IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-CA-01652-COA

ALFA INSURANCE CORPORATION **APPELLANT**

v.

KENNETH WAYNE RYALS, ADMINISTRATOR ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF KENNETH RYALS, DECEASED, AND KENNETH WAYNE RYALS, ADMINISTRATOR ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF GEORGIA RYALS, DECEASED **APPELLEES**

DATE OF TRIAL COURT JUDGMENT:	8/13/2002
TRIAL JUDGE:	HON. ROBERT LOUIS GOZA, JR.
COURT FROM WHICH APPEALED:	FORREST COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	HERMAN M. HOLLENSED
ATTORNEYS FOR APPELLEES:	NORMAN WILLIAM PAULI T. JACKSON LYONS
NATURE OF THE CASE:	CIVIL - INSURANCE
TRIAL COURT DISPOSITION:	FINAL JUDGMENT FOR PLAINTIFFS AND AWARD OF $210,000 FOR EACH DEATH.
DISPOSITION:	AFFIRMED - 06/15/2004
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE KING, C.J., THOMAS AND MYERS, JJ.

MYERS, J., FOR THE COURT:

¶1. Alfa Insurance Corporation appeals from a final judgment of the Circuit Court of Forrest County for the plaintiff, Kenneth Wayne Ryals, as administrator on behalf of the wrongful death beneficiaries of Kenneth Ryals and Georgia Ryals, and an award of $210,000 for each of the deaths. Aggrieved by the judgment, Alfa raises three issues on appeal.

ISSUES PRESENTED

I. Whether the Ryals family is barred from recovering uninsured motorist benefits from Alfa?

II. Whether the Ryals family is entitled to recover uninsured motorist benefits as the deaths were not caused by an accident arising out of the ownership, maintenance, or use of the Mississippi Department of Transportation platform truck as required by the Alfa insurance agreement?

III. Did the trial court err by admitting the testimony of Richard Hagenson, the Ryalses' expert witness?

STATEMENT OF FACTS

¶2. On April 28, 1998, Kenneth Ryals and his wife, Georgia Ryals, sustained fatal injuries as they were traveling north on Highway 49, near Hattiesburg, Mississippi. A dead pine tree fell across the cab of their truck and the couple was killed instantly. On July 26, 1999, Kenneth Wayne Ryals, co-administrator of the Ryalses' estates, filed wrongful death complaints against the Mississippi Department of Transportation (MDOT) and the Mississippi Transportation Commission. The complaints alleged that the Ryalses' deaths were caused by MDOT's failure to provide reasonably safe highways and that prior to the accident, MDOT employees left a dead pine tree standing in a weakened condition after several attempts to knock the tree down with a platform truck were unsuccessful.

¶3. The two cases were consolidated and an amended complaint was filed to include Alfa as a co-defendant. The Ryalses had automobile insurance coverage with Alfa which included an uninsured motorist provision. The Ryals family sought uninsured motorist benefits from Alfa because MDOT admitted that its platform truck was not covered by insurance. Alfa answered the Ryalses' complaint and alleged that the wrongful death beneficiaries were not entitled to recover from Alfa because MDOT was immune from suit under the Mississippi Tort Claims Act, therefore the Ryals family was not "legally entitled to recover" under the Alfa policies. Alfa also filed a cross-claim against MDOT for subrogation of the Ryalses' claims.

¶4. The trial was set for August 2002; however, MDOT settled with the Ryals family for $250,000, the statutory limit set by the Mississippi Tort Claims Act. The trial judge entered an agreed order of dismissal in May 2002. Alfa agreed to dismiss its counter-claim against MDOT but specifically reserved the right to use MDOT's sovereign immunity claim as a defense in its suit against the Ryals family. A jury trial was held against the remaining defendant, Alfa, and the jury returned a unanimous verdict for the Ryals family and awarded a recovery of $210,00 for each death (the maximum amount recoverable under Alfa's uninsured motorist policy). Alfa timely filed its motion for JNOV or alternatively for a new trial, which was denied by the trial court.

LEGAL ANALYSIS

I. WHETHER THE RYALS FAMILY IS BARRED FROM RECOVERING UNINSURED MOTORIST BENEFITS FROM ALFA?

¶5. Alfa asserts that the Ryals family is barred from recovering uninsured motorist benefits under the Alfa policy because they do not meet the standard of being "legally entitled to recover." Alfa's position is that the Ryalses are not "legally entitled to recover" because they have received all they are entitled under the Mississippi Tort Claims Act. Conversely, the Ryals family asserts that they are entitled to uninsured motorist benefits from Alfa because the measure of their damages claim arising from the fatality was stipulated at over $670,000 and they only received the statutory cap of $250,000 from MDOT.

¶6. The basis of Alfa's argument is that the Ryalses are not "legally entitled to recover" uninsured motorist benefits because they have already received the statutory cap of $250,000 from MDOT. The applicable uninsured motorist statute states:

> No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle . . . .

Miss. Code Ann. § 83-11-101 (1) (Rev. 1999). The provision in the Ryalses' insurance policy issued by Alfa contained the following language:

> We will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:
> 1. Bodily injury sustained by an insured and caused by an accident; and
> 2. Property damage caused by an accident of the Schedule or Declaration indicates that both bodily injury and property damage Uninsured Motorist Coverage applies.
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the uninsured motor vehicle.

Alfa cites many workers' compensation cases in support of its proposition that the Ryalses are not legally entitled to recover uninsured motorist benefits.

¶7. Several cases have been decided relating to the interplay of workers' compensation and uninsured motorist benefits. Workers' compensation benefits received by the employee barred recovery under the employer's uninsured motorist policy because the phrase "legally entitled to recover" has been interpreted to mean the insured is entitled to recover at the time of the accident. *Medders v. U.S. Fid. and Guar. Co.*, 623 So. 2d 979, 989 (Miss. 1993). The employee was not entitled to recover uninsured motorist benefits from his insurer because workers' compensation is the employee's exclusive remedy. *Wachtler v. State Farm Mut. Auto. Ins. Co.*, 835 So. 2d 23, 27 (¶ 16) (Miss. 2003); *Steen v. Metro. Prop. and Cas. Ins. Co.*, 858 So. 2d 186,189 (¶ 15) (Miss. Ct. App. 2003). The purpose of the uninsured motorist statute is to allow the insured to get all sums he is legally entitled to recover. *McDaniel v. Shacklee U.S., Inc.*, 807 So. 2d 393, 398-99 (¶ 17) (Miss. 2001).

¶8. Alfa draws a parallel between workers' compensation cases and cases dealing with the Mississippi Tort Claims Act. Alfa argues that like worker's compensation, sovereign immunity bars the insured from receiving uninsured motorist benefits because the Mississippi Tort Claims Act provides the exclusive remedy against the government and its employees for torts. Alfa acknowledges that sovereign immunity may be statutorily waived, as was done in this case by

MDOT, but argues that the statutory cap of $250,000 should remain the insured's exclusive remedy. While it is attractive to group workers' compensation cases together with sovereign immunity cases, the two are distinctly different and each should be decided by its own precedent.

¶9. The Ryals family argues that the case of *City of Jackson v. Perry*, 764 So. 2d 373 (Miss. 2000), holds precedential value for their claim of uninsured motorist benefits against Alfa. In *Perry*, the driver brought suit against a police officer, the city and the uninsured motorist carrier for an accident involving a speeding officer who hit the driver while going to dinner. *Perry*, 764 So. 2d at 375 (¶ 2). The court held that the officer was driving with a "reckless disregard for the safety of others" which waived sovereign immunity under the Mississippi Tort Claims Act. *Id.* at 378 (¶ 19). The court opined that since the reckless disregard exception to the MTCA did apply, the city was liable for $50,000 (then the statutory maximum) and the uninsured motorist carrier was liable for $50,000 (the policy limits). *Id.* at 381 (¶ 38).

¶10. Both parties briefed the *Perry* case and each hold different views on its precedential value. Alfa claims that since *Perry* was decided by a split vote, it is not binding precedent. Our supreme court recently held that 4-4 decisions are good law and binding precedent. *Bridges v. Park Place Entm't*, 860 So. 2d 811, 814 (¶ 9) (Miss. 2003) (citing *Harper v. Harper*, 491 So. 2d 189, 202 (Miss. 1986)). The Ryalses argue that similar to *Perry*, the waiver of immunity by MDOT meant that the insured was "legally entitled to recover" from MDOT up to the statutory cap of $250,000. The Ryalses contend that if the damages claim totals above and beyond the cap, the uninsured motorist funds should be available as funds not collectible from the tortfeasor.

¶11. The Uninsured Motorist Act is remedial in nature and its purpose is to "give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy." *Glennon v. State Farm Mut. Auto. Ins. Co.*,812 So. 2d 927, 930 (¶ 18) (Miss. 2002) (citing *Rampy v. State Farm*

Mut. Auto. Ins. Co., 278 So.2d 428, 432 (Miss. 1973)). The provisions of the Act are to be liberally construed to accomplish this purpose. *Id.* At trial, the parties stipulated that the Ryalses' claims for the wrongful deaths of their parents exceeded $670,000. Defining the term "legally entitled to recover" in the context of sovereign immunity is problematic. There has been no distinction made between liability or fault and financial responsibility or collectability. The Ryalses argue that uninsured motorist benefits should be recoverable if the tortfeasor, regardless of whether a person or state entity, is at fault or legally liable for the damages. Alfa contends that the benefits should be recoverable in limited situations where the tortfeasor is financially responsible.

¶12. Based upon the remedial purposes of the Uninsured Motorist Act and the stipulated damages which well exceed the $250,000 settlement with MDOT, the Ryalses were entitled to receive uninsured motorist benefits from Alfa according to the automobile insurance policy.

II. WHETHER THE RYALS FAMILY IS ENTITLED TO RECOVER UNINSURED MOTORIST BENEFITS AS THE DEATHS WERE NOT CAUSED BY AN ACCIDENT ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF THE MISSISSIPPI DEPARTMENT OF TRANSPORTATION PLATFORM TRUCK AS REQUIRED BY THE ALFA INSURANCE AGREEMENT?

¶13. Alfa contends that the Ryals family is barred from recovering uninsured motorist benefits because the deaths were not caused by an accident arising out of the ownership, maintenance, or use of the MDOT platform truck as required by the Alfa insurance policy. The Ryals family contends that the issue should be decided based on contract principles and that contractual definition of "use" has been decided by prior caselaw.

¶14. Alfa's insurance policy required that in order to recover UM benefits, the insured must establish that the injuries arose out of the ownership, maintenance, or use of the uninsured motor vehicle. It is clear that the deaths did not result from the ownership or maintenance of the platform truck. What is disputed is whether the deaths resulted from the use of the truck. Alfa relies on the case of *Spradlin v. State Farm Mutual Automobile Insurance Co.*, 650 So. 2d 1383 (Miss. 1995),

for its position that the Ryalses did not establish that the deaths arose out of the use of the MDOT truck. Alfa claims that the use of the truck was "incidental" to the "intentional acts" of the MDOT employees who pushed the tree with the truck. *Spradlin* involved an UM claim when shots were fired from an uninsured motor vehicle into an insured vehicle causing personal injury. *Spradlin*, 650 So. 2d at 1384. The court held that the use of the vehicle was merely incidental to what was an intentional and deliberate act. *Id.* at 1388.

¶15. The Ryalses argue that the issue is one of contract construction. They contend that the issue turns on whether using the MDOT truck to push the tree was a 'use' of the truck within the meaning of the policy. The Ryalses cite *Jackson v. Daley*, 739 So. 2d 1031 (Miss. 1999), to support their contention that the use of the MDOT truck caused the two deaths. In *Jackson*, the court explained "use" as follows: "When a policy insures an automobile for the "use" of the automobile, the chain of causation between the use of the automobile and the injury must be direct. We will not extend coverage if the use of the automobile is within the line of causation, but is distinctly remote." *Jackson*, 739 So. 2d at 1041 (¶ 40).

¶16. It is the role of the trial court, not the jury, to determine the meaning and the effect of an insurance contract if the contract is clear and unambiguous. *Id.* at 1041 (¶ 38) (citing *Overstreet v. Allstate Ins. Co.*, 474 So.2d 572, 575 (Miss.1985)). If the language in an insurance contract is clear and unambiguous, then the court should construe it as written. *Id.* (citing *Lowery v. Guar. Bank & Trust Co.*, 592 So.2d 79, 82 (Miss.1991)). The language in the Alfa insurance policy states that it will pay for bodily injury which results from "the operation, maintenance, or use of a uninsured car." The policy also defines the word use or used as "meaning the actual manual and physical driving of a car." A car is defined by the policy as "a land motor vehicle with four or more wheels, which is designed for use mainly on public roads."

¶17. The trial court held on Alfa's motion for directed verdict that there was enough evidence for the jury to conclude that the use of the truck caused the deaths of Kenneth and Georgia Ryals. It was a factual question for the jury to decide whether or not the act of the MDOT truck pushing against the dead tree was the proximate cause of the accident. The jury heard testimony of Charles Finnegan, a bystander who testified that he saw an MDOT platform truck hitting a tree in the vicinity of where the Ryalses' deaths occurred. Finnegan also stated that the crew was unsuccessful at pushing down the tree and left it standing. The jury also heard the testimony of Oscar Brown, an MDOT platform truck driver, who testified that sometimes the MDOT employees would disobey orders from their supervisors and push trees with the platform truck if they thought the trees were dead. Brown admitted that he was not always successful in pushing the trees over because the trees were not as rotten as they looked. Brown also testified that his crew was working in the area where the Ryalses were killed.

¶18. The jury also heard the testimony of Richard Hagenson, a forester who testified about his personal observations of the tree, the decay process in trees and observations he made about what caused the tree to decay as it did. After hearing all the evidence, the jury chose to decide that the Ryalses' deaths arose out of the use of the MDOT truck.

¶19. The dissent focuses on the issue of causation for its proposition that the deaths of Kenneth and Georgia Ryals were not proximately caused by the use of the MDOT platform truck. The dissent correctly cites the cases of *Merchants Company v. Hartford Accident & Indemnity Company*, 188 So. 571 (Miss. 1939) and *Jackson v. Daley*, 739 So. 2d 1031 (Miss. 1999), as authority on this issue. In both cases, the supreme court held that the chain of causation was not broken and therefore coverage was allowed. In *Jackson*, the court outlined two factors to be considered: 1) the chain of causation between the use of the automobile must be direct; and 2) the use must not be distinctly remote. *Jackson*, 739 So. 2d at 1041 (¶ 40).

¶20. Similarly to *Merchants* and *Jackson*, we can find no break in the chain of causation in the Ryalses' case. There was no intervening superceding cause between the MDOT platform truck pushing on the tree and the tree falling on the Ryalses' vehicle. The dissent focuses on evidence that the tree was dead before it fell and therefore the cause of the falling tree was insect infestation and decay, not the force from the platform truck. Richard Hagenson, a forester and expert witness, testified that the substantial factor contributing to the tree falling on the vehicle was the external force which pushed on the tree prior to the fall, not the decay or rainy conditions.

¶21. The dissent also focuses on the issue of remoteness and states that because of a time lapse between the MDOT platform truck pushing on the tree and the tree falling on the Ryalses' vehicle causing death the line of causation was distinctly remote. Remoteness goes to the issue of proximate cause and was a fact question for the jury's determination. *Hankins Lumber Co. v. Moore*, 774 So. 2d 459, 464 (¶ 11) (Miss. Ct. App. 2000). The jury heard all the evidence presented and found liability as to Alfa. This issue is without merit.

III. DID THE TRIAL COURT ERR BY ADMITTING THE TESTIMONY OF RICHARD HAGENSON, THE RYALSES' EXPERT WITNESS?

¶22. Alfa contends that the Ryalses' expert, Richard Hagenson, should not have been allowed to testify as an expert witness. Hagenson stated in voir dire that he had not conducted any scientific tests or studies to support his opinions, nor was he aware of any studies conducted by anyone on the matter. After conducting voir dire, Alfa objected to Hagenson being tendered as an expert in the field of forestry based upon the absence of tests or studies as a basis of his testimony. On appeal, Alfa asserts that Hagenson's testimony should have been excluded as speculative.

¶23. Regardless of the reasons behind Alfa's objection to Hagenson's testimony, the admission of expert testimony is within the sound discretion of the trial judge. *Roberts v. Grafe Auto Co., Inc.*, 701 So. 2d 1093, 1098 (Miss. 1997). Likewise, the decision as to whether a witness is qualified to

testify as an expert is within the discretion of the trial court. *Burnham v. Stevens*, 734 So. 2d 256, 268 (¶ 47) (Miss. Ct. App. 1999). The decision will be reversed only when it amounts to an abuse of discretion. *Sheffield v. Goodwin*, 740 So. 2d 854, 856 (¶ 6) (Miss. 1999).

¶24. Hagenson testified that he has a degree in forestry and has worked in that field for twelve years. Hagenson also testified that he went to the accident site and personally viewed the tree. After much consideration and arguments by both sides, the trial court concluded that Hagenson could testify as to general forestry issues that were in his realm of knowledge such as what causes decay in trees, which stage of decay the tree that caused the accident was in and that some external force hastened the decay process in the tree. Hagenson was allowed to give testimony as to his personal observations of the tree. Addressing Alfa's concerns that Hagenson should not be allowed to testify about the amount of force applied to the tree or what specific object applied the force, the trial court did not allow Hagenson to testify on those subjects. The trial court concluded that the issue was one for the jury to determine based on the testimony of other witnesses. Mr. Hagenson was not allowed to testify specifically on force because that went beyond his expertise in forestry.

¶25. Alfa also called an expert witness, Gerald Moore, who discussed his opinions concerning the decay found in the tree. Moore was permitted to offer testimony on identical issues as Hagenson. Although Moore opined that the tree was in later stage of decay, the trial court considered the issue to be one for the jury's determination for they are given the task of giving weight to testimony. The Ryalses claim that the issue amounts to a "battle of the experts" with the jury choosing to give Hagenson's testimony more weight than Moore's testimony.

¶26. Rule 702 of the Mississippi Rules of Evidence states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case.

M.R.E. 702. According to Rule 702, expert testimony should be admitted if it passes a two-prong test: (1) the witness must be qualified by virtue of his of her knowledge, skill, experience or education, and (2) the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (¶ 7) (Miss. 2003).

¶27. Hagenson testified that he earned a degree in forestry and had worked in that field for twelve years. Clearly, Hagenson was qualified to testify as an expert in the field of forestry. His testimony was helpful to the jury on the issue of what caused the tree to fall and fatally injure the Ryalses. The trial judge limited Hagenson's testimony to those forestry issues within his knowledge and his personal observations of the tree. He was not allowed to give testimony outside his expertise and education. The trial court did not abuse its discretion by allowing Hagenson to testify as an expert witness.

¶28. **THE JUDGMENT OF THE CIRCUIT COURT OF FORREST COUNTY IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., THOMAS, LEE, AND CHANDLER, JJ., CONCUR. GRIFFIS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES AND SOUTHWICK, P.JJ. IRVING, J., DISSENTS WITHOUT WRITTEN OPINION.

GRIFFIS, J., DISSENTING:

¶29. I respectfully disagree with the majority's resolution of the second assignment of error. Therefore, I dissent.

¶30. Proper consideration requires that we look at two separate issues. First, we must consider whether the accident arose out of the "use" of an uninsured vehicle. Second, if the accident arose

out of the use of an uninsured vehicle, we must then consider the question of causation, i.e., whether the Ryalses' deaths were caused by an accident which arose from the use of an uninsured vehicle. After review of either or both of these issues, I am of the opinion that this Court is obligated to reverse and render.

A. Did the accident arise out of the "use" of the Mississippi Department of Transportation vehicle?

¶31. I agree with the majority's statement of the law in paragraph 15. However, it is with the application of this legal principle where the majority and I differ.

¶32. For my analysis, I use the uninsured motorist coverage provision of the Alfa policy that the majority found to be in effect. According to the majority, this provision read:

> We will pay damages for **bodily injury** to a **covered person** if the **covered person** is legally entitled to collect such damages from the owner or driver of an **uninsured car**. The **bodily injury** must be caused by accident arising out of the operation, maintenance or **use** of an **uninsured car**.

(emphasis in original). The majority correctly limits our consideration to determine whether the accident arose out of the "use" of the Mississippi Department of Transportation vehicle. The Ryals family did not claim that the accident arose out of either the operation or maintenance of the vehicle.

¶33. The policy defined several terms. "Use" was defined to mean "the actual manual and physical driving of a **car**." "Car" was defined to mean "a land motor vehicle with four or more wheels, which is designed for **use** mainly on public roads." (emphasis in original).

¶34. The facts of this case are not the typical facts we consider in uninsured motorist cases. Indeed, this is a case of first impression in Mississippi.

¶35. There was no collision or impact between the Ryalses' vehicle and the MDOT vehicle. Instead, the Ryalses contend that MDOT's efforts in removing a dead pine tree from the roadside by the use of its hydraulic lift platform (also commonly referred to as a "bucket"), which was

permanently attached to the vehicle, constitute the "use" of an uninsured vehicle. The "use" of the MDOT vehicle occurred several months *before* the Ryalses were tragically killed.

¶36. Charles Finnegan testified that, about four to six months before the Ryalses' accident, he observed a MDOT platform truck attempting to push down the dead pine tree that fell on the Ryalses' vehicle. Finnegan described what he saw. He testified that the MDOT vehicle had a hydraulic lift platform attached to it and the MDOT personnel were maneuvering the platform to push against the tree in an effort to push down the dead tree. Finnegan testified that he saw MDOT personnel bump the tree several times but they were not successful with their attempts, and the tree remained standing. Finnegan also testified that the truck was stationary and only the platform was moving. He did not see any MDOT personnel in the cab of the truck.

¶37. In 1998, Charles Walters was the roadside development supervisor for MDOT. He testified that the platform could be operated from two places. The operator could maneuver the platform by operating the controls on the platform itself, or the operator could maneuver the platform from the controls located on the side of the vehicle. There were no controls in the cab of the truck.

¶38. Oscar Brown, a former MDOT employee, testified that he had previously operated the platform truck in an effort to push over dead trees. He could not testify that he placed the platform on the tree that fell on the Ryalses' vehicle. Brown, however, did testify that when he operated the platform in an effort to push down a tree that he used the levers on the side of the vehicle to maneuver the platform.

¶39. There was no evidence to suggest that the MDOT vehicle was in transit or was involved in any mode of transportation. There was no evidence that an MDOT employee was behind the steering wheel or that the vehicle's engine was running. There was no evidence that an MDOT employee was driving or using the vehicle for any purpose related or incident to transportation. Instead, the vehicle was stationary. The vehicle's purpose, at the time in question, was to allow the

MDOT employees to maneuver the equipment permanently attached, i.e., the lift platform, for purposes that bore no relation to transportation services.

¶40. There are several Mississippi cases that have expanded the definition of "use" to include activities that are incident to the transportation function of the vehicle. In *Stevens v. U. S. Fidelity & Guaranty Co.,* 345 So. 2d 1041, 1043 (Miss. 1977), the court held that "[w]hether or not an injury arises from the use of a vehicle within the meaning of the statute depends upon the facts of each case." Stevens was a wrecker operator. His duties required that he respond to calls by driving to the scene of an accident to remove a disabled vehicle. *Id.* at 1042. Stevens responded to a call to pick up a truck that had been involved in an accident. He attached the damaged truck to his wrecker and removed it from the highway. Stevens then got out of his wrecker to sweep the accident debris off the highway. He left his wrecker motor running and all emergency lights on. *Id.* After he finished removing the debris, Stevens started walking back to his wrecker when he was hit by an uninsured motorist. He was approximately six to eight feet from his wrecker when he was hit. *Id.* The supreme court held that Stevens had not abandoned the use of his wrecker and his injuries were incurred from the use of his wrecker. *Id.* at 1044.

¶41. In *Harris v. Magee,* 573 So.2d 646 (Miss.1990), a construction company employee was driving a self-propelled crane to a job site when the crane encountered mechanical difficulties. Magee, also employed by the construction company, was following the crane, stopped and crawled under the crane to try to repair it. *Id.* at 648. As Magee crawled from under the crane, he was hit and killed by an uninsured motorist. Magee's wrongful death beneficiaries brought suit to recover uninsured motorist benefits from the construction company's insurance carrier. The supreme court held that coverage was available and found that Magee was performing duties directly related to the use of the insured vehicle when struck by the uninsured motorist. *Id.* at 651.

¶42. In both *Stevens* and *Harris*, the person injured had only recently exited a vehicle that was still accessible. Neither of these cases are on point with the instant case. Here, we consider whether the operation of equipment permanently attached to an uninsured vehicle can constitute the "use" of that vehicle. I find no Mississippi precedent on this issue.

¶43. In *Progressive Cas. Ins. Co. v. Yodice,* 180 Misc.2d 863, 866-67, 694 N.Y.S.2d 281, 283-84 (N.Y. Sup. Ct. 1999), the court held:

> Not every accident involving an automobile concerns the use or operation of that vehicle. The accident must be connected with the use of the automobile qua automobile. The use of the automobile as an automobile must be the proximate cause of the injury. [citations omitted]. The inherent nature of an automobile is to serve as a means of transportation to and from a certain location. [citation omitted]. The accident in question did not arise out of the use or operation of the truck as a truck, i.e., as a means of transportation; it arose out of the operation of a business operating a ride, which happened to be permanently secured to the back of a stationary vehicle.

¶44. In *D & M Logging Co. v. Huffman,* 427 S.E.2d 244, 247 (W.Va. 1993), the court held that the "[u]se of the crane is not 'operation, maintenance or use of a *covered auto*' because the definition of an 'auto' specifically excludes coverage of the crane." The court determined that the only relationship to the automobile insurance policy was the allegation that one of D & M's employees negligently loaded logs onto a truck. The court concluded that the language of the insurance policy, considered with the statutorily required policy language, did not extend coverage to the circumstance where the claim is based on the insured's employee negligent loading of logs by use of a mechanical device attached to the covered vehicle. *Id.*

¶45. The majority has expanded the definition of "use" beyond the Alfa policy or the Mississippi uninsured motorist statutes. The Alfa policy defined "use" as the "actual manual and physical driving of a car." It is clear from this definition that "use" required someone to be driving the vehicle for some type of transit or transportation purpose. I am of the opinion that the trial court erred, as a matter of law, in its determination that there was sufficient evidence for the jury to

conclude that the accident arose from the use of the MDOT vehicle. I would reverse and render on this issue.

B. Whether the Ryalses' deaths were caused by an accident that arose from the use of an uninsured vehicle?

¶46. Even if we accept that the accident arose out of the use of an uninsured vehicle, we must then consider the question of causation, i.e., whether the Ryalses' deaths were caused by an accident which arose from the use of an uninsured vehicle.

¶47. The seminal case on this issue is *Merchants Company v. Hartford Accident & Indemnity Company*, 187 Miss. 301, 188 So. 571 (1939). A Merchants Company delivery truck ran off a road into a ditch. The Merchants Company's agents or employees used several large poles to remove the truck from the ditch and left without removing the poles. Later that evening, an individual was injured when his vehicle collided with the poles that had been left. The issue before the court was whether the accident arose out of the operation, maintenance or use of an automobile. *Id.* at 572. The court held:

> Our conclusion, under a policy such as is here before us, is that where a dangerous situation causing injury is one which arose out of or had its source in, the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation,--which is to say, that the event which breaks the chain, and which, therefore, would exclude liability under the automobile policy, must be an event which bears no direct or substantial relation to the use or operation; and until an event of the latter nature transpires the liability under the policy exists.
>
> Certainly the use of the poles to extricate the truck from the roadside ditch was an event which arose out of, transpired in, and was necessary to, the operation of the truck. The use of the poles in extricating the truck was a part and parcel of the operation of the truck. The next event which happened was that the truck drove away, leaving the poles in the road, but the poles were not left until the moment when the truck drove away. There was no intervention of something which had no direct or substantial relation to the use or operation.
>
> The use of the poles in extricating the truck and thence the driving away and leaving the poles in the road thus had such a direct and substantial relation or connection in

> point of actual fact as respects the use and operation of the truck that in order to separate that use or break its continuity, we must interpose or insert, not an independent act, there being none such, but the negligent omission to remove the poles from the road, which, if allowed, would be to insert or interpolate into the contract a provision that liability shall follow only as to a strictly proximate cause; and, under familiar rules, we cannot rewrite the insurance contract by interpolating that provision therein.

Id. at 572. Thus, the court held that the failure to remove the poles was not an intervening cause, so there was coverage under the automobile policy. *Id.* at 572.

¶48. The supreme court considered this issue again in *Jackson v. Daley*, 739 So. 2d 1031 (Miss. 1999). In *Jackson*, an individual was killed in an accident on a one lane gravel road maintained by Jefferson Davis County. *Id*. at 1034 (¶ 4). Earlier that day, a county road crew unloaded three piles of dirt on the shoulder of the road. *Id.* at (¶ 5). The claimants asserted that Jackson's fatal accident was caused by Jackson either colliding with one of the piles or in an effort to avoid the piles of dirt. *Id.* The court considered whether the county's automobile insurance covered the accident. *Id.* at 1040-41 (¶ 37). The court stated the controlling legal principle as follows:

> When a policy insures an automobile for the "use" of the automobile, the chain of causation between the use of the automobile and the injury must be direct. *National Mut. Cas. Co. v. Clark*, 193 Miss. 27, 7 So. 800, 803 (1942). We will not extend coverage if the use of the automobile is within the line of causation, but is distinctly remote. *Merchants Co. v. Hartford Accident & Indem. Co.*, 187 Miss. 301, 188 So. 571 (1939).

Jackson, 739 So. 2d at 1041 (¶ 40). The supreme court held that leaving the dirt near the side of the road was "not so remote as to bear no direct or substantial relation to the use or operation of the dump truck in this case. There was no intervening cause here to break the chain of responsibility." *Id.* at 1042 (¶ 42).

¶49. There was no evidence of any direct contact between the MDOT vehicle and the Ryalses' vehicle. There was no evidence that the MDOT vehicle was used to push against the tree at the time that the tree fell.

¶50. The tree in question had been dead for some time both before the MDOT vehicle used its platform to apply force or pressure or before the tree fell. Neither of the expert witnesses testified that the tree fell as a direct result of the force or pressure applied by the equipment attached to the MDOT vehicle. Instead, they both agreed that trees begin to rot and decay as soon as they die. After the tree fell, all inspections indicated that the tree was infested by insects as well as in an advanced state of rot and decay. Nevertheless, the tree remained standing for several months after the platform of the MDOT vehicle applied force or pressure to try to push it down.

¶51. The evidence in dispute was from the expert testimony. The Ryalses presented a forestry expert who testified that the force or pressure applied allowed further insect infestation, rot or decay, which weakened the condition of the dead tree. Alfa's forestry expert testified to the opposite conclusion. Both experts testified that the rain and wet conditions also contributed to the timing of the tree's fall.

¶52. While the use of the MDOT vehicle's equipment may have been within the line of causation, any such use was distinctly remote in both time and actual force or pressure applied. Accordingly, under *Merchants Company* and *Jackson*, we should not extend coverage where the use of the automobile was within the line of causation, but was distinctly remote. Accordingly, I would reverse and render.

BRIDGES AND SOUTHWICK, PJJ., JOIN THIS SEPARATE OPINION.