ATTORNEYS FOR APPELLANT

Janet G. Horvath
J. Thomas Vetne
Jones Obenchain, LLP
South Bend, Indiana

ATTORNEY FOR APPELLEES
B&T BULK LLC AND
BRUCE A. BROWN

Tracey S. Schafer
Anderson, Agostino & Keller, P.C.
South Bend, Indiana

ATTORNEYS FOR APPELLEE
ROBIN S. JOHNSON

R.T. Green
Collin W. Green
Letha A. Maier
Blackburn & Green
Indianapolis, Indiana

ATTORNEY FOR APPELLEE
STATE FARM

Lizabeth R. Hopkins
Kopka Pinkus Dolin PC
Crown Point, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Progressive Southeastern Insurance Company,
Appellant-Plaintiff,

v.

B&T Bulk LLC, Bruce A. Brown, Robin S. Johnson, as Personal Representative of the

May 4, 2021

Court of Appeals Case No.
20A-CT-1765

Appeal from the
Carroll Circuit Court

The Honorable
Benjamin A. Diener, Judge

Trial Court Cause No.
08C01-1811-CT-13

Estate of Dona S. Johnson, and Robin S. Johnson, Individually,

Appellees-Defendants,

and

State Farm Mutual Automobile Insurance Company,

Appellee-Intervenor

Vaidik, Judge.

Case Summary

[1] In 2017, an employee of an Indiana trucking company was on his way to pick up a load in Logansport when he crossed a median and collided with a car, killing the driver. Although the truck was not listed under the trucking company's insurance policy, the policy included an MCS-90 endorsement, which the federal Motor Carrier Act requires interstate motor carriers to have and which provides coverage for claims resulting from the negligent operation of a truck even if the truck is not specifically listed under the company's insurance policy. The parties filed cross-motions for summary judgment as to whether the MCS-90 endorsement applies, and the trial court found it does.

[2] On appeal, the insurance company makes two arguments that the MCS-90 endorsement doesn't apply: (1) the truck driver was on an intrastate—not interstate—trip at the time of the accident and (2) the truck wasn't carrying any property at the time of the accident. As for (1), even though the majority of

courts have held the MCS-90 endorsement only applies to the interstate transportation of property under the federal Motor Carrier Act, Indiana Code section 8-2.1-24-18(a) applies this requirement to intrastate transportation. As for (2), we find the MCS-90 endorsement applies when a truck, although empty, is on its way to pick up a load. We therefore affirm the trial court.

Facts and Procedural History

[3] B&T Bulk LLC is a Mishawaka-based motor carrier that hauls bulk cement in Indiana and Michigan. It is a registered interstate motor carrier operating under "U.S. DOT # 676788." Appellant's App. Vol. III p. 186. In 2017, B&T had a commercial auto policy ("the policy") with Progressive Southeastern Insurance Company that covered specifically listed motor vehicles in its fleet. The policy included an MCS-90 endorsement, which the federal Motor Carrier Act of 1980 requires motor carriers to have. *See Markel Ins. Co. v. Rau*, 954 F.3d 1012, 1017 (7th Cir. 2020); *Carolina Cas. Ins. Co. v. E.C. Trucking*, 396 F.3d 837, 841 (7th Cir. 2005); *Prime Ins. Co. v. Wright*, 133 N.E.3d 749, 752 n.3 (Ind. Ct. App. 2019), *trans. denied*; *see also* 49 U.S.C. § 31139(b); 49 C.F.R. §§ 387.7(a), 387.9, 387.15. The primary purpose of an MCS-90 endorsement is "to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways." 49 C.F.R. § 387.1; *see also John Deere Ins. Co. v. Nueva*, 229 F.3d 853, 857 (9th Cir. 2000) ("[T]he primary purpose of the MCS-90 is to assure that injured members of the public are able

to obtain judgment from negligent authorized interstate carriers."). The endorsement provides coverage for claims resulting from the negligent operation of a commercial vehicle even if the negligently driven vehicle is not specifically listed under the motor carrier's insurance policy. *Rau*, 954 F.3d at 1017. The minimum level of financial responsibility for motor carriers of nonhazardous property is $750,000. 49 U.S.C. § 31139(b); 49 C.F.R. § 387.9.

[4] Here, the "Form MCS-90 Endorsement," which provides $750,000 in coverage, 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).
>
> 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. . . . However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident,

> claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

Appellant's App. Vol. II pp. 147-48.

[5] On December 4, B&T sent its employee Bruce A. Brown to pick up a load of cement from Lehigh Cement in Logansport and deliver it to Kuert Concrete in South Bend. Brown drove a semi-truck and trailer (which was empty at the time) that were owned by B&T but not listed on the policy. Before arriving at Lehigh, Brown crossed a median on State Road 25 in Logansport and collided with a car driven by Dona S. Johnson, killing her. Because of the accident, B&T was subject to a Federal Motor Carrier Safety Administration (FMCSA) inspection. *See* Appellant's App. Vol. III pp. 186-87, 190, 225-26.

[6] In July 2018, Dona's husband, Robin S. Johnson, individually and on behalf of Dona's estate (collectively, "Dona's estate"), filed a wrongful-death complaint against B&T and Brown (collectively, "B&T") in Cass Superior Court. *See* Cause No. 09D02-1807-CT-22. B&T asked Progressive to defend and indemnify it. After a coverage investigation, Progressive filed an amended complaint for declaratory judgment in Carroll Circuit Court in January 2019, asking the trial court to declare (1) Progressive had no duty to defend or indemnify B&T "in any lawsuit arising out of the December 4, 2017 accident" since the semi-truck and trailer were not listed on the policy (and therefore not insured) and (2) "Progressive's exposure is limited to the extent the MCS-90

endorsement applies to the December 4, 2017 accident." Appellant's App. Vol. II p. 23.

[7] In November 2019, Progressive moved for summary judgment, arguing it had no duty to defend or indemnify B&T and the MCS-90 endorsement did not apply. The next month, State Farm Mutual Automobile Insurance Company sought to intervene. Specifically, State Farm alleged it had insured Dona at the time of the accident and had made "certain payments for medical care and property damage as a result of the December 4, 2017 accident" and "certain payments for uninsured motorist benefits to [Dona's estate] which were made based upon the denial of coverage by Progressive, and are being held in trust until the resolution of this action." Appellee's App. Vol. II p. 4. The trial court allowed State Farm to intervene.

[8] In March 2020, Dona's estate and B&T filed cross-motions for summary judgment. State Farm joined Dona's estate's motion. Following a hearing in August, the trial court determined Progressive had no duty to defend or indemnify B&T but that the MCS-90 endorsement applied.

[9] Progressive appeals the trial court's determination that the MCS-90 endorsement applies. Dona's estate, B&T, and State Farm (collectively, "the Appellees") do not appeal the trial court's determination that Progressive has no duty to defend or indemnify B&T.

Discussion and Decision

[10] We review motions for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

I. Interstate vs. Intrastate

[11] Progressive first argues the MCS-90 endorsement only applies to the interstate transportation of property and because Brown was on an intrastate trip at the time of the accident, there is no coverage. Section 30 of the Motor Carrier Act is codified at 49 U.S.C. § 31139, which provides:

> (1) The Secretary of Transportation shall prescribe regulations to require minimum levels of financial responsibility sufficient to satisfy liability amounts established by the Secretary covering public liability, property damage, and environmental restoration for the transportation of property by motor carrier or motor private carrier (as such terms are defined in section 13102 of this title) 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.

(Emphasis added); *see also* 49 C.F.R. § 387.3(a) ("This subpart applies to for-hire motor carriers operating motor vehicles transporting property in **interstate** or foreign commerce." (emphasis added)).[1]

[12] "There is a split of authority as to whether the MCS-90 endorsement applies to intrastate accidents." 1 William J. Schermer & Irvin E. Schermer, *Automobile Liability Insurance*, § 2:15 (Nov. 2020 update); *see also* Michael J. Leizerman, *Litigating Truck Accident Cases*, § 3:9 (Dec. 2020 update). However, most courts–including the federal circuit courts that have addressed the issue—have held the MCS-90 endorsement does not apply to accidents that occur during a purely intrastate trip. Under this approach, called the trip-specific approach, "the [MCS-90] endorsement covers vehicles only when they are **presently** engaged in the transportation of property in interstate commerce." *Canal Ins. Co. v. Coleman*, 625 F.3d 244, 249 (5th Cir. 2010) (emphasis added); *see also Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 60 (2d Cir. 2012) (concluding an MCS-90 endorsement did not apply because "the accident occurred on [a] trip that was **wholly** intrastate" (emphasis added)); *Martinez v. Empire Fire & Marine Ins. Co.*, 139 A.3d 611, 619 (Conn. 2016) ("We are persuaded to follow the 'trip-specific' interpretation used by the Second Circuit in *Lyons.* It is consistent with the text of the MCS-90 endorsement and the statute and regulations governing that

[1] It also applies to motor carriers operating motor vehicles in intrastate commerce if they are transporting hazardous property, 49 C.F.R. § 387.3(b), but this case does not involve hazardous property.

endorsement, and has been embraced by a majority of courts to consider the question."); *Automobile Liability Insurance*, § 2.15 (collecting cases).

[13] The Appellees respond that even if the MCS-90 endorsement only applies to the interstate transportation of property under the Motor Carrier Act, the Indiana General Assembly has applied the minimum levels of financial responsibility in 49 C.F.R. part 387 to intrastate transportation. Indiana Code section 8-2.1-24-18(a) provides, "49 CFR Parts 40, 375, 380, 382 through **387**, 390 through 393, and 395 through 398 are **incorporated into Indiana law by reference**, and . . . **must be complied with by an** interstate and **intrastate motor carrier** of persons or property throughout Indiana." (Emphases added).

[14] Whether our legislature has applied the federally required minimum levels of financial responsibility to intrastate transportation is an issue of first impression in this state. However, as the Appellees note, this Court addressed Section 18(a)'s incorporation of a different federal regulation into Indiana law by reference in *Sandberg Trucking, Inc. v. Johnson*, 76 N.E.3d 178 (Ind. Ct. App. 2017). There, a passenger in a car sued a trucking company, alleging its truck driver, who had stopped on the shoulder of an interstate after striking a deer, was negligent in failing to activate his emergency flashers as required by 49 C.F.R. § 392.22. The trucking company claimed 49 C.F.R. § 392.22 did not apply because the truck driver was not engaged in interstate commerce at the time of the accident. *Id.* at 182. On appeal, we assumed the truck driver was "engaged in exclusively intrastate commerce" and focused on Section 18(a), which incorporates 49 C.F.R. part 392 into Indiana law by reference and

provides it "must be complied with by an interstate and **intrastate** motor carrier of persons or property throughout Indiana." *Id.* at 187 (emphasis added). We held the legislature's intent was to apply the regulation to intrastate motor carriers given its explicit inclusion of "intrastate" in the statute and that to hold otherwise would be absurd. *Id.* at 188.

[15] Progressive argues *Sandberg Trucking* is "inapposite" and doesn't apply because it "addresses a motor carrier's responsibilities, not the obligations of the motor carrier's insurers, to provide coverage for liability arising from intrastate travel." Appellant's Reply Br. p. 9. However, unless an insurance contract provides otherwise, "all applicable law in force at the time the agreement is made impliedly forms a part of the agreement without any statement to that effect." *Cent. Mut. Ins. Co. v. Motorists Mut. Ins. Co.*, 23 N.E.3d 18, 22 (Ind. Ct. App. 2014), *trans. denied*; *Westfield Cos. v. Knapp*, 804 N.E.2d 1270, 1274 (Ind. Ct. App. 2004), *trans. denied*. Indeed, the policy in this case provides: "If any provision of this policy fails to conform to the statutes of the state listed on **your** application as **your** business location, the provision shall be deemed amended to conform to such statutes." Appellant's App. Vol. II p. 146. Accordingly, in order to write policies in Indiana, Progressive had to comply with Section 18(a)'s requirement that the minimum levels of financial responsibility in 49 C.F.R. part 387 apply to intrastate transportation.

[16] At oral argument, Progressive made an additional argument based on a notice of additional authorities it filed shortly before the argument. Specifically, Progressive cited Indiana Code section 8-2.1-24-17(a), which provides:

> A person may not operate a motor vehicle for the transportation of property upon a public highway, and a motor carrier may not be certified, unless the motor carrier complies with the rules adopted by the [Indiana Department of Revenue] governing the filing and approval of surety bonds, policies of insurance, qualifications of a self-insurer, or other securities or agreements.

According to Progressive, "Section 17 can't be read as the General Assembly intending to adopt the federal requirements because the General Assembly has instructed the Indiana Department of Revenue to rule make in the same area for intrastate commerce that Part 387 has already covered." Oral Arg. Video at 13:20-13:42.

[17] Progressive, however, did not cite Section 17 or make this argument in its appellant's brief. *See* Oral Arg. Video at 46:12-46:22 (B&T's attorney explaining she didn't "delve" into this issue because Progressive didn't brief it). Indiana Appellate Rule 48 provides:

> When pertinent and significant authorities come to the attention of a party after the party's brief or Petition has been filed, or after oral argument but before decision, a party may promptly file with the Clerk a notice of those authorities setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, with a parenthetical or a single sentence explaining the authority.

As this Court has explained, Appellate Rule 48 does not mean a party may present an argument that was available but not presented in their appellant's brief simply by filing a notice of additional authority. *Chupp v. State*, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005). This is because an issue not raised in an

appellant's brief may not be raised for the first time in a reply brief. *Id.* (citing *James v. State*, 716 N.E.2d 935, 940 n.5 (Ind. 1999)). Accordingly, Appellate Rule 48 does not allow "a party who failed to present an issue in his appellant's brief to bypass the general rule that un-raised issues may not be presented for the first time in a reply brief by filing a citation to additional authority." *Id.* Instead, "where a party has properly presented an issue, he may supplement his brief by providing citations to additional authority to support the argument previously raised." *Id.* Because Progressive did not make this argument in its appellant's brief, it has waived the issue.

[18] Waiver notwithstanding, even though Section 17 requires motor carriers to comply "with the rules adopted by the [Indiana Department of Revenue] governing the filing and approval of surety bonds, policies of insurance, qualifications of a self-insurer, or other securities or agreements," the Department of Revenue must regulate within the confines of Section 18(a), which requires that the minimum levels of financial responsibility in 49 C.F.R. part 387 apply to intrastate transportation. Indeed, 45 Indiana Administrative Code 16-1-2, which Progressive also cited in its notice of additional authorities, confirms that the Department of Revenue did just that:

> (a) General Filing Requirements. Every common and contract carrier of passengers and/or property for hire by motor vehicle over the highways of the state of Indiana, in **intrastate** and/or interstate commerce shall, subject to the approval of the [Public Service Commission of Indiana], file with and keep in effect and on file Uniform Motor Carrier Bodily Injury and Property Damage Liability Certificate of Insurance (commonly known as Form E Indiana) covering public liability, property damage, loss

> to cargo subject to the exceptions and minimum amounts hereinafter set out.
>
> (b) Public Liability and Property Damage Coverage. **The minimum amounts for public liability** and property damage coverage **shall be those contained in Title 49, Code of Federal Regulations, Part 387**.

(Emphases added). According to this regulation, an intrastate motor carrier must have public-liability coverage in the minimum amounts set forth in 49 C.F.R. part 387. And for nonhazardous property, that amount is $750,000. *See* 49 C.F.R. § 387.9. Contrary to Progressive's argument, this regulation is consistent with the legislature's intent in Section 18(a) that the minimum levels of financial responsibility in 49 C.F.R. part 387 apply to intrastate transportation. As in *Sandberg Trucking*, we hold the legislature's intent was to apply the minimum levels of financial responsibility in 49 C.F.R. part 387 to intrastate motor carriers given its explicit inclusion of "intrastate" in the statutes.

II. Transportation of Property

[19] Progressive next argues the MCS-90 endorsement doesn't apply because B&T "wasn't transporting property" at the time of the accident. Appellant's Br. p. 17. 49 U.S.C. § 13102(23) defines the term "transportation" as follows:

> (A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

> (B) **services related to that movement**, **including arranging for**, **receipt**, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

(Emphasis added).

[20] The parties do not direct us to any cases addressing the specific facts of this case, and we can find none. Progressive, however, cites three cases it says are similar and therefore should apply here: (1) *Canal Insurance Co. v. Coleman*, 625 F.3d 244 (5th Cir. 2010), (2) *Titan Indemnity Co. v. Gaitan Enterprises, Inc.*, 237 F. Supp. 3d 343 (D. Md. 2017), and (3) *Brunson ex rel. Brunson v. Canal Insurance Co.*, 602 F. Supp. 2d 711, 716 (D.S.C. 2007). The Appellees, also relying on *Titan*, argue B&T was transporting property at the time of the accident because Brown was on his way to pick up a load of cement.

[21] In the first case, *Coleman*, an employee of a trucking company was returning home from work. As he backed his truck (which had no trailer attached) into his driveway, he collided with a car. The sole issue on appeal was whether the trucking company's MCS-90 endorsement covered the accident. Although the Fifth Circuit said the MCS-90 endorsement "does not cover vehicles when they are not presently transporting property in interstate commerce," the court did not address whether the employee was engaged in the transportation of property because the accident victim "explicitly conceded that [the employee's] liability was not 'for the transportation of property.'" *Coleman*, 625 F.3d at 251, 252. The court noted that given 49 U.S.C. § 13102's "broad" definition of "transportation," "it [was] at least arguable that [the employee's] conduct at the

time of the accident could be termed 'transportation of property.'" *Id.* at 252. However, "because the district court accepted [the accident victim's] stipulation that it was not," the Fifth Circuit "d[id] not reach that question." *Id.*

[22] In the second case, *Titan*, a truck driver was waiting in line at an asphalt plant to fill his dump truck with a load of asphalt when a fatal accident occurred. In addressing whether an MCS-90 endorsement applied, the district court had to determine whether the truck driver was engaged in the transportation of property at the time of the accident. The court noted 49 U.S.C. § 13102(23)(B) defines "transportation" "exceptionally broadly to include 'services related to' the movement of property." *Titan*, 237 F. Supp. 3d at 348. The court found the truck driver was in the process of "receiving" the cargo he was to haul, which was explicitly included within the statutory definition of transportation. *Id.*

[23] In the last case, *Brunson*, a truck driver drove his tractor-trailer only a few miles from his home "strictly on a personal mission to sell it" when an accident occurred. 602 F. Supp. 2d at 716. In addressing whether an MCS-90 endorsement applied, the district court found the truck driver was not transporting property at the time of the accident. Specifically, the court noted the truck driver, in his deposition, answered "no" when asked "were you hauling anything when the accident . . . happened." *Id.*

[24] *Coleman* and *Brunson* do not support Progressive's argument. In *Coleman*, the Fifth Circuit did not reach the question of whether the employee was engaged in the transportation of property at the time of the accident because the accident victim stipulated otherwise. Moreover, the court said given 49 U.S.C. § 13102's

"broad" definition of "transportation," it was "arguable" the employee was engaged in the transportation of property. In *Brunson*, the truck driver was "strictly on a personal mission" when the accident occurred. Here, Brown was not on a personal mission at the time of the accident; rather, he was on his way from B&T in Mishawaka to Lehigh in Logansport to pick up a load of cement.

[25] Progressive argues *Titan* supports its argument because the truck driver in that case "was in the process of receiving the cargo he was to haul," which Brown wasn't doing. Appellant's Reply Br. p. 16. The Appellees claim *Titan* supports their argument because Brown was "en route" to pick up a load of cement. *See, e.g.*, Dona's Estate's Br. p. 14. We find *Titan* supports the Appellees' argument. Although Brown was not in line to receive the cargo he was to haul, he was on his way from B&T in Mishawaka to Lehigh in Logansport to pick it up. Once he received the load, Brown intended to transport it to Kuert in South Bend. Travel from a trucking facility to a customer location to pick up a load is a "service[] related to" the transportation of property. Accordingly, B&T was engaged in the transportation of property at the time of the accident even though its trailer was empty.

[26] We affirm the trial court's summary-judgment ruling that the MCS-90 endorsement applies.

[27] Affirmed.

Brown, J., and Pyle, J., concur.