NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0220

WANDA LANDRY, ELLERY PAUL LANDRY, JR., JAMIE RENEE LANDRY, AND WANDA LANDRY ON BEHALF OF JAMIE RENEE LANDRY AND THE DECEASED, ELLERY PAUL LANDRY, SR.

VERSUS

ALLSTATE INSURANCE COMPANY AND CARMEN M. LETOURNEAU

Judgment Rendered: September 10, 2010

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Appealed from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Case No. 119,341

The Honorable Jerome M. Winsberg, Judge *Pro Tempore*

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Ted M. Mitchell Covington, Louisiana	Counsel for Plaintiffs/Appellants Wanda Landry, Ellery Landry, Jr. and Jamie Landry
Carey J. Guglielmo Brad M. Boudreaux Baton Rouge, Louisiana	Counsel for Defendant/Appellee Lafayette Insurance Company

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

MEMORANDUM OPINION

This is a wrongful death action brought by Wanda Landry, the widow of Ellery P. Landry, Sr. and the mother of Jamie Renée Landry, a minor, and Ellery P. Landry, Jr., the decedent's adult son.[1] Ellery P. Landry, Sr., an employee of Traffic Solutions, LLC, was killed after being struck by an automobile while walking in a highway median to retrieve and return a traffic warning sign to his employer's truck. One of the named defendants was Lafayette Insurance Company (Lafayette), which had issued a policy of commercial automobile insurance providing unininsured/underinsured motorists (UM/UIM) coverage to the employer. The plaintiffs have appealed a summary judgment of the 21st Judicial District Court for the Parish of Livingston in favor of Lafayette, holding that the decedent was not covered under its UM/UIM coverage and dismissing the plaintiffs' causes of action against it. For the following reasons, we affirm.

It is undisputed that Mr. Landry, the decedent, was not a named insured under the Lafayette policy, and that to otherwise qualify as an insured for purposes of the UM/UIM coverage, he had to have been "occupying" a covered vehicle. Lafayette's policy defined "occupying" as "in, upon, getting in, on, out or off." A passing motorist testified by deposition that Mr. Landry was still walking toward the warning sign in the median a few seconds before he was struck. The depositions of two co-workers filed in the record unequivocally placed the employer's trucks, including the particular truck at issue, no closer than 300 feet from the point where Mr. Landry was struck or where his body came to rest, and the

[1] Mrs. Landry asserted claims for herself and for her minor daughter. Although Jamie has now attained the age of majority, the trial court's judgment was rendered prior to that time, and Jamie has not since been substituted as plaintiff for her own claims.

testimony of one of the co-workers, Mr. Landry's nephew, placed the truck at issue almost a quarter-mile from where Mr. Landry was struck.

Interpretation of an insurance policy is usually a legal question that can be properly resolved by summary judgment. *Doe v. Breedlove*, 04-0006, p. 7 (La. App. 1st Cir. 2/11/05), 906 So.2d 565, 570. However, the question of whether a person is "occupying" a vehicle is a mixed question of fact and law. *Minor v. Cas. Reciprocal Exch.*, 96-2096, p. 3 (La. App. 1st Cir. 9/19/97), 700 So.2d 951, 953, *writ denied*, 97-2585 (La. 12/19/97), 706 So.2d 463.

The plaintiffs contend that the policy language is ambiguous, and that the particular facts support an interpretation that Mr. Landry may have been "upon" (in physical contact with) an integral appurtenance or "component" of the work truck (the warning sign), or in the course of "getting in" the truck to leave the worksite while engaged in the mission of retrieving the sign. In support of their contentions, the plaintiffs rely upon the case of *Westerfield v. LaFleur*, 493 So.2d 600, 603 (La. 1986), which enunciated the principle that a person's physical relationship to a vehicle, in terms of time and distance rather than actual physical contact, was determinative of whether a person was "entering into" and therefore "occupying" the vehicle under the policy language. In *Westerfield*, the supreme court found the phrase "entering into," part of the policy definition of "occupying," to be ambiguous. *Id.* at 605-06.

The definition of "occupying" in Lafayette's policy, however, differs from that of the policy in *Westerfield.* In *Valentine v. Bonneville Ins. Co.*, 96-1382 (La. 3/17/97), 691 So.2d 665, the supreme court held that the same policy language as that of the Lafayette policy was clear and unambiguous, and that the alleged insured, a deputy sheriff directing traffic outside his

vehicle after a traffic stop, was not an insured. According to *Valentine*, the application of the "physical relationship test" enunciated in *Westerfield* and its progeny is ultimately predicated upon ambiguity of policy language defining the alleged insured's physical relationship to the insured vehicle. If the policy language unambiguously excludes the alleged insured as a person "occupying" the insured vehicle, then the *Westerfield* rationale does not come into play. *Valentine*, 96-1382 at p. 8, 691 So.2d at 671.

We have carefully considered the logical and well-articulated argument of plaintiffs' counsel, but we must conclude that under the "general, ordinary, plain and popular meaning" of the policy language, Mr. Landry was neither "in," "upon," "getting in," "getting on," "getting out," or "getting off" the insured truck at the time of his tragic death and that summary judgment was appropriate. *See Valentine*, 96-1382 at pp. 8-9, 691 So.2d at 671. An insurance policy should not be interpreted in an unreasonable or strained manner so as to enlarge or restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. *Magnon v. Collins*, 98-2822, p. 7 (La. 7/7/99), 739 So.2d 191, 196. Here, Mr. Landry's "physical and intentional relationship to the vehicle had become attenuated," and he clearly "was no longer within the zone of risk attendant to getting out or off [or in or on] the vehicle." *See Minor*, 96-2096 at pp. 10-11, 700 So.2d at 957.

The judgment of the trial court is affirmed, and all costs of this appeal are assessed to the plaintiffs-appellants, Wanda Landry and Ellery P. Landry, Jr. This memorandum opinion is issued pursuant to Rule 2-16.1(B) of the Uniform Rules of Louisiana Courts of Appeal.

AFFIRMED.