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| COURT OF APPEALS, STATE OF COLORADO<br>Colorado State Judicial Building<br>2 East 14th Avenue<br>Denver, CO 80203<br><br>DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO<br>1437 Bannock Street<br>Denver, CO 80202<br>Case No. 08-CV-7007 - Hon. J. Mansfield<br><br>Plaintiff/Appellee: FIRE INSURANCE EXCHANGE<br><br>Defendant/Appellant: PEDRO SOTO<br><br>Edward W. Holub, #23856<br>ZAPILER FERRIS, LLP<br>201 Steele Street, Suite 201<br>Denver, CO 80206<br>Attorneys for Appellant<br>Telephone: (303) 333-4488<br>Facsimile: (303) 333-7488<br>E-mail: ed@zapilerferris.com | ▲ COURT USE ONLY ▲<br><br>Case No.: 09-CA-1152 |

**APPELLANT'S OPENING BRIEF**

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g) as it contains 4866 words and does not exceed 30 pages.

2. The brief complies with C.A.R. 28(k). It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

/s Edward W. Holub
Edward W. Holub, #23856

## TABLE OF CONTENTS


Page

I. STATEMENT OF ISSUES…… 1

II. STANDARD OF REVIEW…… 1

III. STATEMENT OF THE CASE…… 2

A. Nature of the Case…… 2

B. Course of the Proceedings…… 2

C. Statement of Facts…… 2

IV. SUMMARY OF ARGUMENT…… 7

V. ARGUMENT…… 7

THE TRIAL COURT ERRED BY FINDING THAT THE MOTOR VEHICLE EXCLUSION PRECLUDED COVERAGE FOR SOTO'S INJURIES AND DAMAGES…… 7

A. The Trailer Was Not A Motor Vehicle Because It Was Not Being Towed At The Time Soto Sustained Injury…… 8

B. Disconnecting The Trailer From The Truck Did Not Constitute Unloading…… 12

C. There Was No Causal Link Between Soto's Injuries And The Use Of The Truck…… 13

D. Concurrent Causes Existed Which Arose From Non-Automobile Related Conduct…… 18

VI. CONCLUSION…… 22

# TABLE OF AUTHORITIES

**Case Law:**


Page

Aetna Casualty & Surety Co. v. McMichael,
906 P.2d 92 (Colo. 1995) …… 18

Allstate Insurance Co. v. Watts,
811 S.W.2d 883 (Tenn. 1991) …… 21

American Modern Home Insurance Co. v. Rocha,
729 P.2d 949 (Ariz.App. 1986) …… 20

Azar v. Employers Casualty Company,
495 P.2d 554 (Colo. 1972) ……17

Barge v. Jaber,
831 F.Supp. 593 (S.D. Ohio 1993) ……21

Cary v. United of Omaha Life Ins. Co.,
108 P.3d 288 (Colo. 2005) ……11

Compton v. State Farm Mutual Automobile Insurance Co.,
870 P.2d 545 (Colo. App. 1993) …… 8, 13

Farmers Alliance Mutual Insurance Co. v. Reeves,
775 P.2d 84 (Colo.App. 1989) …… 8

Fibreglas Fabricators, Inc. v. Kylberg,
799 P.2d 371 (Colo. 1990) …… 1

ISG, LLC v. Arkansas Valley Ditch Association,
120 P.3d 724 (Colo. 2005) …… 1

Kalell v. Mutual Fire and Automobile Insurance Co.,
471 N.W.2d 865 (Iowa, 1991) …… 20

Lawver v. Bowling,
238 N.W.2d 514 (Wisc. 1976) …… 20

Page

Maryland Casualty Co. v. Aguayo,
29 F.Supp. 561 (S.D. Cal. 1939) ……10, 11

Mason v. Celina Mutual Insurance Co.,
423 P.2d 24 (Colo. 1967) …… 17

Northern Ins. Co. of New York v. Ekstrom,
784 P.2d 320 (Colo. 1989) …… 18, 19

Sanchez v. State Farm Mutual Automobile Insurance Co.,
878 P.2d 31 (Colo.App. 1994) …… 17

Simon v. Shelter General Insurance Co.,
842 P.2d 236 (Colo. 1992) …… 8

State Automobile and Casualty Underwriters v. Beeson,
516 P.2d 623 (Colo. 1973) ……8, 17

State Farm Mutual Automobile Insurance Co. v. Kastner,
77 P.3d 1256 (Colo. 2003) ……14, 15, 16

State Farm Mutual Automobile Insurance Co. v. Partridge,
514 P.2d 123 (Cal. 1973) …… 20

Surdyka v. DeWitt,
784 P.2d 819 (Colo.App. 1989) …… 8

Titan Construction Co. v. Nolf,
515 P.2d 1123 (Colo. 1973) ……12, 14

Waseca Mutual Insurance Co. v. Noska,
331 N.W.2d 917 (Minn. 1983) …… 21

**Other Authorities:**

Black's Law Dictionary, 1378 (5th ed. 1979) …… 12

Appellant PEDRO SOTO ("Soto") hereby submits his Opening Brief:

## I.

## STATEMENT OF ISSUES

Whether the trial court erred by finding that the insurance policy issued by Appellee FIRE INSURANCE EXCHANGE ("FIE") did not provide coverage for Soto's injuries and damages.

## II.

## STANDARD OF REVIEW

Final judgment in this case was entered via summary judgment. Appellate review of summary judgment is undertaken using the de novo standard. ISG, LLC v. Arkansas Valley Ditch Association, 120 P.3d 724, 730 (Colo. 2005). In addition, this case involves the interpretation of an insurance policy. The interpretation of a contract is also a question of law, subject to de novo review, such that an appellate court need not defer to the interpretation given by the trial court. Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 374 (Colo. 1990). The issues on appeal were raised in the parties' respective summary judgment pleadings.

## III.

## STATEMENT OF THE CASE

### A. Nature of the Case

This appeal arises from an action for declaratory relief wherein FIE sought a determination that there was no coverage for Soto's injuries and damages under a certain homeowner's insurance policy issued to James Kelley ("Kelley").

### B. Course of the Proceedings

The parties filed cross-motions for summary judgment. An undisputed set of facts was provided to the trial court in two (2) affidavits executed by Soto. On April 21, 2009, the trial court denied Soto's Motion for Summary Judgment and granted FIE's Cross-Motion for Summary Judgment, thereby disposing of all issues in the action. ***Order, CD page 123-24.*** It is this order from which the instant appeal is taken.

### C. Statement of Facts

The following are the undisputed facts:

1. On June 17, 2005, Soto offered to help Kelley and his daughter Megan Murphy ("Murphy") load dirt taken from Murphy's property, 7853 South Independence Way, Littleton, Colorado and transport it to Kelley's property located at 10205 W. Montgomery Avenue, Littleton, Colorado. ***Affidavit of Pedro Soto, CD page 29.***

2. The dirt was loaded onto a utility trailer (the "Trailer") owned by Kelley.[1] ***Affidavit of Pedro Soto, CD page 29.***

3. The Trailer itself was not motorized. In order for the dirt to be transported to the Kelley property, the Trailer was attached to a pick up truck (the "Truck") owned and driven by Murphy. ***Affidavit of Pedro Soto, CD page 29.***

4. Upon arrival, Murphy parked the Truck and Trailer near a barn on Kelley's property. The engine to the Truck was turned off and Murphy exited the vehicle. ***Affidavit of Pedro Soto, CD page 30.***

5. Soto and Kelley began manually removing the dirt from the Trailer using shovels. ***Affidavit of Pedro Soto, CD page 30.***

6. Eventually, Kelley suggested that an easier method of removal would be to detach the Trailer from the Truck and dump the dirt by having it spill from the rear of the Trailer. ***Affidavit of Pedro Soto, CD page 30.***

7. Kelley and Soto positioned themselves on either side of the tongue of the Trailer, which was the front part of the Trailer that was attached to the Truck's towing hitch. Their plan was to lift the tongue of the Trailer vertically off the ball of the Truck's tow hitch such that the rear of the Trailer would touch the ground, thereby causing the remaining dirt to fall out the back of the Trailer. ***Affidavit of Pedro Soto, CD page 30.***

[1]Photographs of the Trailer were attached to the Affidavit of Pedro Soto. ***Affidavit of Pedro Soto, Exhibit A, CD page 31-34.***

8. After the Trailer had been completely unhitched from the Truck, it swiveled laterally knocking Soto to the ground. ***Affidavit of Pedro Soto, CD page 30.***

9. The tongue of the Trailer landed on the ground, pinning Soto's right leg underneath it - causing serious vascular and orthopedic injuries. ***Affidavit of Pedro Soto, CD page 30.***

10. There were numerous reasons why the trailer fell on Soto's leg, including:

a. Kelley's failure to block the tires of the Trailer before suggesting that it be tipped backwards;

b. Kelley's failure to appreciate the weight of the dirt still remaining in the Trailer;

c. Kelley's failure to distribute the dirt toward the rear of the Trailer to facilitate the dumping process;

d. Kelley's failure to maintain an adequate grip on the Trailer allowing it to swivel sideways toward Soto after unhitching; and

e. Kelley's failure to have the Trailer equipped with a jack to be used during the unhitching process. ***Supplemental Affidavit of Pedro Soto, CD page 98.***

11. Before and after the incident, Soto owned a trailer which he used to tow an off road vehicle. He towed the off road vehicle to numerous locations in and out of Colorado for purposes of four-wheeling. During these trips, Soto often met up with other four wheel drive enthusiasts. ***Supplemental Affidavit of Pedro Soto, CD page 97.***

12. Soto detached his trailer from his towing vehicle dozens of times. He has also helped other do the same on a similar amount of occasions. This activity was referred to, *inter alia*, as "unhitching," "detaching," "uncoupling," and "disconnecting." He never used, nor has he ever heard anyone else use, the term "unload" to describe the separating of a trailer from the vehicle towing it. ***Supplemental Affidavit of Pedro Soto, CD page 97.***

13. On the date of the incident, Kelley was insured by a Protector Plus Homeowners Package Policy (the "Policy") issued by FIE. ***Affidavit of Pedro Soto, CD page 30 and Exhibit B, CD page 35-73.***

14. The Policy contained the following salient provisions:

**Definitions:**

Motor vehicle – means:

a. a motorized land vehicle, including a trailer, semi-trailer, or motorized bicycle, designed or travel on public roads.
b. any vehicle while being towed or carried on a vehicle described in 11a.
c. any other motorized land vehicle designed for recreational use off public roads.

None of the following is a motor vehicle.

a. a motorized golf cart while on the gold course and used for golfing purposes.
b. a motorized land vehicle, not subject to motor vehicle registration, used on an insured location.
c. any watercraft or camp, home or utility trailer not being towed or carried on a vehicle described in 11a.

***Affidavit of Pedro Soto, Exhibit B, CD page 41-42.***

**Liability Insuring Clause:**

> We will pay those damages which an insured become legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies.

***Affidavit of Pedro Soto, Exhibit B, CD page 51.***

**Motor Vehicle Exclusion:**

We do not cover bodily injury, property damage or personal injury which:

7. results from the ownership maintenance, use, loading or unloading of:
   a. aircraft
   b. motor vehicles

***Affidavit of Pedro Soto, Exhibit B, CD page 53.***

## IV.

## SUMMARY OF ARGUMENT

THE TRIAL COURT ERRED BY FINDING THAT THE MOTOR VEHICLE EXCLUSION PRECLUDED COVERAGE FOR SOTO'S INJURIES AND DAMAGES

A. The Trailer Was Not A Motor Vehicle Because It Was Not Being Towed At The Time Soto Sustained Injury

B. Disconnecting The Trailer From The Truck Did Not Constitute Unloading

C. There Was No Causal Link Between Soto's Injuries And The Use Of The Truck

D. Concurrent Causes Existed Which Arose From Non-Automobile Related Conduct

## V.

## ARGUMENT

### THE TRIAL COURT ERRED BY FINDING THAT THE MOTOR VEHICLE EXCLUSION PRECLUDED COVERAGE FOR SOTO'S INJURIES AND DAMAGES

In its ruling, the trial court found that the detaching the Trailer from the Truck constituted unloading. Specifically the trial court determined that the Truck was a motor vehicle and the act of unhitching the Trailer fell within the motor vehicle exclusion. Implicit in the trial court's ruling is a finding that the Trailer was not a motor vehicle. Soto agrees with that portion of the trial court's ruling. However, as FIE is likely to reargue this finding and because the status of the Trailer not being a motor vehicle is important to other arguments herein, Soto addresses it first.

## A. The Trailer Was Not A Motor Vehicle Because It Was Not Being Towed At The Time Soto Sustained Injury

The standards for interpretation of insurance contracts are well established. Insurance policies purporting to grant broad coverage are to be interpreted so as to further the principle of coverage. Farmers Alliance Mutual Insurance Co. v. Reeves, 775 P.2d 84, 85 (Colo.App. 1989). Any limitations on coverage must be expressed clearly and specifically. Surdyka v. DeWitt, 784 P.2d 819, 820 (Colo.App. 1989). The insurer has the burden of proving the applicability of an exclusion to coverage. Id. Importantly, exclusionary clauses are to be interpreted against a defeat of coverage. State Automobile and Casualty Underwriters v. Beeson, 516 P.2d 623, 626 (Colo. 1973).

In addition, when interpreting the provisions of the Policy, the meaning is not determined by reference to what experts in the construction of insurance contracts or persons with a clear understanding of the legal effects of specific language might understand by reading a policy. Simon v. Shelter General Insurance Co., 842 P.2d 236, 240 (Colo. 1992). Rather, the construction of an insurance contract must be ascertained by reference to what meaning a person of ordinary intelligence would attach to it. Id. Words should be given their plain meaning according to common usage and strained interpretations should be avoided. Compton v. State Farm Mutual Automobile Insurance Co., 870 P.2d 545, 547 (Colo. App. 1993).

The Policy provides broad liability coverage to Kelley. Unquestionably, the initial grant of coverage would encompass Soto's claims against Kelley. Absent an applicable exclusion, coverage for Soto's injuries would exist. FIE has not disputed this assertion.

In the Policy, FIE defined what is not a motor vehicle, namely "any watercraft or camp, home or utility trailer not being towed." ***Affidavit of Pedro Soto, Exhibit B, CD page 41-42.*** At the time of Soto's injury the Trailer was not being towed. Kelley and Soto had completely unhitched the Trailer from the Truck prior to it falling on Soto's leg. There is no factual dispute that the Trailer was fully detached from the Truck at the time of Soto's injury. In particular, it was the tongue of the Trailer hitting the ground which pinned Soto's right leg underneath the Trailer. ***Affidavit of Pedro Soto, CD page 30.***

Prior to that time, the Trailer had been towed by the Truck. However, at the time of injury, clearly, the Trailer was not being towed. The towing operation was fully completed once Murphy parked the Truck at the desired location on the Kelley property. She turned off the engine of the Truck and exited the vehicle. At that point, unloading of the contents of the Trailer commenced. The Trailer was no longer being towed - it was being unloaded.

Unlike the phrase "loading or unloading" which is analyzed under the completed operations doctrine, the phrase "not being towed" is interpreted under

standard rules of contract interpretation. There is no case law which suggests that this phrase encompasses the entire towing process. In fact, case law supports Soto's contention that the phrase "being towed" connotes action.

For example, in Maryland Casualty Co. v. Aguayo, 29 F.Supp. 561 (S.D. Cal. 1939), a coverage dispute arose involving a concrete mixer that had been towed to a job site. While the trailer was still attached to the truck that had towed it and prior to unhitching, Aguayo sustained injuries when the end gate of the truck fell injuring his hand. The operative insurance policy language excluded liability "while the automobile is used for towing of any trailer." Id. at 564. The Court noted:

> The concrete mixer had been delivered and was no longer being towed at the time of the injury involved. The word "towing" signifies movement. As defined in Webster's New International Dictionary: "to tow" means "to pull", "to drag", "to draw", "to pull about", "to drag or take along with one". It is clear from the stipulated facts that at the time of the accident no towing was taking place, within the meaning of the policy.

Id. (emphasis added).

Similarly, in the present case, once the Truck was parked and turned off, the Trailer was no longer being towed. Moreover, unlike the trailer in Aguayo, which was still attached to its towing vehicle at the time of the occurrence, the Trailer in the present case was not attached to the Truck at the time of Soto's injuries. This additional fact, further supports the conclusion that the Trailer was not being

towed. At a very minimum, a necessary pre-requisite to the Trailer "being towed" has to be its attachment to the Truck.

In addition, the Court found that the insurance company could have easily written the exclusion to encompass the entire towing process: "[t]his policy does not apply while the automobile is used for the towing of any trailer, semitrailer, special mobile equipment, or other vehicle equipment, or while the automobile is in any way attached thereto or connected therewith." Id.

Similarly, in the present case, had FIE wanted the Trailer to be defined as a motor vehicle not only when "being towed," but through any part of the towing process, it simply could have so written. Having failed to do so, FIE cannot now rewrite the Policy to broaden the scope of this Policy definition.

Lastly, at a minimum, Soto has advanced a reasonable interpretation of the phrase "not being towed." Once established, the term must be considered ambiguous and gets interpreted in Soto's favor. An insurance policy is ambiguous if it is susceptible on its face to more than one reasonable interpretation. Cary v. United of Omaha Life Ins. Co., 108 P.3d 288, 290 (Colo. 2005). Any ambiguity in an insurance policy is construed in favor of providing coverage to the insured. Id. Accordingly for purposes of interpreting the remainder of the Policy, the Trailer cannot be considered to be a motor vehicle.

## B. Disconnecting The Trailer From The Truck Did Not Constitute Unloading

In its ruling, the trial court found that "[u]nhitching and disconnecting a trailer from a truck constitutes unloading the truck." ***Order, CD page 124.*** This finding is contrary to the record and a plain reading of the Policy.

Although the completed operations test has been applied to the term "loading or unloading," it has always been applied to articles or goods:

> "[U]nloading" compromises only the actual removing or lifting of the article from the loaded vehicle to the moment when it again comes to rest. The "complete operation" doctrine embraces the entire process involved in the movement of goods from the time they are given to the insured's possession until the insured has completed delivery thereof.

Titan Construction Co. v. Nolf, 515 P.2d 1123, 1125 (Colo. 1973) (emphasis added). This is consistent with the common understanding of the phrase "loading or unloading," namely, the placement of items into a motor vehicle or removal thereof. Black's Law Dictionary, 1378 (5th ed. 1979) ("'loading or unloading" within homeowner's policy excluding personal liability coverage with respect to 'loading or unloading' of automobiles has primary reference to objects being transported from one place for delivery to some at least temporary final destination").

In the present case, the record is clear that the "goods" being unloaded was the dirt as it was removed from the Trailer. The purpose of the parties' outing was

to transport dirt from Murphy's house to Kelley's house. The Trailer merely facilitated the movement of the goods. The term "loading or unloading" as applied in Colorado case law cannot reasonably be interpreted to include the unhitching of the Trailer.

In addition, there is no support in the record that the process of unhitching the Trailer from the Truck is synonymous with unloading. The uncontroverted record reveals that the term "unloading" is never used to describe the detachment of a trailer from the vehicle towing it. ***Supplemental Affidavit of Pedro Soto, CD page 97.*** To find otherwise is inconsistent with the rules of insurance policy interpretation, namely, that words should be given their plain meaning according to common usage and strained interpretations should be avoided. Compton, supra.

Lastly, at a minimum the term "loading or unloading" as it pertains to this case is ambiguous. Once again, Soto's interpretation of the term "loading or unloading" is a reasonable one, and importantly, is uncontroverted in the record. Under such circumstances, it must be interpreted against FIE and in favor of coverage.

### C. There Was No Causal Link Between Soto's Injuries And The Use Of The Truck

Assuming that detaching the Trailer from the Truck is considered unloading, the motor vehicle exclusion only applies if there is a causal link between Soto's injuries and the use of the Truck. In the present case the record is completely devoid

of this important evidence. Moreover, FIE completely disregarded Soto's causation argument in its summary judgment pleadings. ***Plaintiff's Reply Brief In Support of Cross-Motion For Summary Judgment, CD page 120.*** Likewise, the trial court failed to address this important issue in its ruling. ***Order, CD page 123-124.***

Any analysis involving insurance coverage and the use of an automobile must begin with State Farm Mutual Automobile Insurance Co. v. Kastner, 77 P.3d 1256 (Colo. 2003). There, the Colorado Supreme Court went through an exhaustive analysis of prior case law and clearly announced the framework for resolving insurance disputes involving motor vehicles:

> [T]he claimant must first show that except for the use of the vehicle, the accident or incident would never have taken place. Since Titan Insurance Co., this requirement has been explicit and continually treated on an ad hoc basis. [citation omitted].
>
> In addition, to complete and satisfy the casual analysis, the claimant must show that the "use" of the vehicle and the injury are directly related or inextricably linked so that no independent significant act or non-use of the vehicle interrupted the "but for" causal chain between the covered use of the vehicle and the injury.

Id. at 1264. Although the Court interpreted the terms "arising out of the use" and "use" there is no reason to believe that the analytic framework established would not apply to an unloading case.[2] Similarly, the Court expressly stated that its analytical

[2]For example, in Titan Insurance Co., supra a loading and unloading case, the Court required a causal link between the motor vehicle and the injury, "[w]e do not hold that the 'but for' doctrine should apply when there is a lack of relationship between the truck and the accident." Id. at 1126.

framework applies to PIP, Uninsured Motorist and Liability insurance policies. Id. at 1271, fn.4.

Soto concedes that in a strict "but for" analysis, there never would have been an opportunity for the Trailer to fall on his leg and cause injury absent the use of the Truck. However, FIE failed to establish the second prong of the Kastner test, namely that the use of the Truck and Soto's injuries are directly related or inextricably linked.

In the present case, the undisputed facts show that the Truck merely transported the Trailer, the instrumentality of harm, from one location to the other. The record is devoid of any causal link between the Truck and Soto's injuries. There are no allegations that there was anything wrong with the hitch on the Truck or that the Truck suddenly moved causing the Trailer to fall. At the time of the occurrence, the Truck had been parked for some time with the engine turned off and no one left inside. No part of the Truck touched Soto's body, nor did any portion of the Truck contribute to the injury.

Conversely, the record undeniably demonstrates that numerous acts and omissions by Kelley, solely related to the Trailer, were the cause of Soto's injuries:

1. Kelley's failure to block the tires of the Trailer before suggesting that it be tipped backwards;

2. Kelley's failure to appreciate the weight of the dirt still remaining in the Trailer;

3. Kelley's failure to distribute the dirt toward the rear of the Trailer to facilitate the dumping process;

4. Kelley's failure to maintain an adequate grip on the Trailer allowing it to swivel sideways toward Soto after unhitching; and

5. Kelley's failure to have the Trailer equipped with a jack to be used during the unhitching process.

***Supplemental Affidavit of Pedro Soto, CD page 98.*** Under these facts and this record, the use of the Truck cannot legitimately been deemed to be "directly related" or "inextricably linked" with Soto's injuries.

Colorado case law supports this conclusion. In Kastner, the Court found no coverage under PIP and UM policy provisions where a sexual assault took place in a motor vehicle. The relationship between the vehicle and the injury in Kastner was certainly more substantial than the present case. In particular, the assailant in Kastner (1) drove the vehicle to a remote location before committing the sexual assault; (2) reclined the seats in order to prevent the victim from signaling for help; and (3) used the automatic seat belts as restraints when committing the crime. Here, the only involvement by the Truck was that its trailer hitch served as a resting place for the tongue of the Trailer.

Importantly, the Court noted "use of a car to get to an isolated area to commit a crime may relate to a vehicle's general transportation purpose, but here it was not concurrent with the injury itself." Id. at 1265. Similarly, in the present case, the use

of the Truck's transportation purpose ended when it was parked and the engine turned off. Soto's injury occurred much later, after removing the dirt by shovels proved too time consuming. Concurrence between the use of the Truck and Soto's injury is absent.

Other Colorado cases are also instructive on when a motor vehicle is inextricably linked to the injury causing event: Mason v. Celina Mutual Insurance Co., 423 P.2d 24 (Colo. 1967) (no causal link found where "the vehicle was parked at the time, the engine was not in operation and no part of Donald's body struck the vehicle to occasion the discharge of the firearm"); Azar v. Employers Casualty Co., 495 P.2d 554, 555 (Colo. 1972) (no causal link found as "no contention was made that the vehicle in any way contributed to or was connected with the accidental discharge of the firearm. The only relationship of the vehicle to the accident was the presence of the tort-feasor and the injured person in the automobile at the time of the infliction of the injuries"); Beeson, supra (no causal link found where keys thrown from three story building into window of motor vehicle causing loss of an eye); Sanchez v. State Farm Mutual Automobile Insurance Co., 878 P.2d 31, 33 (Colo.App. 1994) (no causal link found where police officer bit by driver's dog after pulling motor vehicle over and arresting the driver - "the mere transportation of the dog to the scene of the injury is, by itself, insufficient to support a finding that the injury arose from the use of the automobile").

In all these cases, the key common fact is that the "injury could have occurred in any location and had no connection to the use of the vehicle." Aetna Casualty & Surety Co. v. McMichael, 906 P.2d 92, 104 (Colo. 1995). Similarly, in the present case, Soto's injuries could just as easily have occurred had he and Kelley lifted the Trailer off of its perch on a block of wood. ***Affidavit of Pedro Soto, Exhibit A, CD page 31-34 (Pictures)***. All five (5) causes of the incident referenced above related solely to the Trailer. Just as in all the cited cases in this section, the presence of the Truck was merely coincidental and not contributory to Soto's injuries.

**D. Concurrent Causes Existed Which Arose From Non-Automobile Related Conduct**

Even if unhitching the Trailer from the Truck is deemed to be an unloading and there is a finding that use of the Truck and Soto's injuries are inextricably linked or this Court believes that the Kastner analysis does not apply to an unloading case, coverage must still be found due to the existence of non-automobile related conduct:

> Where multiple causes of injury are alleged, a claim is barred by the automobile exclusion unless it arises from non-automobile related conduct and is independent of any ownership, operation, or use of an automobile.

Northern Ins. Co. of New York v. Ekstrom, 784 P.2d 320, 323 (Colo. 1989). In other words:

> Where the coverage of a risk is reasonably contemplated by the parties and such risk is independent of the 'ownership, maintenance, operation, use, loading or unloading" of a motor vehicle within the meaning of an exclusion clause of a homeowner's policy, the risk will be covered under the policy even if the injury also arises out of the ownership, maintenance, etc. of the vehicle; however, the liability must also arise from nonvehicular conduct and must exist independently of the use or ownership of a vehicle.

Id. at 324.

To begin, it is clear that the Policy reasonably contemplated covering the risk that the Trailer could cause injury to a third party. Any injury caused by the Trailer, except those incurred while the Trailer was "being towed," is clearly a covered risk. In the same vein, that risk is independent of the ownership, maintenance, operation, use, loading or unloading of a motor vehicle, as the Trailer could cause injury in countless ways, none of which would involve a motor vehicle. As FIE insured this risk and accepted premiums therefor, it must now honor its promise of coverage.

Once again, the record is completely devoid of any automobile related conduct. On the contrary, the record and undisputed facts only show conduct wholly related toward the Trailer. ***Supplemental Affidavit of Pedro Soto, CD page 98.*** Anyone of Kelley's five (5) acts or omissions, standing alone, would suffice to establish nonvehicular conduct and warrant reversal of the trial court's ruling.

Although this doctrine is now twenty (20) years old, there is a dearth of Colorado cases addressing it. However, treatment by other jurisdictions of the doctrine of concurrent causation is instructive:

1. American Modern Home Insurance Co. v. Rocha, 729 P.2d 949 (Ariz.App. 1986) (motor vehicle exclusion inapplicable where negligently constructed tripod collapsed causing injury as it was being pulled into a vertical position by rope attached to motor vehicle);

2. Lawver v. Bowling, 238 N.W.2d 514 (Wisc. 1976) (motor vehicle exclusion inapplicable where rope broke causing injury as a lift chair was being hoisted due to non-automobile related negligence of choosing defective rope combining with the negligent operation of a motor vehicle);

3. State Farm Mutual Automobile Insurance Co. v. Partridge, 514 P.2d 123 (Cal. 1973) (motor vehicle exclusion found inapplicable where handgun accidentally discharged causing injury due to non-automobile related negligence of modifying handgun to give it hair trigger action combining with the negligent operation of a motor vehicle);

4. Kalell v. Mutual Fire and Automobile Insurance Co., 471 N.W.2d 865 (Iowa, 1991) (motor vehicle exclusion inapplicable where non-automobile related negligence in removal of dead tree limb caused injury by striking victim when it was pulled by rope attached to motor vehicle);

5. Waseca Mutual Insurance Co. v. Noska, 331 N.W.2d 917 (Minn. 1983) (motor vehicle exclusion inapplicable where non-automobile related negligence of placing live embers in uncovered barrel combined with negligent motor vehicle operation causing injury);

6. Allstate Insurance Co. v. Watts, 811 S.W.2d 883 (Tenn. 1991) (motor vehicle exclusion inapplicable where non-automobile related negligence of dropping and kicking pan of burning liquid combined with negligent maintenance of motor vehicle causing injury).

Finally, the Court in Barge v. Jaber, 831 F.Supp. 593 (S.D. Ohio 1993), after an extensive analysis of numerous concurrent causation cases, arrived at the following conclusion:

> Where the "auto exception" applied and coverage was precluded, the use of the vehicle was a central and indispensible element, inextricably intertwined with the cause of the injuries. In the other cases which, despite the plain language of the policy, held that "auto exception" inapplicable, the negligent act which caused the injuries was a wholly separate and independent act which could have occurred regardless of the use of the vehicle.

Id. at 600. The Court further distilled the test to "remove the vehicle and remove the hazard." Id. at 600-01. Removing the Truck from the facts of this case would not have removed the risk. Soto's injuries could just as easily have happened if the Trailer was sitting on a block of wood prior to Kelley and Soto lifting the Trailer.

## VI.

## CONCLUSION

Injury caused by the Trailer when it was not being towed was a risk contemplated by the Policy. FIE received and accepted premiums for that risk. At the time of Soto's injuries, the Trailer was not being towed; hence the motor vehicle exclusion was inapplicable. Furthermore, the plain meaning of the term "unloading" does not encompass the actions of unhitching the Trailer from the Truck. Even if it did, the record is devoid of the required nexus between the Truck and Soto's injuries. Lastly, coverage must be found due to concurrent causes arising from non-automobile related conduct.

Based upon the foregoing, Soto respectfully requests that the Order granting FIE's Cross-Motion for Summary Judgment be reversed and this case remanded with instructions that the trial court grant Soto's Motion for Summary Judgment.

Dated: October 16, 2009.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 16, 2009, a true and correct copy of the within and foregoing **APPELLANT'S OPENING BRIEF** was served upon:

| | |
|---|---|
| John P. Craver, Esq. | ( ) by First-Class U.S. Mail |
| WHITE & STEELE, PC | (X) by CourtLink |
| 600 17th Street, Suite 600N | ( ) by Facsimile |
| Denver, CO 80202 | ( ) by Overnight Mail |

/s Edward W. Holub