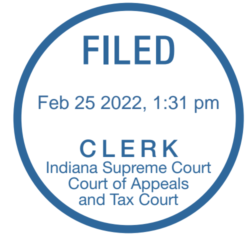

IN THE
Indiana Supreme Court

Supreme Court Case No. 21S-CT-496

Progressive Southeastern Insurance Company,

Appellant,

–v–

Bruce A. Brown, et al.,

Appellees.

Argued: December 16, 2021 | Decided: February 25, 2022

Appeal from the Carroll Circuit Court
No. 08C01-1811-CT-13
The Honorable Benjamin A. Diener, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-CT-1765

Opinion by Justice Slaughter

Chief Justice Rush and Justices David, Massa, and Goff concur.

Slaughter, Justice

The federal Motor Carrier Act of 1980 requires some motor carriers to maintain minimum levels of financial responsibility. One way carriers can comply with these requirements is by adding an MCS-90 endorsement to their insurance policy. This endorsement provides that if a motor vehicle is involved in an accident, the insurer may be required to pay any final judgment against the insured arising out of the accident. We must decide whether, under either federal or state law, the MCS-90 endorsement applies to an accident that occurred during an intrastate trip transporting non-hazardous property. We hold it does not.

I

B&T Bulk is a motor carrier based in Mishawaka, Indiana, and operates in both Indiana and Michigan. In 2017, a B&T Bulk employee, Bruce Brown, was driving a truck and empty trailer to pick up a load of cement in Logansport, Indiana, for delivery to South Bend, Indiana. Brown's truck crossed the centerline and struck Dona Johnson's oncoming vehicle. She died in the collision.

Before the accident, B&T Bulk had bought a commercial auto policy from Progressive Southeast Insurance Company, the plaintiff below. But at the time of the accident, the truck and trailer were not listed on the policy. The policy did have an MCS-90 endorsement, however, creating a suretyship whereby Progressive agreed to pay a final judgment against B&T Bulk in certain negligence cases.

Johnson's widower filed a wrongful-death action against Brown and B&T Bulk, individually and on behalf of Johnson's estate. Progressive filed this separate cause of action, seeking a declaration that (1) it has no duty to defend or indemnify B&T Bulk or Brown because the truck and trailer involved in the accident were not listed in the policy as insured autos; and (2) the MCS-90 endorsement does not apply. State Farm, Johnson's insurance carrier, intervened in the declaratory action. Progressive, B&T Bulk, Brown, Johnson's husband, and Johnson's estate, joined by State Farm, filed cross-motions for summary judgment.

The trial court entered an order finding (1) Progressive has no duty to defend or indemnify Brown; (2) the truck and trailer were not insured autos; and (3) the MCS-90 endorsement applies. Progressive appealed only the MCS-90 issue. The court of appeals affirmed, holding that the MCS-90 endorsement applies. *Progressive Se. Ins. Co. v. B&T Bulk, LLC*, 170 N.E.3d 1125, 1134 (Ind. Ct. App. 2021). Progressive sought transfer, which we granted, *Progressive Se. Ins. Co. v. Brown*, 176 N.E.3d 446 (Ind. 2021), thus vacating the appellate opinion.

II

We review summary-judgment decisions de novo. *Perkins v. Mem'l Hosp. of South Bend*, 141 N.E.3d 1231, 1234 (Ind. 2020). "[S]ummary judgment is appropriate only when the designated evidence shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Rogers v. Martin*, 63 N.E.3d 316, 320 (Ind. 2016); Ind. Trial Rule 56(C). Here, the parties agree there are no disputed issues of material fact. Thus, the sole issue is whether, as a matter of law, the MCS-90 endorsement applies to intrastate trips transporting non-hazardous property. We hold it does not and reverse the trial court on this issue.

In Part A, we hold under the plain language of the MCS-90 and the weight of federal authority that the endorsement does not apply to intrastate trips transporting non-hazardous property as a matter of federal law. In Part B, we hold that the endorsement also does not apply under Indiana law because the state statute incorporating the federal regulations does not expand the regulations' scope.

A

Under section 30 of the Motor Carrier Act of 1980, certain motor carriers must maintain minimum levels of financial responsibility. 49 U.S.C. § 31139. The governing statutes and regulations ensure a motor carrier "has independent financial responsibility to pay for losses sustained by the general public arising out of its trucking operations." *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133, 1140 (7th Cir. 1986). Motor carriers have three options to comply with the financial

responsibility requirements, one of which is at issue here: the Form MCS-90 endorsement. 49 C.F.R. § 387.7(d)(1).

The MCS-90 is an endorsement to an underlying insurance policy between the motor carrier and its insurer. The endorsement "obligates an insurer to pay certain judgments against the insured . . . even though the insurance contract would have otherwise excluded coverage." *Canal Ins. Co. v. Coleman*, 625 F.3d 244, 247 (5th Cir. 2010). It also requires the insured to reimburse the insurer for any payment made to the public under the endorsement. The MCS-90 thus "creates a suretyship among the injured public, the insured, and the insurer". *Auto-Owners Ins. Co. v. Munroe*, 614 F.3d 322, 327 (7th Cir. 2010). See also *Carolina Cas. Ins. Co. v. Yeates,* 584 F.3d 868, 878-79 (10th Cir. 2009) (en banc) (adopting the "Majority View" that the MCS-90 creates a suretyship).

Appellees argue that the "clear and unambiguous language" of the MCS-90 dictates that it applies to this accident. We disagree. The MCS-90, by its terms, applies only to "motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980". Section 29 is not relevant here because it merely amends a statute, now superseded, that was a predecessor to the Motor Carrier Act. See Pub. L. No. 96–296, § 29, 94 Stat. 820 (1980).

But section 30, codified at 49 U.S.C. § 31139, is relevant. It provides that the minimum financial responsibility requirements apply to motor carriers transporting property "in the United States between a place in a State" and (A) "a place in another State"; (B) "another place in the same State through a place outside of that State"; or (C) "a place outside the United States". 49 U.S.C. § 31139(b)(1); 49 C.F.R. § 387.3(a). In other words, these requirements apply when a motor carrier transports property in foreign or interstate commerce. They also apply when a motor carrier in intrastate commerce transports hazardous property. 49 U.S.C. § 31139(d)(1); 49 C.F.R. § 387.3(b). Thus, section 30's financial responsibility requirements apply in only two circumstances: first, when a motor carrier transports property in foreign or interstate commerce; second, when a motor carrier transports hazardous property in foreign, interstate, or intrastate commerce. And because the MCS-90 applies only when the

motor carrier is subject to section 30's requirements, the MCS-90 also applies only in these circumstances.

Here, all parties agree that Brown's trip was purely intrastate and that he was not transporting hazardous property at the time of the accident. But that does not end our inquiry because intrastate trips can also qualify as interstate commerce. Thus, whether the MCS-90 applies here depends on whether Brown was engaged in interstate commerce at the time of the accident. We hold he was not. Because the MCS-90 is a federally mandated form, the operation and effect of which are a matter of federal law, *Carolina Cas. Ins. Co. v. E.C. Trucking*, 396 F.3d 837, 841 (7th Cir. 2005) (citing *John Deere Ins. Co. v. Nueva*, 229 F.3d 853, 856 (9th Cir. 2000)), we turn to federal law to answer this question.

Federal courts use three different approaches to determine whether an MCS-90 applies to a particular loss. The trip-specific approach is the narrowest approach and is the majority one. See, e.g., *Coleman*, 625 F.3d at 251. This approach relies on the unambiguous language of both the MCS-90 and section 30 of the Motor Carrier Act and looks at whether the motor carrier's employee was transporting property on an interstate trip at the time of the loss. *Ibid*.

Another, similar approach determines "[w]hether transportation is interstate or intrastate . . . by the essential character of the commerce, **manifested by shipper's fixed and persisting transportation intent at the time of the shipment**". *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir. 1997) (emphasis in original). See also *Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 58 (2d Cir. 2012) ("the existence of the requisite interstate nexus may be determined by looking to the intent of the goods' seller or shipper with respect to the goods' destination"); *Century Indem. Co. v. Carlson*, 133 F.3d 591, 598 (8th Cir. 1998) (examining "the 'essential character' of the shipment from the shipper's intent"). Under this approach, even an intrastate trip can satisfy the interstate commerce requirement if the shipper has a "fixed and persisting transportation intent" to ship the goods to an interstate terminal. *Carlson*, 133 F.3d at 598.

The final and broadest approach, and the one Appellees ask us to adopt, applies the MCS-90 when the court finds it aligns with the public

policy behind the Motor Carrier Act. See *Canal Ins. Co. v. YMV Transport, Inc.*, 867 F. Supp. 2d 1099, 1108 (W.D. Wash. 2011) (declining to apply trip-specific approach when question is whether vehicle was paid to transport goods because "such an approach is inconsistent with the purposes of the Motor Carrier Act"); *Royal Indem. Co. v. Jacobsen*, 863 F. Supp. 1537, 1542 (D. Utah 1994) (rejecting trip-specific approach because it "would not advance the public policy goals of the Motor Carrier Act").

We agree with the weight of authority that rejects the public-policy approach because it ignores the unambiguous language of the MCS-90 endorsement and section 30 of the Motor Carrier Act. As for the two remaining approaches (trip-specific and fixed-intent-of-the-shipper) we need not choose today which is better. Under either approach B&T Bulk was not engaged in interstate commerce here.

The parties agree that Brown was on an intrastate trip at the time of the accident. And Appellees do not argue that Brown intended to leave Indiana at any point on his trip. Therefore, under either the trip-specific or fixed-intent-of-the-shipper approach, Brown was not engaged in interstate commerce at the time of the accident. Thus, we hold under federal law that the MCS-90 endorsement does not apply to this accident.

Our inquiry does not end here, however, because despite the MCS-90's limitations under the federal law, states "remain free to create their own regulations governing insurance requirements for motor carrier transportation within their state borders." *Martinez v. Empire Fire and Marine Ins. Co.*, 139 A.3d 611, 620 (Conn. 2016). Here, Appellees argue that under Indiana law, the MCS-90 applies to motor carriers transporting non-hazardous property in intrastate commerce. We address this argument next.

B

Our general assembly has incorporated into Indiana law the federal regulations governing the minimum levels of financial responsibility for motor carriers, including 49 C.F.R. Part 387:

> 49 CFR Parts 40, 375, 380, 382 through 387, 390 through 393, and 395 through 398 are incorporated into Indiana law by reference, and, except as provided in subsections (d), (e), (f), (g), and (j), must be complied with by an interstate and intrastate motor carrier of persons or property throughout Indiana.

Ind. Code § 8-2.1-24-18(a). The exceptions do not apply here, so the issue is whether this incorporation statute expands Part 387 beyond what federal law requires. Specifically, Appellees argue that section 18(a) expands the financial responsibility requirements to **all** intrastate motor carriers, regardless of what type of property they are transporting. Their argument relies on the fact that section 18(a) does not limit Part 387's applicability to certain types of intrastate carriers. We hold this argument is unavailing.

While section 18(a) requires all intrastate motor carriers to comply with Part 387, the section incorporates Part 387 in full and does not amend any subparts or provide alternate definitions for "interstate" or "intrastate". Thus, we must look to Part 387 and each of its subparts to determine what an intrastate motor carrier must do to comply. Section 387.3(b) says that the minimum financial responsibility requirements apply to intrastate motor carriers only when they transport hazardous property. 49 C.F.R. § 387.3(b). Under a plain reading of both section 18(a) and Part 387, the financial responsibility requirements do not apply to intrastate motor carriers transporting non-hazardous property.

Appellees urge the opposite conclusion, which would require us to cherry-pick which subparts of Part 387 to apply and to fill in the gaps with our own views. Were we to hold that section 18(a) expands Part 387 to apply to intrastate transport of non-hazardous property, we would have to ignore section 387.3's limitations on the financial responsibility requirements. *Id.* at § 387.3. We would also have to determine how much public-liability coverage is required because section 387.9 does not provide a coverage amount for motor carriers transporting non-hazardous property in intrastate commerce. *Id.* at § 387.9. If our legislature had intended to adopt only specific subparts of Part 387 or to amend it after

incorporation, it could have done so. But as section 18(a) incorporates Part 387 in its entirety, we cannot choose which subparts to apply, which to ignore, and which to amend. Thus, we hold that section 18(a) does not expand Part 387's minimum financial responsibility requirements to intrastate commerce of non-hazardous property.

We recognize that today's opinion is at odds with our court of appeals' opinion in *Sandberg Trucking, Inc. v. Johnson*, 76 N.E.3d 178 (Ind. Ct. App. 2017). In *Sandberg*, the court held that 49 C.F.R. § 392.22 applied to motor carriers engaged in purely intrastate commerce, despite a contrary federal regulation. *Id.* at 188. The court reasoned that it would be absurd to hold that the general assembly "went to the trouble of adopting federal regulations and specifically making them applicable to intrastate commerce while simultaneously adopting one that nullified the entire adoption." *Ibid.* But this approach asks us to ignore the plain language of section 18(a). Again, were we to agree with the *Sandberg* court's interpretation, we would have to read each provision of each regulation and determine when replacing "interstate" with "intrastate" made sense with our understanding of the legislature's policy goals under section 18(a). We decline to impose our own value judgments for those the legislature could have enacted but did not. Thus, to the extent *Sandberg* is at odds with our opinion today, we overrule it.

Because section 18(a) does not expand Part 387's applicability to motor carriers transporting non-hazardous property in intrastate commerce, the MCS-90 endorsement does not apply to this accident under state law.

* * *

Brown was neither engaged in interstate commerce at the time of the accident nor transporting hazardous property. Thus, we hold that the MCS-90 endorsement does not apply under either federal or state law. We affirm the trial court's judgment that Progressive has no duty to defend or indemnify Brown and reverse its judgment that the MCS-90 endorsement applies here.

Rush, C.J., and David, Massa, and Goff, JJ., concur.

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