bodily injury and property damage incurred by third parties arising from the operation of the tractor at all times while it was not in operation on Trimac's business. Mr. Suarez purchased a non-trucking liability policy from Progressive Security Insurance Company (Progressive) covering the tractor. The Independent Contractor Service Agreement also provided that Trimac would "provide and maintain, at its expense and without charge back to the Independent Contractor, insurance coverages for the protection of the public as required by applicable laws and regulations." Trimac obtained such liability coverage on Mr. Suarez's tractor from Great West Casualty Company (Great West).

On April 5, 2016, Mr. Suarez telephoned the Trimac office inquiring about revenue opportunities on the following day, and was advised by a Trimac supervisor that there was a load available on April 6, 2016, at one of Trimac's customer's plants in Geismar, Louisiana, if he was interested. Mr. Suarez agreed [Pg 3] to pick up the load under the Independent [\*3] Contractor Service Agreement, and load information was sent to the on-board computer in Mr. Suarez's tractor.

On the morning of April 6, 2016, Mr. Suarez was driving the tractor from his home in Baton Rouge, Louisiana, to Trimac's terminal in Geismar to pick up the empty Trimac-owned trailer assigned to him before travelling to the plant to pick up the load. Mr. Suarez was unable to make the pick-up because he was involved in an accident en route to the Trimac terminal in which he rear-ended a bus driven by Stacy George.

Alleging she sustained injuries in the accident, Ms. George filed this lawsuit against Mr. Suarez, Progressive, Trimac, and Great West. Progressive filed a motion for summary judgment, relying on an exclusion contained in its policy which provides that coverage, including Progressive's duty to defend, did not apply to any insured vehicle "while operated, maintained, or used" "[i]n any business or for any business purpose" (sometimes referred to as the "business use" exclusion or the "trucking use" exclusion). Progressive maintained that the trucking use exclusion applied because it was undisputed that at the time of the accident, Mr. Suarez was driving his tractor to [\*4] the Trimac facility to pick up a trailer to haul a load for Trimac pursuant to the Independent Contractor Service Agreement. Progressive also asserted that it is undisputed that Mr. Suarez was operating his tractor under dispatch from Trimac when the accident occurred. Progressive urged that as a matter of law, at the time of the accident, Mr. Suarez was operating the tractor in the business of Trimac and therefore, the Great West policy provided coverage for Trimac and Mr. Suarez for the subject accident, not Progressive's non-trucking liability policy, entitling Progressive to summary judgment and dismissal from the lawsuit.

[Pg 4] In support of the motion for summary judgment, Progressive attached to its motion: the petition for damages; Trimac's responses to Progressive's interrogatories and requests for production of documents; Trimac and Great West's responses to Ms. George's interrogatories and requests for production of documents and admissions; the Independent Contractor Service Agreement executed by Mr. Suarez and Trimac on July 1, 2015; the affidavit of Michealean A. McCauley, Progressive's commercial claims verification representative, attesting to the authenticity of the [\*5] Progressive policy; and the Progressive policy, including the

declarations page.

Great West, Trimac, and Mr. Suarez (collectively referred to as "Great West") opposed the motion.<sup>1</sup> In support of their opposition to the motion for summary judgment, Great West submitted the following documents: the affidavit of Mr. Suarez; Mr. Suarez's driver log; and the affidavit of James Winton, Trimac's vice president of operations for its south division. Mr. Suarez attested that at the time of the accident, his duty status was "Off-Duty Driving" as evidenced by his driver log for April 6, 2016. Mr. Suarez also attested that pursuant to the Independent Contractor Service Agreement, he was not paid for the mileage between his home and the Trimac terminal. Mr. Winton also stated that as an independent contractor, Mr. Suarez was not paid for mileage travelled between his home and the Trimac facility, as those were not compensable miles. Mr. Winton attested that on the date of the accident, Trimac offered free parking at its Geismar facility to all independent contractors, allowing them to park their tractors at the facility and take their personal vehicles between their homes and the Trimac facility each [\*6] morning. Mr. Suarez attested that he chose to drive his tractor between his home and the Trimac facility as a means of personal conveyance, even [Pg 5] though Trimac offered him free parking at its Geismar facility for the tractor. Finally, Mr. Suarez attested that at the time of the accident, there was no trailer attached to the tractor he was operating.

Great West urged that based on the undisputed facts of this case, the trucking use exclusion in the Progressive policy did not apply because at the time of the accident, Mr. Suarez was not operating the tractor in the business of Trimac. Great West focused on the following facts as proof that Mr. Suarez was not in the business of Trimac at the time of the accident: Mr. Suarez was off-duty; Mr. Suarez was not paid for miles travelled to Trimac's facility and Mr. Suarez's compensable mileage began once he left the Trimac facility to pick up the load; the nature of Mr. Suarez's trip to the Trimac facility was personal in nature rather than work-related because Trimac allowed its drivers to park their tractors at the Trimac facility and use their personal vehicles to travel to and from the facility, and Mr. Suarez chose to use his [\*7] tractor as a means of personal conveyance to report to work; Mr. Suarez was "bobtailing," a term used in the trucking industry to refer to driving a tractor without the trailer attached to it; and Mr. Suarez was not "under dispatch." Regarding the latter factor, Great West took issue with Progressive's claim that Mr. Suarez was "under dispatch" at the time of the accident, maintaining that although Mr. Suarez had received his dispatch instructions the day before the accident, Mr. Suarez had to first report to the Trimac facility to pick up the trailer

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<sup>1</sup> Plaintiff did not oppose the motion for summary judgment.

before he was actually "dispatched" to pick up the load. Great West argued that since Mr. Suarez was on his way to the Trimac facility to pick up the trailer when the accident occurred, he was not "under dispatch" from Trimac at that time. Accordingly, Great West argued that the trucking use exclusion of the Progressive policy did not apply, and therefore, the Progressive policy provided coverage for Mr. Suarez's tractor.

[Pg 6] Following a hearing, the trial court granted Progressive's motion for summary judgment upon finding that Progressive's non-trucking policy excluded coverage for the subject accident. In written reasons for judgment, [\*8] the trial court expressed its belief that Mr. Suarez was operating the tractor in furtherance of the business purposes of Trimac at the time of the accident, and therefore, the business use exclusion in the Progressive policy applied. The trial court signed a written judgment on November 2, 2017, granting Progressive's motion for summary judgment and dismissing all claims against Progressive with prejudice.

Great West, Trimac, and Mr. Suarez filed this appeal. They assert that the trial court erred in granting summary judgment in favor of Progressive upon finding that Mr. Suarez was operating his truck in furtherance of the business purposes of Trimac at the time of the accident.

## SUMMARY JUDGMENT

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966A(3). The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden does not require him to negate [\*9] all essential claims of the adverse party's claim, action, or defense, but rather, to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966D(1).

[Pg 7] Appellate courts review evidence de novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Crosstex Energy Services, LP v. Texas Brine Company, LLC**, 2017-0895 (La. App. 1 Cir. 12/21/17), 240 So.3d 932, 936, writ denied, 2018-0145 (La. 3/23/18), 238 So.3d 963. Appellate courts ask

the same questions as the trial court: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Id.** The applicable substantive law determines materiality; thus, whether a particular dispute is material can only be seen in light of the substantive law applicable to the case. **Id.** A genuine issue is one as to which reasonable persons could disagree. If reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Thompson v. Center for Pediatric and Adolescent Medicine, L.L.C.**, 2017-1088 (La. App. 1 Cir. 3/15/18), 244 So.3d 441, 445, writ denied, 2018-0583 (La. 6/1/18), 243 So.3d 1062.

The [\*10] issue of whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can be resolved properly within the framework of a motion for summary judgment. **Green v. State Farm Mutual Automobile Insurance Company**, 2007-0094 (La. App. 1 Cir. 11/2/07), 978 So.2d 912, 914, writ denied, 2008-0074 (La. 3/7/08), 977 So.2d 917. Summary judgment decreeing a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. **Id.** An insurer seeking to avoid coverage through summary judgment bears the burden of proving some exclusion applies to preclude coverage. **Guste v. Lirette**, 2017-1248 (La. App. 1 Cir. 6/4/18), 251 So.3d 1126, 1129.

[Pg 8] Progressive issued a "Commercial Auto" policy covering Mr. Suarez's tractor. In the insurance agreement, Progressive agreed to pay damages for which Mr. Suarez became legally responsible because of an accident "arising out of the ownership, maintenance or use" of the insured auto. The policy contained a contingent liability endorsement providing limited liability coverage for non-trucking use of the tractor which contained an exclusion for trucking use of the tractor. The policy provides as follows:

### CONTINGENT LIABILITY ENDORSEMENT-LIMITED LIABILITY COVERAGE FOR [\*11] NON-TRUCKING USE OF AN AUTOMOBILE

Except as specifically modified in this endorsement, all provisions of the Commercial Auto Policy apply.

We agree with **you** that the insurance provided under **your** Commercial Auto Policy is modified as follows:

#### PART I-LIABILITY TO OTHERS

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B. The following exclusion is added:

## 15. Trucking Use

Coverage under this Part I, including **our** duty to defend, does not apply to an **insured auto** or any attached **trailer** while operated, maintained, or used:

- a. To carry property or while property is being loaded or unloaded from the **insured auto** or an attached **trailer**; or
- b. In any business or for any business purpose.

The term "in any business or for any business purpose" contained in Progressive's trucking use exclusion is clear and unambiguous. See **Jurey v. Kemp**, 2011-0142 (La. App. 1 Cir. 9/20/11), 77 So.3d 83, 86 (stating that the term "used in your business" in a liability policy is clear and unambiguous, and noting that while the application of the endorsement to the facts of the case may pose difficult questions, the difficulty of the questions does not create an ambiguity). Because the trucking use exclusion in the Progressive policy is clear and unambiguous, the coverage [Pg 9] issue is properly resolved as a matter of law on a motion [\*12] for summary judgment. See **Jurey v. Kemp, Id.** Thus, the only issue presented by the motion for summary judgment is whether, as a matter of law and under the undisputed facts of the case, Mr. Suarez was operating the tractor in the business of Trimac or for any business purpose at the time of the accident so as to invoke the trucking use exclusion contained in the Progressive policy.

Great West contends that Suarez was not in the business of Trimac at the time of the accident because Mr. Suarez was bobtailing; he was not under dispatch or standby from Trimac; his duty status was "off-duty driving"; he was using his tractor as a means of personal conveyance to commute from his home to the Trimac facility; and he was not acting within the scope of the service agreement with Trimac. All of these factors, Great West argues, indicate that Mr. Suarez was not in the business of Trimac when the accident occurred and as such, the trucking use exclusion in the Progressive policy is not triggered to exclude coverage. Great West urges this court to reverse the summary judgment and find that the Progressive policy does not exclude coverage for the accident sued upon.

On the other hand, Progressive [\*13] submits that the undisputed evidence demonstrates that Mr. Suarez was acting in furtherance of Trimac's business when the accident occurred. It stresses that Mr. Suarez was operating his tractor to pick up a load for Trimac pursuant to Trimac's load instructions and was therefore acting under the direction of Trimac by travelling to the Trimac terminal in Geismar to pick up the load for Trimac's customer. Progressive contends

that Great West's argument that Mr. Suarez was not "under dispatch" at the time of the accident is just a matter of semantics. It further submits that the fact Mr. Suarez was bobtailing at the time of the accident, was not being paid for mileage, and was on "off-duty status" does not change the fact that Mr. Suarez was operating the [Pg 10] tractor for the benefit of Trimac. Progressive urges that the facts relied on by Great West in opposition to the motion for summary judgment do not create a genuine issue of material fact regarding the applicability of its business exclusion, which by its clear terms, excludes coverage when the insured vehicle is being operated "for any business purpose."

Both sides contend that their respective arguments are supported by the [\*14] jurisprudence construing "in the business of language contained in insurance policies. A number of Louisiana and federal cases have addressed the issue of whether a truck owner/lessor's non-trucking liability policy, or the lessee/motor carrier/transportation company's liability policy, provides coverage when an independent contractor is involved in an accident in a vehicle that is a covered vehicle under both policies.

In **LeBlanc v. Bailey**, 97-0388 (La. App. 4 Cir. 10/1/97), 700 So.2d 1311, writ denied, 97-2988 (La. 2/6/98), 709 So.2d 743, the Fourth Circuit was asked to determine whether an independent contractor truck owner, who leased his vehicle to a transportation company, was "in the business" of the transportation company when, following a day of deliveries, he was involved in an accident on the way to his home. **Id.** at 1314. The insurer which provided "bobtail coverage" through a non-trucking use endorsement in its policy, filed a motion for summary judgment, insisting that its policy excluded coverage because the covered vehicle was being used "in the business of the transportation company at the time of the accident. **Id.** at 1313. The transportation company's insurer argued that the truck owner had completed his work with the company for the day, and at the time of the accident, was bobtailing, and [\*15] was thus covered by the bobtail policy. **Id.** The Fourth Circuit agreed, concluding that the truck owner was no longer in the business of the transportation company after he made his last delivery and started for home. At [Pg 11] this point, the court noted, the truck owner was free to go where he pleased and was not subject to the transportation company's control or paid for his time or mileage. The court further emphasized that the truck owner was not under dispatch or stand-by for further deliveries and under these circumstances, his drive home was more of a personal nature than a work-related function. Finally, the court noted that to construe the bobtail policy as not affording coverage would render the non-trucking use endorsement meaningless and would defeat the very purpose of obtaining this type of coverage. **Id.** at 1314-1315. Upon finding that the

business use exclusion in the non-trucking liability policy was not applicable as a matter of law, the court held that the transportation company's insurer was entitled to summary judgment decreeing that the non-trucking liability policy provided primary coverage for the accident. **Id.** at 1315.

Later, in **Jurey v. Kemp**, this court was asked to determine, on cross-motions [\*16] for summary judgment, whether an independent contractor truck owner/lessee was "in the business of a motor carrier/lessee such that the liability insurance secured by the carrier/lessee, as opposed to bobtail insurance secured by a truck owner/lessor, provided coverage for an accident in which the trucker was involved. In that case, a truck owner picked up his flatbed trailer at a facility where improvements had been performed on the trailer and was involved in a vehicular accident as he was leaving the facility. **Id.** at 84-87. This court held that under the undisputed facts of the case, the truck owner was not acting "in the business of the carrier" as he drove from the facility where he picked up the flatbed trailer. **Id.** at 88. This court observed that pertinent inquiry under the facts of the case was whether the trucker was acting within the scope of the lease agreement with the carrier, noting that to the extent the trucker was executing his contractual duties, he would be acting "in the business of the carrier. **Id.** Looking to the [Pg 12] scope of the lease agreement, this court concluded that the truck owner was not furthering the carrier's business because there was no showing that the improvements [\*17] the trucker had done to the trailer were required under the terms of the lease agreement with the carrier; instead, it appeared that the improvements were merely done for the convenience of the owner. Ultimately, this court concluded that the truck owner's trip to the repair shop was not undertaken in the business of the carrier, and affirmed the trial court's ruling granting summary judgment in favor of the carrier's liability insurer and denying summary judgment as to the truck owner's bobtail insurer. **Id.** at 88-89.

However, other cases involving different factual scenarios have found that a truck owner/lessor was acting "in the business of the lessee carrier when an accident occurred. In **Auto-Owners Ins. Co. v. Redland Ins. Co.**, 549 F.3d 1043 (6th Cir. 2008), a federal court was asked to decide whether an employee of a company which leased a tractor to a motor carrier was using the truck "in the business" of the motor carrier after he completed one delivery, and in anticipation of receiving another delivery order, began to drive to find a place to sleep for the night, at which point he was involved in a fatal accident. The federal court upheld a summary judgment granted in favor of the insurer which provided a non-trucking liability policy on the tractor, holding [\*18] that the policy excluded coverage because under the undisputed facts of the case, the tractor was being used in the business of

the carrier. **Id.** at 1045, 1049. The court stressed that at the time of the accident, the driver was not engaged in some "frolic and detour, heading somewhere for his own purposes," but was heading in the direction of his next presumed, although not confirmed, dispatch, and as such, was engaged in an activity related to and directly serving the carrier's commercial interests. **Id.** at 1045.

[Pg 13] Additionally, in **Mahaffey v. General Security Insurance Co.**, 543 F.3d 738 (5th Cir. 2008), the Fifth Circuit rendered summary judgment in favor of a non-trucking bobtail insurer, holding that under Louisiana law, and based on the reasoning of **LeBlanc v. Bailey**, a truck owner was in the business of the carrier when he was driving to a motel to sleep and was on standby for further deliveries the following day when an accident occurred. The court reasoned that one of the important considerations in **LeBlanc v. Bailey** was whether the driver was on dispatch or standby for further deliveries, or whether his drive home was of a more work-related one rather than a personal one. **Id.** at 742. The court observed that unlike the driver in **LeBlanc v. Bailey**, who was heading home and who was not under pre-dispatch [\*19] for deliveries the following day, the driver in the case before it was not heading home and was on standby for further deliveries. **Id.** at 742. See also **Empire Fire and Marine Insurance Company v. Brantley Trucking, Inc.**, 220 F.3d 679 (5th Cir. 2000) (wherein the court stated that a business use exclusion in a bobtail policy clearly referred to situations where the truck was being used to further the commercial interests of the lessee. **Id.** at 682. Employing this test, the court held that a lessor/truck owner, who bobtailed from the lessee's terminal to have service performed on his truck while waiting for cargo to be loaded, was acting in the lessee's business when he was involved in an accident on the way back to the lessee's terminal. **Id.** The court noted that the truck owner was not "out pursuing leisurely engagement" and concluded that under the undisputed facts of the case, the truck owner's actions were in furtherance of the carrier's business. **Id.**)

Considering the substantive law in light of the undisputed facts of this case, we conclude that as a matter of law, Mr. Suarez was operating the tractor in the business of Trimac or for a business purpose at the time he was involved in an [Pg 14] accident with Ms. George. It is undisputed that at the time of the accident, Mr. Suarez was driving to [\*20] the Trimac facility to pick up an assigned trailer to carry a load for Trimac's customer pursuant to pre-dispatch instructions sent to Mr. Suarez by Trimac. He was not heading home after a day of deliveries, nor was he on some personal mission as were the truck owners in **LeBlanc v. Bailey** and **Jurey v. Kemp**. Rather, he was acting in accordance with the Independent Contractor Service Agreement and Trimac's

dispatch instructions when he was heading in the direction of his next confirmed dispatch, and he was clearly furthering the commercial interests of Trimac at the time the accident occurred. He was further acting in accordance with the load information that was sent to the on-board computer in his vehicle. At the time of the accident, he was only doing the business of Trimac in accordance with Trimac's instructions and directions. Accordingly, we hold that because Mr. Suarez was operating his tractor in the business of Trimac, the trucking use exclusion of the Progressive policy is applicable, and that exclusion precludes coverage for the accident in question. The trial court correctly entered summary judgment in favor of Progressive, dismissing it from this lawsuit.

### **CONCLUSION**

For the [\*21] foregoing reasons, the summary judgment in favor of Progressive Security Insurance Company appealed from is affirmed. All costs of this appeal are assessed to appellants, Great West Casualty Company, Trimac Transportation, Inc., and Jorge Suarez.

**AFFIRMED.**