

<p>COLORADO COURT OF APPEALS 2 East 14th Street Denver, Colorado 80203</p>	
<p>Appeal From: Denver County District Court Judge Anne M. Mansfield Case Number: 08 CV 7007</p>	
<p>Plaintiff-Appellee: FIRE INSURANCE EXCHANGE</p> <p>v.</p> <p>Defendant-Appellant: PEDRO SOTO</p>	
<p>Attorneys for Plaintiff-Appellee Fire Insurance Exchange: John P. Craver, #11242 John M. Lebsack, #9550 Lucas Lorenz, #35739 WHITE AND STEELE, P.C. 600 17th Street, Suite 600N Denver, CO 80202-5406 303-296-2828 Fax: 303-296-3131 jlebsack@wsteele.com; llorenz@wsteele.com</p>	<p>▲ COURT USE ONLY ▲</p> <p><u>09 CA 1152</u></p>
<p style="text-align: center;">ANSWER BRIEF</p>	

CERTIFICATE OF COMPLIANCE

Pursuant to C.A.R. 32(f), 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:

The brief complies with C.A.R. 28(g).

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For the party raising the issue:

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For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/John M. Lebsack

Signature of Attorney

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I. STATEMENT OF ISSUES

1. When a person is injured while unhitching a trailer from a truck, and the truck meets the definition of “motor vehicle” in the insurance policy, does the exclusion for injuries resulting from “use” or “unloading” of motor vehicles apply?
2. When a person is injured while unhitching a trailer from a truck to empty the cargo, is the injury caused by “use” or “unloading” of the truck?
3. When a person is injured in the act of unhitching a trailer to empty the cargo, is the trailer still in the process of “being towed”?

II. STATEMENT OF THE CASE

A. Nature of the Case

This is a declaratory judgment action to determine coverage under a homeowner’s insurance policy issued by Plaintiff-Appellee Fire Insurance Exchange (“F.I.E.”) to James P. Kelley and Carolyn S. Kelley (the “Kelleys”). At issue is a claim arising from injuries sustained by Defendant-Appellant Pedro Soto (“Soto”). Soto was injured while disconnecting a trailer from a truck parked on the Kelleys’ property. Soto asserted claims for damages against the Kelleys. F.I.E. contends that an exclusion in the homeowner’s policy for “use, loading and unloading” of motor vehicles precludes coverage for Soto’s claim.

B. Course of Proceedings

F.I.E. filed a complaint for declaratory relief naming Soto as the sole defendant. (CD page 4.) F.I.E. later filed an amended complaint. (CD page 18.)

Soto moved for summary judgment. (CD page 24.) F.I.E. opposed Soto's motion and filed a cross-motion for summary judgment. (CD page 78.) The trial court resolved the coverage question in favor of F.I.E., granting F.I.E.'s motion for summary judgment and denying Soto's. (CD page 123.) A copy of the summary judgment order is attached as [Appendix A](#).

The basis for the trial court's decision was the conclusion that "unhitching and disconnecting a trailer from a truck constitutes unloading the truck." (CD page 124.) The trial court applied the phrase "loading or unloading" to the *truck* as a "motor vehicle" under the policy definition. Because the truck "clearly falls within the policy's definition of a motor vehicle, the motor vehicle exclusion is triggered in this case and [Soto's] accident is not covered by [F.I.E.'s] insurance policy." (CD page 124.)

C. Statement of Facts

Policy Language. The opening brief accurately quotes the pertinent sections of the policy (specifically, paragraphs 13 and 14 on pages 5 and 6 of the opening brief). The complete policy is in the record starting at [CD page 38](#). The

definition of “motor vehicle” is item 11 at the bottom of [CD page 41](#). The motor vehicle exclusion is item 7 at the bottom of [CD page 53](#).

Facts of the Accident. The opening brief accurately quotes the affidavit of Mr. Soto, which contains the material facts with respect to the circumstances of the accident. For purposes of the appeal, F.I.E. accepts paragraphs 1 through 9 on pages 2, 3, and 4 of the opening brief.

F.I.E. does *not* accept paragraphs 10 through 12 on pages 4 and 5 of the opening brief, because those statements are immaterial to the legal issues involved in this appeal. Those paragraphs discuss Soto’s theories about why the accident happened and his own personal interpretation of several terms, including “unload.” As F.I.E. will argue below, interpretation of policy language is a matter for the court to decide.

Underlying Lawsuit. In 2007, Soto filed suit against Mr. Kelley and the owner of the truck to recover damages for the injuries he suffered. Soto settled those claims in exchange for payments from insurance sources other than F.I.E. ([CD page 100-03.](#)) In addition, under the settlement agreement Soto stands to collect another \$200,000 under the F.I.E. homeowner’s policy if Soto is successful in this declaratory judgment action. ([CD page 100-03.](#))

III. SUMMARY OF THE ARGUMENT

The trial court properly granted summary judgment in favor of F.I.E. because the motor vehicle exclusion unambiguously precludes coverage. That exclusion states there is no coverage for bodily injuries from “ownership, maintenance, use, loading or unloading of...motor vehicles...” (CD page 53.)

It is undisputed the truck qualifies as a “motor vehicle” under the policy definition (“a motorized land vehicle...designed for travel on public roads”). This truck was designed to haul cargo by means of a hitch for pulling a trailer. Soto’s injuries occurred while he was unhitching the trailer from the truck. Because that act was within the purpose of the truck, the act was “use” or “unloading” of a “motor vehicle.” The policy thus excludes coverage.

Soto’s injuries would not have happened “but for” the act of unhitching the trailer. The truck was used to move dirt in a trailer, and Soto was hurt while unhitching the trailer to spill out the dirt. This accident happened in the course of the use and unloading of the truck. That operation caused Soto’s injuries. Hence the exclusion applies.

An independent basis for applying the exclusion is because the *trailer* also fits the policy’s definition of “motor vehicle” (“any vehicle while being towed or carried...”). That the trailer was not in motion or physically connected to the truck

at the moment of Soto's accident does not put it outside the definition of "motor vehicle." Colorado cases hold that a vehicle can still be "in use" even if it is not moving. Cases from other states hold that a trailer is still "being towed" when the trailer hits someone after the trailer physically separates from the towing vehicle. Soto's injuries thus resulted from the "use" and "unloading" of the trailer, and thus the motor vehicle exclusion applies.

IV. LEGAL ARGUMENT

Standard of Review. Summary judgment is reviewed de novo. Aspen Wilderness Workshop v. Colorado Water Conservancy Bd., 901 P.2d 1251 (Colo. 1995). The interpretation of an insurance policy is a question of law to be determined by the court in accordance with the traditional principles of contract interpretation. Union Ins. Co. v. Houtz, 883 P.2d 1057, 1061 (Colo. 1994). A court's construction of an insurance policy's provisions must be "fair, natural and reasonable, rather than strained or strictly technical." Public Serv. Co. of Colo. v. Wallis, 986 P.2d 924, 939 (Colo. 1999). A term is not ambiguous simply because the parties disagree as to its interpretation. Union Ins. Co., 883 P.2d at 1061. An unambiguous policy must be enforced as written. Id.

A. The trial court correctly held that the motor vehicle exclusion applies because the truck was being used to move dirt, and unhitching the trailer to spill out the dirt was "use" or "unloading" of the truck.

If Soto was injured while engaged in the “use” or “unloading” of the truck, the F.I.E. policy excludes coverage for his claim against Kelley. There is no question of fact that Soto and Kelley were unhitching the trailer from the truck when they lost control of the trailer, resulting in Soto’s injuries. While moving the dirt to Kelley’s property, the dirt was in a trailer towed behind the truck. After the truck had towed the trailer to the Kelley’s property, the trailer was to be lifted off the truck’s hitch in order to complete the process of emptying the cargo from the trailer. Soto was hurt while lifting the tongue of the trailer off the truck hitch. This operation falls within the natural and reasonable meaning of the term “unloading.” Because this truck was designed to haul cargo by pulling a trailer, the act of disconnecting the trailer is part of “unloading” the truck.

Disconnecting the trailer was part of the “complete operation” of hauling dirt from one location to another. The term “unloading” has historically been subject to two different interpretations by courts: the “coming to rest” doctrine and the “complete operation” doctrine. [Titan Constr. Co. v. Nolf](#), 183 Colo. 188, 515 P.2d 1123, 1125 (1973). Titan expressly adopted the “complete operation” doctrine. “The ‘complete operation’ doctrine embraces the entire process involved in the movement of goods from the time they are given into the insured’s possession until the insured has completed delivery thereof.” [Id.](#) The court rejected the narrower

“coming to rest doctrine,” which interprets “unloading” as “only the actual removing or lifting of the article from the loaded vehicle to the moment when it again comes to rest.” [Id.](#) Here it is undisputed that Soto’s injuries occurred while unhitching the trailer from the truck. The accident occurred before the completion of the process of unloading the cargo.

In [Trujillo v. Farmers Insurance Exchange](#), 862 P.2d 962 (Colo. App. 1993), the plaintiff was lifting a camper shell to secure it to a pick-up truck. While in the process of lifting the camper it fell to one side, injuring Trujillo. The panel held that because the camper was being loaded onto the truck, the injuries arose out of the use of the vehicle. The panel described attaching or detaching the camper shell as loading or unloading of the truck: “[a] camper shell is rarely lifted for any other purpose but to *load or unload it to a pick-up truck*; indeed, once loaded, it becomes a part of the pick-up truck itself.” [Id.](#) at 965 (emphasis added). Applying this rationale to this instant case, the act of detaching the trailer was “unloading” the truck.

Even if unhitching the trailer from the truck is not considered “unloading” the truck, it is unquestionably “use” of the truck, thus providing another basis for applying the motor vehicle exclusion. It is undisputed the truck falls within the policy definition of motor vehicle (“a motorized land vehicle...designed for travel

on public roads”). (CD page 41). The truck was used to tow a trailer in order to move dirt to the Kelleys’ property. Unhitching the trailer from the truck was a part of that use.

Colorado courts have interpreted “use” of a vehicle broadly. See e.g., [Kohl v. Union Ins. Co.](#), 731 P.2d 134 (Colo. 1986) (accidental discharge of rifle while in a parked vehicle arose out of use of the vehicle); [Trinity Universal Ins. Co. v. Hall](#), 690 P.2d 227 (Colo. 1984) (truck was being used where refreshment stand awning incorporated into truck fell and injured patron); [Aetna Ins. Co. v. McMichael](#), 906 P.2d 92 (Colo. 1995) (employee of construction company was using vehicle when he parked it to act as a barricade).

[Titan](#) illustrates the broad definition of “use” when applied to motor vehicles. The driver of a concrete truck was injured by a falling brick dislodged by hoses attached to the truck. The driver had parked the truck and was waiting for it to be refilled. The [Titan](#) court held that the injury arose out of the use of the truck. The case before this Court is analogous to [Titan](#). Here the truck was stopped and the operation of unloading dirt was in process when the accident happened. It was not the truck itself that injured Soto, just as in [Titan](#) it was a brick rather than the truck itself that injured the driver. But the injury happened as a result of use of the motor vehicle.

Colorado is not alone in broadly interpreting “use” in the context of the motor vehicle exclusion. In [Nationwide Mutual Insurance Co. v. Integon Indemnity Corp.](#), 473 S.E.2d 23 (N.C. Ct. App. 1996), the insured was using a pickup truck to tow a trailer. The trailer detached from the truck and crossed the centerline of the road, colliding with a car and killing its driver. The court held that a homeowner’s policy exclusion for use of motor vehicles applied to the accident and thus there was no coverage. “[T]he exclusion still applies because the accident...arose out of, and could not have occurred without, the ‘use’ of the truck.” [Id. at 25.](#)

Soto’s argument that the term “loading or unloading” has “always been applied to articles or goods” is without merit. (Opening Brief at 12.) As the trial court correctly held, “when read in the context of the entire provision, which discusses the ‘ownership, maintenance, [and] use’ of motor vehicles, the phrase ‘loading or unloading,’ appropriately grouped with these other actions, best applies to the truck as the motor vehicle.” ([CD page 124.](#)) The policy language focuses on the act of loading or unloading *the motor vehicle*, without regard to what is being loaded or unloaded to or from the vehicle.

Colorado law does not support the narrow reading argued by Soto. As discussed, [Trujillo](#) said it was “loading” to lift a camper shell in order to secure it

to a truck. In [Colorado Farm Bureau Mutual Insurance Co. v. West American Insurance Co.](#), 540 P.2d 1112 (Colo. App. 1975), the court used the term “loading” with regard to a person: “the victim was waiting to ‘load’ or enter [the vehicle].” [Id.](#) at 1114. Thus not only is Soto’s interpretation of the phrase “loading or unloading” contrary to the plain language of the policy, his limitation to “articles or goods” is contrary to case law interpreting and applying the phrase.

B. The “use” and “unloading” of the truck were the cause of Soto’s injuries because *but for* such “use” and “unloading” the accident would not have happened.

Soto’s injuries would not have occurred but for his attempt to unhitch the trailer from the truck. Colorado follows the “but for” analysis to determine causation for purposes of the motor vehicle exclusion. In [Colorado Farm Bureau](#), 540 P.2d 1112, the insured accidentally shot another person in his hunting party. The insured had been driving a vehicle on a hunting trip. The group decided to load the vehicle with their equipment and to move to another location. A member of the group asked the insured to borrow binoculars. The insured opened the door of the vehicle and laid his rifle on the front seat with the barrel facing the passenger’s door. When he lifted the rifle, it discharged and struck another hunter. The issue in the case was whether the driver’s homeowner’s policy provided coverage for the injured party’s damages claimed against the insured.

Colorado Farm Bureau held there was no coverage under a homeowner's policy because of the "loading and unloading" provision in the motor vehicle exclusion. The court noted under Titan, that "loading and unloading" encompasses "the entire process of loading or unloading the insured vehicle from the time of commencement of such operation until its completion...." 540 P.2d at 1114. The panel held there was no coverage under the homeowner's policy because "the accident occurred between the time of commencement and conclusion of the loading and unloading of the insured vehicle, and the accident would not have occurred 'but for' that operation...." Id. Similarly, in this case the accident occurred while Kelley and Soto were in the process of unloading the trailer from the truck. The accident would not have occurred but for the unloading that was taking place. Therefore, under Colorado Farm Bureau, the motor vehicle exclusion applies.

Soto's arguments regarding causation are without merit. Soto incorrectly cites State Farm Mutual Automobile Insurance Co. v. Kastner, 77 P.3d 1256 (Colo. 2003). That case did not involve a motor vehicle exclusion like that at issue here. Rather, that case involved a grant of coverage for injuries resulting from the use of a motor vehicle. The court's analysis focused on what constitutes "use" of a motor vehicle for purposes of "no fault" and uninsured/underinsured motorist insurance

policies. Likewise, the other cases cited by Soto for this argument all involve policy language granting coverage for liability arising from use of a vehicle. (Opening Brief at 17-18.) None of the cases cited by Soto with respect to this argument involved “loading or unloading” of a motor vehicle and therefore they are distinguishable.

Soto’s argument regarding concurrent causes is also misguided. Soto argues that “[a]ny injury caused by the Trailer, except those incurred while the Trailer was ‘being towed,’ is clearly a covered risk.” (Opening Brief at 19.) This is contrary to the plain language of the policy. The motor vehicle exclusion plainly excludes coverage for injuries resulting from the “loading or unloading of...motor vehicles.” As discussed, Soto’s injury was caused by the unloading of the trailer from a motor vehicle, *i.e.*, the truck. Soto’s reliance on [Northern Insurance Co. of New York v. Ekstrom](#), 784 P.2d 320, 323-24 (Colo. 1989), is misplaced because that case involved interpretation of the phrase “arising out of” with respect to a negligent entrustment claim. Soto’s argument regarding “automobile related conduct” is irrelevant because it has no bearing on application of the “loading or unloading” provision in the motor vehicle exclusion at issue here. Soto’s injuries resulted from unloading of the truck, which is undisputedly a “motor vehicle” as defined by the policy. The out-of-state authority relied on by Soto is inapplicable and not

binding on this Court. Colorado courts interpreting “loading or unloading” provisions have found causation in circumstances more attenuated from the use of a motor vehicle. See e.g., Colorado Farm Bureau, 540 P.2d 1112. The Titan court noted that with regard to unloading, “the question is not whether the insured truck was the cause of the accident.” 515 P.2d at 1126 (quoting St. Paul Mercury Ins. Co. v. Huitt, 336 F.2d 37 (6th Cir. 1964)). In Kohl, the Colorado Supreme Court recognized “the settled rule that injuries resulting from the adjustment of cargo and the loading and unloading of vehicles are causally related to a proper use [of a vehicle].” 731 P.2d at 137 n. 4.

As a matter of law, Soto’s injuries would not have occurred but for the unloading operation. Unloading the motor vehicle was the legal cause of his injuries. Thus, the trial court properly held that the motor vehicle exclusion applies to preclude coverage for Soto’s injuries.

C. The motor vehicle exclusion also applies because the trailer qualifies as a “motor vehicle” while being towed, and it did not stop being towed merely because at the moment of the accident it was not in motion or physically attached to the truck.

The policy’s definition of “motor vehicle” includes trailers while they are “being towed.” (CD page 42.) Unhitching the trailer was a natural and foreseeable part of the towing operation. Therefore the trailer was still a “motor vehicle” at the time of the accident.

The fact the trailer was not physically connected to the truck's tow hitch at the instant of the accident does not preclude application of the motor vehicle exclusion. Several courts have applied the motor vehicle exclusion in situations where a trailer caused injuries after separating from the vehicle towing it. In [Vann v. United Farm Family Mutual Insurance Co.](#), 790 N.E.2d 497 (Ind. Ct. App. 2003), the insured was driving a truck towing a boat trailer. The trailer detached and struck another vehicle, causing injuries. The policy contained an exclusion for injuries arising from the use of motor vehicles. The policy defined "motor vehicle" to include a trailer while being towed. Holding that the motor vehicle exclusion applied to both the truck and trailer as motor vehicles, the court explained:

Both the truck and the trailer qualify as 'motor vehicles' under the Policy's definition. Upchurch was using the truck and the trailer, loaded with the boat, at the time of the accident. It was the trailer, carrying the boat, that impacted with Vann's vehicle. For these reasons, we find that Vann's injuries arose out of the ownership and use of Upchurch's truck and trailer.

[Id.](#) at 503.

Similarly, in [State Farm Insurance Co. v. Seefeld](#), 472 N.W.2d 170 (Minn. Ct. App. 1991), the court held that a trailer was a "motor vehicle" even after it detached from the vehicle towing it. The injured person was riding on the trailer as it was towed behind an all-terrain vehicle. The trailer detached, resulting in

injuries to the person riding in it. Analyzing a homeowner's policy with a motor vehicle exclusion similar to that in the F.I.E. policy, Seefeld held the trailer was still a "motor vehicle" after it separated, thus the exclusion applied.

The court reached the same conclusion in [White v. American Deposit Ins. Co.](#), 732 So.2d 675, 676 (La. Ct. App. 1999). The policy in that case had a similar motor vehicle exclusion. The policy defined "motor vehicle" to include trailers except when a trailer is not "being towed." A boat and trailer became separated from the towing vehicle, then the boat and trailer hit the plaintiff. Despite the fact the trailer caused the injuries after separating from the truck, the court held the trailer was still within the definition of a motor vehicle at the time of the accident. "[T]he accident was the result of an unbroken chain of events, the clearly definable beginning of which arose out of the attachment of the trailer to the pickup truck." [732 So.2d at 676.](#)

These cases demonstrate that even if a trailer becomes separated from the towing vehicle shortly before the accident, the trailer is still "being towed" for purposes of the motor vehicle exclusion. Unhitching the trailer is part of the chain of events encompassed by the towing operation. Under the rationale of these cases, which applied similar policy language, Soto's accident happened while the

trailer was still “being towed” for purposes of the motor vehicle definition.

Therefore the motor vehicle exclusion applies to bar coverage for Soto’s injuries.

Similarly, the fact that the truck and trailer were not moving does not preclude application of the motor vehicle exclusion. See [Kohl](#), 731 P.2d 134 (vehicle was parked); [Trinity Universal Ins. Co.](#), 690 P.2d 227 (truck was being used as refreshment stand); [McMichael](#), 906 P.2d 92 (vehicle was parked).

Towing a trailer involves not only the actual pulling of the trailer by a vehicle, but also the attachment of the trailer to the vehicle and the detachment of the trailer from the vehicle. Naturally, hitching and unhitching the trailer must be done while the truck and trailer are stationary. The towing operation encompasses the entire process. Thus, Soto’s injuries occurred while the trailer was being towed, and as a result of the towing operation. His injuries resulted from use of the trailer. The motor vehicle exclusion may be applied on this basis, independent of its application based on the “use, loading or unloading” of the truck.

V. CONCLUSION

For these reasons, the judgment should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of December, 2009, a true and correct copy of the foregoing was e-served via LexisNexis to the following and a CD and a hard copy hand delivered to the Court of Appeals:

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