IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
THIRD DISTRICT

APPEAL CASE NO.: 3D24-0245

L.T. CASE NO.: 2021CA000572

JULIANNA CHARLES, as Personal Representative of the Estate of JOSUE CALA, deceased, *et al*

Appellant/Defendant,

vs.

PROGRESSIVE EXPRESS INSURANCE COMPANY, an Ohio Corporation.

Appellee/Plaintiff.

APPELLEE'S ANSWER BRIEF

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Preface

This Answer Brief is submitted on behalf of Appellee/Plaintiff, Progressive Express Insurance Company.

Julianna Charles, As Personal Representative of the Estate of Josue Cala, is referred to as Defendant, Appellant, or "Charles." Yokoyama Corporation is referred to as Defendant or Yokoyama. XPO Last Mile Inc., defendant in the lower tribunal is referred to as "XPO Last Mile." XPO Logistics, LLC, defendant in the lower tribunal is referred to as "XPO Logistics." Francisco Javier Guerrero Romero, defendant in the lower tribunal is referred to as "Mr. Romero." Marcelo Alejandro Munoz, defendant in the lower tribunal is referred to as "Mr. Munoz"

The following symbols will be used:

"R. ___" references are to the Record on Appeal.

"S.R. ___" references are to the Supplemental Record on Appeal, which is Appellee's Motion to Supplement the Record, filed on August 7, 2024, pursuant to this court's August 26, 2024 Order and refers to PDF pagination numbers 1-34 and then cites to the page/line of the transcript.

"S.R.2.___" references are to the Second Supplemental Record on Appeal which is Appellee's Second Motion to Supplement Record

filed on September 27, 2024, which includes the deposition transcript of Douglas Ingle conducted on June 14, 2022; the deposition transcript of Marcelo Munoz conducted on February 24, 2022; and the deposition transcript of martin Yokoyama conducted on November 10, 2021. and Notice of Non-Objection filed on October 7, 2024 and refers to PDF pagination numbers 1-185 and then cites to the page/line of the transcript.

Unless otherwise indicated, all emphasis is supplied by the writer.

Statement of Case and Facts

This case involves an action for declaratory judgment wherein Progressive requested the trial court determine that the motor carrier, Yokohama Corporation ("Yokoyama") involved in the June 5, 2018, accident was not operating as a "for hire motor carrier operating a motor vehicle transporting property in interstate or foreign commerce"[1], therefore the Form MCS-90 endorsement in Yokoyama's policy mandated by the Federal Motor Carrier Act financial responsibility requirements is not triggered by the accident. (R. 502). There is no dispute that there is no coverage under the policy's term, but rather the appeal focuses on whether the subject accident took place during an intrastate or interstate trip to determine application of the MCS-90 endorsement to guarantee a minimum level of coverage.

Progressive issued a Commercial Auto Insurance policy under Policy No. 03809146-2 to Appellant/Defendant, Yokoyama Corporation ("Yokoyama"), a Motor Carrier, for the policy period from June 3, 2018 to June 3, 2019. (R. 887-967). The Policy was in full force and effect on June

[1] 49 C.F.R. § 387.3(a)

5, 2018. (R. 888-889). XPO Last Mile, Inc.,[2] is named as an Additional Insured on the subject policy. (R. 891).

The insurance policy contains the required Form MCS-90 Endorsement. (R. 964-965). The MCS-90 endorsement at issue is titled:

FORM MCS-90 ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

(R. 964). The MCS-90 endorsement provides coverage up to $750,000.00 for public liability resulting from the negligence of the motor carrier arising from the operation of a motor vehicle that transports property in **interstate** commerce. (R. 964-965). The MCS-90 endorsement provides:

> The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Motor Carrier Safety Administration (FMSCA).

[2] XPO Last Mile, Inc., and XPO Logistics, are named Defendants. On June 5, 2018, at the time that this accident occurred, the parent company was XPO Logistics and the subsidiary company was XPO Last Mile, but since then the name has changed a few times. XPO Last Mile was a division of XPO Logistics. They eventually changed the name to just XPO Logistics in order to not cause confusion. (S.R.2. 5, Depo of Ingle, Pg. 8:15-9:20)

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere.
> …

(R. 965)

On June 5, 2018, Yokoyama was contacted by XPO Logistics, to pick up merchandise from the Lowe's retail store #1792 located at 1851 N Federal Hwy, Pompano Beach, Florida 33062 ("Lowe's Pompano Beach" or "retail store #1792") for multiple local deliveries. (S.R.2. 154, Depo Yokoyama, Pg. 9:9-11; S.R.2. 5, Depo of Ingle, Pg. 13:25-14:24; S.R.2. 123, Exhibit 5; R.110-1165;). Yokoyama entered a Delivery Service Agreement with XPO Last Mile, Inc. (S.R.2. 154 Depo Yokoyama, Pg. 9:18-24; See S.R.2. 5 Depo of Ingle, Pg. 11:2-12, Exhibit 3(103). On June 5, 2018, XPO hired Yokoyama to pick up appliances from the Lowe's store in Pompano Beach, Florida, and deliver those appliances to customers located in Florida. (S.R.2 5, Depo Ingle, Pg. 14:20-24, see also S.R.2 123, Exhibit 5 attached to Ingle deposition).

Mr. Munoz owned the 2006 International truck that was used by Yokoyama to make local deliveries for Lowe's, including on June 5, 2018. (S.R.2. 132, Munoz depo, Pg. 6:15-8:4). Mr. Munoz testified:

> Q. I mentioned in the beginning of this deposition, the accident of June 5, 2018, which you said you were familiar with. That accident involved a 2006 International truck. Did you own that truck?
> A. Yes.
> Q. So that truck was used by Yokoyama Corporation to make deliveries to Lowe's?
> A. Yes. I would rent it out to him.

(S.R.2. 132, Depo Munoz, pg. 8:5-12; see also Pg. 16:4-22). Mr. Munoz rented the truck to Yokoyama on a weekly basis. (S.R.2. 132, Depo Munoz, Pg. 9:5-9).

On June 5, 2018, Martin Yokoyama contacted Sele Transportation to pick up items from Lowe's Pompano Beach and deliver items to customers in various cities in South Florida. (S.R.2. 154, Yokoyama depo, Pg. 9:9-10:12; S.R.2. 5, Ingle Depo, Ex. 5). Martin Yokoyama testified that Mr. Munoz owned the truck and rented the trucks to Sele Transportation. (S.R.2. 154, Depo of Yokoyama, Pg. 11:2-8). Francisco Javier Guerrero Romero ("Romero") was the driver of the truck involved in the June 5, 2018 accident and was employed by Sele Transportation. (S.R.2. 154, Depo Yokoyama, Pg. 11:9-17).

The truck that was involved in the accident on June 5, 2018, was garaged at the Lowe's Pompano Beach store #1792 when not in use. Mr. Munoz testified:

> Q. The truck that was involved in the accident, where was that truck garaged?
> A. The trucks are stored at the location at the stores and at that time it was open.
> Q. Whose stores?
> A. Lowe's.
> Q. So that's where the 2006 International was stored at a Lowe's location?
> A. Yes. It was always parked there because that's where we would load - - **at the Pompano store but it would stay there because that's where we load**.

(S.R.2. 132, Munoz Depo, pg. 11:11-21).

Mr. Munoz testified that on June 5, 2018, the 2006 International truck was used to make deliveries for Lowe's with the pickup from the Lowe's Pompano Beach retail store #1792. (S.R.2. 132, Munoz depo, Pg. 14:3-6). Mr. Munoz testified that the truck was used only for deliveries in the southeast area of Florida, never beyond West Palm Beach. Mr. Munoz testified:

> Q. …The truck you leased to Mr. Yokoyama or the company Yokoyama Corporation, was that truck used only in the state of Florida or was it ever used out of state?
> A. No, no, no. That truck was always here. It's always been here. We actually just keep them locally and they never left the Miami area. And when

> I mean Miami area, they wouldn't go past West Palm beach of or far south as Key West. They were always local.

(S.R.2. 132, Depo Munoz, Pg. 17: 23-18:6)

All trips made by Yokoyama to deliver appliances for Lowe's took place within the State of Florida, including the June 5, 2018, Pompano Beach Lowe's deliveries. Martin Yokoyama testified:

> Q. The deliveries that you contracted for that were being made for Lowe's, were all of these deliveries made within the State of Florida?
> A. Yes.
> Q. And the Lowe's itself from which the deliveries were made is also located in the State of Florida; correct?
> A. Correct.

(S.R.2. 154, Depo Yokoyama, Pg. 20:3-10)

> Q. The deliveries that were being made on the day of this accident on June 5, 2018, by the 2006 truck being operated by Mr. Romero, were they being made to customers in Broward County?
> A. Most probably, yes.

(S.R.2. 154, Depo Yokoyama, Pg. 20:23-21:2).

Because XPO brokered to Yokoyama to transport goods intrastate, i.e., pickup from Lowe's Pompano Beach store and deliver to customers in Florida, Yokoyama was not operating as a for hire motor carrier operating a motor vehicle transporting property in interstate commerce; therefore, the Form MCS-90 endorsement in Yokoyama's policy mandated by the Federal

Motor Carrier Act financial responsibility requirements does not trigger for the June 5, 2018, accident and Progressive filed a Motion for Summary Judgment. (R. 872-967, 1187).

In opposition to Progressive's Motion for Summary Judgment, Appellant filed the affidavit of Troy Ryzek, Assistant Planning Manager for Lowe's. (R. 1104-1105). Mr. Ryzek does not dispute the trip at issue in this litigation began at the Lowe's Pompano Beach retail store. Instead, Charles argues and Mr. Ryzek emphasizes that all appliances being delivered on June 5, 2018 from Lowe's Pompano Beach store #1792, were "new" and arrived at the Lowe's Pompano Beach store #1792 from out-of-state either directly from a Lowe's vendor, or from a Lowe's distribution center. (R. 1104-1105). Each loading ticket attached to Mr. Ryzek's affidavit is from Lowe's retail store #1792 in Pompano Beach Florida with a delivery within the State of Florida. (R. 1104-1165).

Progressive's Motion for Summary Judgment was heard on December 21, 2023. (S.R. 5). On January 11, 2024, the trial court issued an Order granting Plaintiff's Motion for Final Summary Judgment/Motion for Default Judgment. (R. 1400-1413). Ultimately the trial court determined that Yokoyama was not engaged in interstate transport at the time of the accident. (R. 1400-1413).

On January 25, 2024, the trial court entered a Final Judgment for Plaintiff Progressive Express Insurance Company and Against Defendants pursuant to the Order Granting Progressive's Motion for Final Summary Judgment. (R. 1420-1422). The trial court ruled: (1) the subject insurance policy does not provide bodily injury coverage as a result of the June 5, 2018 accident; (2) that at the time of accident, Yokoyama Corporation was not engaged in interstate commerce and the MCS-90 Endorsement was not triggered; (3) Progressive has no duty to indemnify under either the insurance policy or the MCS-90 endorsement for any damages awarded to Julianna Charles as Personal Representative of the Estate of Josue Cala in the underlying Circuit Court case; and (4) Progressive has no duty to defend Yokoyama, XPO Last Mile Inc., XPO Logistics, LLC, or Lowe's Home Centers, LLC in the underlying litigation. (R. 1420-1422).

On February 7, 2024, Appellants filed their Notice of Appeal. (R. 1415-1416).

Summary of Argument

This court should affirm the trial court's Order granting Progressive's Motion for Final Summary Judgment because the trial court correctly applied the "trip specific" approach to determine the application of the MCS-90 endorsement. The undisputed evidence shows that on June 5, 2018, **at the time of the accident,** the motor carrier was engaged in a **purely intrastate** trip, having picked up goods from Lowe's Pompano Beach retail store #1792 for multiple local deliveries that same day.

There is no evidence that the purely intrastate trip was a leg of a coordinated and continuous interstate journey. There was no continuity of movement or coordination between various unidentified shipments of merchandise delivered to Lowe's Pompano Beach store #1792 and the June 5, 2018, local deliveries from store #1792. There is no evidence how, when or where shipments of merchandise arrived at store #1792, any evidence of any shippers' intent and all evidence shows only that the June 5, 2018, transport began at store #1792 and making only local deliveries, nothing more. There is no evidence of any practical continuity of movement in interstate travel. There is no evidence of coordination between the interstate and intrastate transportation provided. There is no disputed issue

of fact and the MCS-90 Endorsement does not apply to this accident as a matter of law.

Charles argues that the trial court applied the wrong standard when it applied the federal majority "trip specific" approach instead of the minority "fixed and persisting intent" approach to determine whether the MCS-90 Endorsement applies to the subject accident. However, Charles' argument fails as a matter of law. Charles relies on contextually distinguishable caselaw that analyzes the Federal Labor Standards Act (FLSA), the Motor Carrier's Act (MCA) and the practical continuity of movement between the intrastate segment and the overall interstate flow to determine whether employers are exempt from paying overtime wages to drivers, not the "fixed and persisting intent" that a minority of federal courts apply when analyzing the application of the MCS-90 endorsement.

Charles contends that Mr. Ryzek's affidavit creates a question of fact whether the truck involved in the accident was transporting new merchandise that originated from out-of-state at some point in time, arguing that the trip was simply a leg in the continuous stream of interstate transport. Charles argument misses the mark. The issue is not whether a piece of merchandise was at one time in the stream of interstate commerce. That much could be said of nearly any piece of merchandise

sold by Lowe's at any of its retail stores. Rather, it is whether the injury in question occurred during a trip where the truck was operating in interstate commerce. There is no evidence that the June 5, 2018, trip was part of a continuous stream of interstate commerce, rather the evidence shows the accident took place during the specific trip which began at point A, Lowe's Pompano Beach retail store #1792, to multiple local delivery points, purely intrastate.

Standard of Review

Standard of Review is de novo of a trial court's order granting final summary judgment. See *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla. 2000).

Summary Judgment and Burden of Proof

The burden is on the insured to prove that the insurance policy covers a claim against it. See *E. Fla. Hauling, Inc., v. Lexington Ins. Co.*, 913 So.2d 673, 678 (Fla. 3d DCA 2005). "In Florida it will no longer be plausible to maintain that 'the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised.'" *In re Amendments to Fl. Rule of Civil Procedure 1.510*, 317 So.3d 72, 76 (Fla. 2021).

Under the federal summary judgment standard that is now applicable in Florida state courts, where the nonmoving party bears the burden of proof on a dispositive issue at trial, the moving party need only demonstrate that there is an absence of evidence to support the nonmoving party's case. See *Rich v. Narog*, 366 So.3d 1111 (Fla. 3d DCA 2022). "Under the new standard, once the moving party satisfies this initial burden, the burden then shifts to the nonmoving party to make a showing

sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Id* citing *Celotex Corp.*, 477 U.S. 317, 322 (1986). Specifically, it is incumbent upon the nonmoving party to come forward with evidentiary material demonstrating that a genuine issue of fact exists as to an element necessary for the non-movant to prevail at trial. *Id*. at 324.

In the present case, Progressive demonstrated the absence of any disputed issue of fact, showing that the transport at the time of the accident was purely intrastate, there was no continuity of interstate commerce and no coordination between interstate and intrastate transport. The burden was on Charles to show that the driver was engaged in interstate commerce at the time of the accident. Charles relies solely on the affidavit of Mr. Ryzek. Mr. Ryzek's statement does not present a sufficient disagreement as to whether the transport was interstate at the time of the accident because the only thing that Mr. Ryzek attests is that Lowe's merchandise at some time in the past came from out-of-state. According to the rules of civil procedure, "a party asserting that a fact…is genuinely disputed must support that assertion by…citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those

made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fla. R. Civ P. 1.1510(c)(1)(A).

There is no evidence of when, where or how products were shipped to retail store #1792, no evidence of how long merchandise sat at retail store #1792, and no evidence of continuity of interstate commerce. Charles failed to present a disputed issue of fact.

Argument

I. THE MCS-90 ENDORSEMENT IS NOT APPLICABLE TO THE CLAIM

A. The trial court correctly Adopted the Trip Specific Test when Analyzing the Application of the MCS-90 Endorsement

The MCS-90 Endorsement is a means of complying with federal insurance regulations for motor carriers. *Nat'l Spec. Ins. Co. v. Martin-Vegue*, 644 Fed.Appx. 900 (11th Cir. 2016). The Motor Carrier Act of 1980 addresses financial responsibility for trucking accidents in interstate commerce. 49 U.S.C.A. § 13906(a); see also *Nat'l Spec. Ins. Co. v. Martin-Vegue*, 644 Fed.Appx. 900, 906 (11th Cir. 2016). The Secretary of Transportation requires a motor carrier endorsement form known as the MCS-90 endorsement. See 49 C.F.R. § 387.15. It applies, with exceptions, to "for-hire motor carriers operating motor vehicles transporting property in

interstate or foreign commerce." 49 C.F.R. § 387.3. See also 49 U.S.C.A. § 13501(1).

Whether the MCS-90 endorsement applies to the accident is a matter of federal law. See *Northland Ins. Co. v. Top Rank Trucking of Kissimmee, Inc.*, 2013 WL 12361936 *6, Case No: 6:11-cv-1126-Orl-22TBS (M.D. Fla. January 29, 2013) relying on *Lincoln Gen. Ins. Co. v. De La Luz Garcia*, 501 F.3d 436, 439 (5th Cir. 2007)("The operation and effect of a federally mandated endorsement is a matter of federal law."); see also *John Deere Ins. Co. v. Nueva*, 229 F.3d 853, 856 (9th Cir. 2000).

Most federal courts[3], including the Eleventh Circuit, adopt the majority "specific trip" approach to determine the applicability of the MCS-90 endorsement which analyzes whether the vehicle is engaged in interstate commerce at the time of the loss. See *Martin-Vegue*, 644 Fed.Appx. at 907 fn9 (11th Cir. 2016). In *Martin-Vegue*, the time of the accident was the relevant focal point in deciding the motor carrier's status for purpose of

[3]*Martinez v. Empire Fire and Marine Ins. Co.*, 322 Conn. 47, 58 (Conn. 2016)("The Second Circuit has embraced the trip specific interpretation that the motor carrier's vehicle must be operating in interstate commerce at the time of the accident for the endorsement to apply."); *Canal Ins. Co. v. Coleman*, 625 F.3d 244 (5th Cir. 2010)(The Fifth Circuit has interpreted the statute most narrowly, holding that "the MCS-90 endorsement covers vehicles only when they are presently engaged in the transportation of property in interstate commerce.")

triggering the MCS-90. *Id*. The Fifth Circuit, in *Canal Ins. Co. v. Coleman*, 625 F.3d 244, 251 (5th Cir. 2010) applied the "specific trip" approach to determine the application of the MCS-90 endorsement. "Other courts have varied as to whether they determine the MCS-90's application at the time of the loss, but ours appears to be the majority approach." *Id.*

In *National Independent Truckers Ins. Co. v. Mathieu*, 2017 WL 478 5455 *2-3, Case No: 8:16-cv-3081-T-27TGW (M.D. Fla. October 17, 2017), the unreported driver of a tractor-trailer was involved in a car accident, and at the time of the accident he was delivering a load from Kissimmee to Pompano Beach Florida. *Id* at *1. The shipment was entirely within the state of Florida. *Id*. The truck owner argued that the truck was otherwise engaged or intended to engage in foreign and interstate commerce. *Id.* The Middle District Court of Florida rejected this argument reaffirming the Eleventh Circuit's use of the "trip specific" approach recognizing that the "at the time of the accident" analysis is the majority approach and granted summary judgment to the insurer finding the MCS-90 did not apply to the purely intrastate transport at the time of the accident.

In *Northland Ins. Co. v. Top Rank Trucking of Kissimmee, Inc.*, 2013 WL 12361936 *6, Case No: 6:11-cv-1126-Orl-22TBS (M.D. Fla. January 29, 2013), the district court judge held, "To be covered by the MCS-90 at the

time of the accident…Hines would have to be using a motor vehicle to provide services related to the movement of property across state lines in exchange for compensation." See also *New Hampshire Ins. Co. v. Champion*, 2013 WL 12156445 *26, Case No: 6:12-cv-1832-Orl-22GJK (M.D. Fla. November 26, 2013).

Florida appellate courts have also recognized and applied the majority federal "trip specific" approach to determine the application of an MCS-90 Endorsement. In *Branson v. MGA Ins. Co., Inc.*, 673 So.2d 89, 90-91 (Fla. 5th DCA 1996), the court held, "The statutes and federal regulations direct us to the conclusion that the coverage afforded specifically by an ICC endorsement does not apply to a purely intrastate haul of products over which the ICC expressly has no jurisdiction." In *General Sec. Ins. Co. v. Barrentine*, 829 So.2d 980, 983-984 (Fla. 1st DCA 2002), the appellate court specified, "The issue is not whether a truck might be used for an interstate shipment in the future. That much could be said of nearly any tractor-trailer rig. Rather, the issue is whether the injury in question occurred while the truck was operating in interstate commerce."

In *Lyles v. FTL Ltd., Inc.*, 339 F.Supp.3d 570, 575, Civil Action No. 2:17-cv-01974 (S.D. W.Va. September 11, 2018), the district court determined the MCS-90 did not apply because the dump truck was

engaged in an intrastate trip at the time of the accident, applying the "trip-specific" approach.

> Indeed, this is the "majority approach." Under this approach, the MCS-90 endorsement covers vehicles only when they are presently engaged in the transportation of property in interstate commerce. The endorsement does not provide compensation for every accident involving a motor vehicle operated by a motor carrier or private motor carrier.

Id. at 576.

The Eleventh Circuit Court of Appeals, the majority of federal courts and the lower court in this case, applied the "trip specific" approach to determine whether the MCS-90 is triggered. At the time of the accident, Mr. Romero was transporting merchandise from Lowe's Pompano Beach retail store #1792 to multiple local deliveries. Its route was entirely intrastate. It did not travel "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.A. § 31139(b). At the time of the accident, the truck was not subject to the financial responsibility requirements of 49 U.S.C.A. § 31139. The MCS-90 endorsement does not apply to the accident at issue in this case.

B. Charles' reliance on a string of FLSA cases does not support the application of the "fixed and persisting intent"

approach when determining the application of the MCS-90 Endorsement.

Charles argues that the Eleventh Circuit Court of Appeal adopted the minority "fixed and persisting intent" approach when determining whether an intrastate trip constitutes interstate commerce relying on *Abel v. S. Shuttle Servs., Inc.*, 631 F.3d 1210, 1215 (11th Cir. 2011), *Walters v. American Coach Lines of Miami, Inc.*, 575 F.3d 1221 (11th Cir. 2009), *Mena v. Mcarthur Dairy, LLC*, 352 Fed.Appx. 303 (11th Cir. 2009), *Harris v. Performance Transportation, LLC*, Case No. 8:14-cv-2913-T-23-AAS, 2016 WL 7666177 (M.D. Fla. July 11, 2016), and *Ehrlich v. Rich Products Corp*, 767 Fed.Appx. 845 (11th Cir. 2019).

However, all of these cases address whether an employer violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, by not paying overtime wages.[4] In that context, the Eleventh Circuit, in applying the trip-specific approach, provided the general rule that "trips within a single state are made in interstate commerce when they are part of a practical continuity of movement of goods in interstate commerce" not the minority "fixed and persisting intent" approach as argued by Charles herein. See

[4] Exemptions under the FLSA are construed narrowly against the employer, and the employer bears the burden of showing entitlement to the exemption. See *Abel*, 631 F.3d 1210, 1212 (11th Cir. 2016).

Abel v. Southern Shuttle Services, Inc., 631 F.3d 1210, 1215 (11th Cir. 2011).

In *Abel*, the court held that a shuttle company that transported individuals to and from several Florida airports without leaving the state engaged in interstate commerce excluding employers from having to pay overtime wages under the Fair Labor Standards Act. *Id*. at 1216. Several conditions were critical to the analysis: (1) the shuttle passengers had mostly flown from or were about to fly to other states or countries; (2) travelers often boarded these shuttles with tickets purchased in packages that included airfare and hotel accommodations; and (3) these packages resulted from an arrangement between the shuttle company and only travel companies. *Id*. at 1216-17. The *Abel* court also cited case law that held "the lack of coordination with other transportation" providers could render a journey "purely intrastate." *Id.* at 1216 (citing *Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246, 258 (3d. Cir. 2005). Despite Charles' argument, the court in *Abel* applied the specific trip approach, albeit in a different context, not the minority "fixed and persisting intent" approach when analyzing application of the MCS-90.

In the present case, unlike in *Abel*, the relevant trip at the time of the accident was purely intrastate and there was no practical continuity of

movement or evidence of coordination between transportation providers. First, regarding the practical continuity of movement, the undisputed facts show that Mr. Romero's route was from Lowe's Pompano Beach store #1792 for local delivery. Charles argues that all Lowe's retail store #1792 merchandise originates, at some point, from out of state and this creates an issue of fact whether the June 5, 2018 deliveries were part of a continuous stream of commerce. Charles argument is not supported by record evidence or case law.

Charles does not identify any record evidence that shows continuity or coordination between interstate and intrastate transport of any of the merchandise that was being delivered on June 5, 2018. Charles does not identify any record evidence showing when, where or how any of the products being transported at the time of the accident were originally shipped to retail store #1792. There is no record evidence that demonstrates that Yokoyama or Sele Transportation coordinated with any other motor carrier or carrier of that property to continue a direct out of state trip to a local address.

There is no evidence that the June 5, 2018, trip was merely one leg of a continuous interstate journey. Such a finding would massively expand activities that fall within interstate travel, rendering every local delivery from

every Lowe's retail store interstate commerce. Charles argued at the summary judgment hearing, "it is the definition of supply chain. We can drag the supply chain off to Korea where many of these appliances were actually manufactured…." (S.R. 5, MSJ Tr. Pg. 23:9-11). In the present case, there is no practical continuity of movement between unidentified/unknown out-of-state shipments of merchandise to Lowe's Pompano Beach retail store #1792 and the June 5, 2018, local deliveries, being made at the time of the accident.

Second, and related to the practical continuity of movement, there was no evidence of coordination between the interstate and intrastate transportation providers. The evidence in the record shows that XPO tendered to Yokoyama the local delivery of merchandise from retail store #1792. There is no evidence of any coordination between interstate shipping providers. Mr. Ryzek's affidavit does not identify any coordination between the interstate and intrastate transportation providers or intent of the shipper. There is zero evidence that the specific trip at the time of the accident was simply a leg of a coordinated interstate journey and zero evidence of practical continuity of movement. Mr. Romero's trip was purely intrastate transport. The Progressive policy's MCS-90 endorsement does not apply here.

There is no record evidence to support the minority test Charles is asking this Court to apply. Charles reliance on *Ehrlich v. Rich Products Corp*, 767 Fed.Appx. 845 (11th Cir. 2019) for the application of the "fixed and persisting intent" analysis is misplaced. In *Ehrlich*, the manufacturer of frozen ice cream cakes sought exemption under the MCA from paying overtime wages under the FLSA to its delivery drivers who picked up products at a Florida warehouse and delivered the products to Florida retail stores. In *Ehrlich*, there was evidence that showed the shipper intended to maintain the continuous interstate flow of the products through a warehouse, rather than allowing the products to languish at the warehouse, looking at 29 C.F.R. § 782.7(b)(2) and a policy statement from the Interstate Commerce Commission. *Ehrlich* at 849. In *Ehrlich*, unlike the present case, there was evidence the manufacturer/shipper intended for products to be stored at a warehouse only on a temporary basis, products were released on a first in-first out basis and shipments were made based on real-time projections of customers. *Ehrlich* at 848-849. In the present case there is no record evidence of where, when, or how shipments originated or arrived at store #1792, no evidence of how long merchandise sat at retail store #1792, and no evidence of continuity of interstate commerce.

Charles reliance on *Mena v. Mcarthur Dairy, LLC*, 352 Fed.Appx. 303 (11th Cir. 2009) for the proposition that products delivered on June 5, 2018, originated at some point from out of state is evidence of fixed and persistent intent of continuity of stream of interstate commerce is misplaced. In *Mena*, when analyzing whether an employer was exempt from paying overtime wages to delivery drivers, there was evidence that the manufacturer/shipper delivered dairy and other refrigerated products to its Miami warehouse, the property transported was perishable and usually of a reasonably short shelf-life, pre-packaged and not modified once it reached the warehouse, products were distributed to customers based on standing orders and customers' projected needs. *Id.* at 307. In the present case, unlike in *Mena*, there is no evidence of when, where or how products were shipped to retail store #1792, originated or arrived at retail store #1792no evidence of how long merchandise sat at retail store #1792, and no evidence of continuity of interstate commerce.

Charles reliance on *Harris v. Performance transportation, LLC*, Case No. 8:14-cv-2913-T-23-AAS, 2016 WL 7666177 (M.D. Fla. July 11, 2016), for applying the minority fixed and persisting intent at the time of the shipment is misplaced. In *Harris*, unlike the present case, delivery drivers sought unpaid overtime wages claiming their deliveries from a Florida

warehouse to Florida customers was intrastate and employers were not exempt from paying overtime wages under the MCA. In *Harris*, unlike the present case, there was substantial conflicting evidence whether the Florida warehouse was nothing more than a temporary storage hub used to facilitate the orderly distribution of products through interstate commerce, acknowledging conflicting evidence of the length of time merchandise remained at the warehouse. In the present case, unlike in *Mena*, there is no evidence of when, where or how products were shipped to retail store #1792, the manner in which shipments originated or arrived at retail store #1792no evidence of how long merchandise sat at retail store #1792, and no evidence of continuity of interstate commerce.

The present case is analogous to *Lancer Ins. Co. v. Jet Executive Limousine Service, Inc.*, 614 F.Supp.3d 1351 (N.D. Ga. July 14, 2024). In *Lancer*, a motor coach was carrying 18 passengers when involved in a car accident in Georgia. The insurer argued the MCS-90B did not apply because the trip was solely intrastate and there was no continuity of movement in interstate commerce. *Id.* at 1358-1359. The motor carrier argued that the trip was merely one leg in an interstate trip for individuals traveling from outside Georgia to attend the Masters golf tournament in Augusta, Georgia. *Id.* at 1360. However, the court found the trip was solely

intrastate, there was no practical continuity of movement between the interstate journey to arrive in Atlanta and the intrastate journey from the Atlanta hotel to Augusta. *Id*. at 1360. “In essence, the arrival at the Atlanta hotel interrupts the Defendants’ practical continuity of movement in interstate travel.” *Id.*

In the present case, there is no evidence that shows the practical continuity of interstate movement of merchandise when it was shipped to the Lowe’s Pompano Beach retail store #1792. There is no evidence showing where, when or how shipments originated, traveled, or arrived at retail store #1792. Additionally, like in *Jet Executive*, there is no evidence of any coordination between interstate and intrastate transport of the goods. There is no disputed issue of material fact. Mr. Romero’s trip, at the time of the accident, was purely intrastate and the MCS-90 endorsement does not apply.

CONCLUSION

Based on the foregoing, this Court should affirm the trial court's Order Granting Defendant's Motion for Final Summary Judgment.

Respectfully submitted,

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Certificate of Service

WE HEREBY CERTIFY that a true and correct copy of the foregoing brief has filed via the Florida Courts E-Filing Portal and furnished via electronic mail to all counsel of record, as shown on the attached Service List, this 8th day of October 2024.

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