tial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He can meet this standard if he shows that the issue " '[is] debatable among jurists, or that a court could resolve the issue[ ] differently, or that the question[ ] deserve[s] further proceedings.' " *English v. Cody,* 241 F.3d 1279, 1281 (10th Cir. 2001) (quoting *United States v. Sistrunk,* 111 F.3d 91, 91 (10th Cir.1997)).

[22] Because we have repeatedly rejected similar arguments asserted by other Oklahoma state prisoners, *e.g. Sherrill,* 184 F.3d at 1175–76 (rejecting habeas petitioner's claim that appellate counsel was ineffective for failing to challenge "presumed not guilty" instruction on direct appeal), McCracken cannot demonstrate that the issue is debatable among jurists, or that the issue deserves further proceedings. Even assuming, arguendo, that a COA were granted on the issue, it is clear that we would be bound by our prior decisions to deny relief on the issue.

The judgment of the district court is AFFIRMED.

PROGRESSIVE CASUALTY INSURANCE COMPANY, Plaintiff–Appellee,

v.

Chris ENGEMANN, Defendant–Appellant,

and

Road Express, Inc., Defendant.

No. 00–6282.

United States Court of Appeals, Tenth Circuit.

Oct. 10, 2001.

Commercial automobile liability insurer brought suit, seeking to avoid coverage for assault by insured's employees. The United States District Court for the Western District of Oklahoma, David L. Russell, Chief Judge, granted summary judgment for insurer, and defendants appealed. The Court of Appeals, McKay, Circuit Judge, held that policy did not cover liability for injuries suffered by driver when truck owned by another carrier backed over him while he was fighting with insured's employees.

Affirmed.

1. Insurance ⚿1091(10)

Under Oklahoma choice of law principles, law of New Jersey where parties entered into insurance contract, rather than law of Oklahoma where incidents occurred, governed issue of whether trucking company's commercial automobile policy covered liability for injuries suffered by plaintiff when truck owned by another carrier backed over him while he was fighting with insured's employees.

2. Federal Courts ⚿383, 390, 391

When highest court of state whose law is being applied by federal court has not definitively decided issue presented, federal court must determine what decision that court would make if faced with same facts and issues, considering authorities such as analogous decisions by state Supreme Court, decisions of lower courts in the state, decisions of federal courts and of other state courts, and general weight and trend of authority.

3. Federal Courts ⚿776

On review of district court's determination on summary judgment, Court of Appeals reviews decision de novo, applying same legal standard used by district court.

4. Federal Courts ⚿766

On review of district court's determination on summary judgment, Court of Appeals reviews whether district court correctly applied substantive law and reverses if there is any genuine issue of material fact.

5. Insurance ⚿2678

Under New Jersey law, direct and proximate result, in strict legal sense, of use of the automobile is not necessary for coverage to exist pursuant to automobile liability policy covering personal and property damages "caused by an 'accident' and resulting from the ownership, maintenance, or use of covered 'autos' "; instead, there need be shown only substantial nexus between injury and use of vehicle.

6. Insurance ⚿2678

Under New Jersey law as predicted by federal Court of Appeals, trucking company's commercial automobile policy covering liability for personal and property damages "caused by an 'accident' and resulting from the ownership, maintenance, or use of covered 'autos' " did not cover liability for injuries suffered by driver when truck owned by another carrier backed over him while he was fighting with insured's employees; although driver's original encounter with one assailant who was washing his truck arguably involved issue of vehicle maintenance, ensuing assault was unrelated to maintenance or operation of insured vehicle.

7. Insurance ⚿1834(3), 2734

New Jersey liability insurance policies are to be construed broadly in favor of insured and injured persons to effectuate strong legislative policy of assuring financial protection for innocent victims of automobile accidents.

Larry A. Tawwater (Darren M. Tawwater with him on the briefs) of McCaffrey & Tawwater, L.L.P., Oklahoma City, OK, for Defendant–Appellant.

Sarah J. Rhodes (William C. McAlister with her on the brief) of Abowitz, Rhodes & Dahnke, P.C., Oklahoma City, OK.

Before KELLY and McKAY, Circuit Judges, and BRIMMER,* District Judge.

McKAY, Circuit Judge.

Appellee Progressive Casualty Insurance Company issued Road Express, Inc. (Road Express) a commercial automobile insurance policy covering injuries arising out of the ownership, maintenance, or use of insured vehicles. The question on appeal is whether the policy Appellee issued covers severe and permanent injuries suffered by Appellant when a truck owned by Four Star Transport, Inc. (Four Star) backed over Appellant while he was fighting with Road Express employees. To clarify, only the vehicle liability policy of the company that employed the assailants is at issue; Four Star's liability is not.

The policy issued by Appellee provides coverage for personal and property damages "caused by an 'accident' and resulting from the ownership, maintenance, or use of covered 'autos'." Aplt.App. at 144 (Policy). At trial, Appellee moved for summary judgment contending that Appellant's injuries were not covered under its liability policy. The district court granted summary judgment in favor of Appellee,

* Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

holding that "[a]ny nexus between the maintenance of the Road Express truck and Defendant's injuries was not substantial but tangential." *Id.* at 268 (Order). This appeal followed. Appellant argues that the liability policy Appellee issued covers his injuries because the injuries result from the ownership and maintenance of the Road Express vehicle. We have jurisdiction over this diversity action under 28 U.S.C. § 1291.

The incidents that gave rise to this appeal occurred in Oklahoma City, Oklahoma, on June 8, 1996, at a crowded truck stop along Interstate 40. Appellant, a truck driver, exited the interstate around midnight. Traffic that night was especially congested, and there were long lines at every gas pump. Upon reaching the fuel pumps, Appellant discovered another truck driver washing his rig at the fuel island. Appellant approached the man and told him to "pull your truck forward, there's trucks backed up all the way to interstate 40." Aplt.App. at 106. The man responded that he would move his truck when he finished washing it. Appellant grabbed a brush from the man, who then accused Appellant of pushing him. Tensions escalated, but eventually the two truckers went their separate ways. *See id.* at 105–08.

As long as five to ten minutes after the original confrontation, the man who had been washing his truck, accompanied by two others, attacked Appellant as Appellant walked toward the fuel stop. Appellant's lawsuit alleged that two of his assailants, including the man that was washing his truck at the fuel pump, were Road Express employees and the third was a passenger in the Road Express truck. *See* Aplt.App. at 10. Appellant attempted to flee, but his assailants continued to pursue him. The fight continued and ranged across much of the truck stop. Eventually, the three assailants knocked Appellant to the ground either behind or under the parked Four Star truck. With Appellant on the ground, his assailants kicked and punched him repeatedly. The altercation ended only when the driver of the Four Star truck unknowingly backed across Appellant, crushing his pelvis. *See id.* at 109–13.

[1] It is well established that federal courts sitting in diversity apply the choice of law provisions of the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Electrical Distrib., Inc. v. SFR, Inc.,* 166 F.3d 1074, 1083 (10th Cir.1999). Accordingly, we look to Oklahoma law for our choice of law framework. On this point, we adopt the district court's careful analysis. *See* Aplt.App. at 261–62. In sum, although the incidents occurred in Oklahoma, Oklahoma law directs us to rely on New Jersey law concerning insurance coverage because the parties entered the insurance contract under the laws of New Jersey. *See Bohannan v. Allstate Ins. Co.,* 820 P.2d 787, 797 (Okla.1991).

[2] When New Jersey's highest court has not definitively decided the precise issue we must decide, we nonetheless must determine what decision that court would make if faced with the same facts and issues that are before us.[1] *See Phillips v. State Farm Mut. Auto. Ins. Co.,* 73 F.3d 1535, 1537 (10th Cir.1996). In reaching

1. Having carefully reviewed the relevant case law, we do not find a definitive decision on this issue. Further, we agree with the district court that this might be a case in which judicial economy would be served by certification of state law questions to the New Jersey Supreme Court "if its newly-enacted certification procedure, *see* NJ Rule 2:12A (effective January 3, 2000) permitted certification ... by courts other than the United States Court of Appeals for the Third Circuit." Aplt.App. at 264 (Order).

that determination, "we consider a number of authorities, including analogous decisions by the [state] Supreme Court, the decisions of the lower courts in [the state], the decisions of the federal courts and of other state courts, and 'the general weight and trend of authority.' " *Id.* at 1537 (citation omitted).

[3, 4] The district court determined that under New Jersey law the policy Appellee issued does not cover Appellant's injuries, because the connection between Appellant's injuries and the ownership, maintenance, or use of the covered auto was not substantial. Because the district court made that determination on summary judgment, we review the decision de novo, applying the same legal standard used by the district court. *See Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.,* 165 F.3d 1321, 1326 (10th Cir.1999), *cert. denied,* 528 U.S. 815, 120 S.Ct. 53, 145 L.Ed.2d 46. We review whether the district court correctly applied the substantive law and reverse if there is any genuine issue of material fact. *See id.*

[5] Appellant contends that his injuries stem from Road Express's ownership, use, and maintenance of insured vehicles. To prevail, Appellant must show that the insured vehicle was "central to the incident." *See Stevenson v. State Farm Indem. Co.,* 311 N.J.Super. 363, 709 A.2d 1359, 1365 (1998). Under New Jersey law, "a direct and proximate result, in a strict legal sense, of the use of the automobile" is not necessary for coverage to exist pursuant to the policy language at issue. *See Westchester Fire Ins. Co. v. Continental Ins. Cos.,* 126 N.J.Super. 29, 312 A.2d 664, 668–69 (1973), *aff'd* 65 N.J. 152, 319 A.2d 732 (1974). Instead, "there need be shown only a substantial nexus between the injury and the use of the vehicle." *Id.* at 669; *accord Home State Ins. Co. v. Continental Ins. Co.,* 313 N.J.Super. 584, 713 A.2d 557, 559–60 (1998), *aff'd* 158 N.J. 104, 726 A.2d 1289 (1999); *Diehl v. Cumberland Mut. Fire Ins. Co.,* 296 N.J.Super. 231, 686 A.2d 785, 787–88 (1997), *rev. denied* 149 N.J. 144, 693 A.2d 112 (1997); *Lindstrom v. Hanover Ins. Co.,* 138 N.J. 242, 649 A.2d 1272, 1274 (1994).

[6] After reviewing the existing case law, the district court expressly held that in this case the nexus was not substantial, adding that "[a]ny nexus between the maintenance of the Road Express truck and Defendant's injuries was not substantial but tangential or remote." Aplt.App. at 268 (Order). Although the reason for Appellant's original encounter with one of his assailants was arguably an issue of vehicle maintenance, Appellant's injuries did not result from this encounter. The injuries sustained by the Appellant resulted from a fight occurring five to ten minutes after the original confrontation.

Appellee's articulation that "[t]he fact that hostilities were created due to the use of an automobile does not bring a non-automobile related assault within the 'operation, maintenance and use' of an automobile," accurately reflects the law that governs this type of situation. Aple. Br. at 13 (caps in original deleted); *see Foss v. Cignarella,* 196 N.J.Super. 378, 482 A.2d 954, 957 (1984); *Cerullo v. Allstate Ins. Co.,* 236 N.J.Super. 372, 565 A.2d 1125, 1127 (1989); *Vasil v. Zullo,* 238 N.J.Super. 572, 570 A.2d 464, 466–67 (1990). When an altercation occurs away from a vehicle and the vehicle can in no way be considered a physical instrumentality of the altercation, vehicle liability insurance does not cover injuries that may result.

[7] The district court remarked that "the question is admittedly close." Aplt. App. at 264 (Order). We disagree with the district court on this point. If the case

were such that reasonable minds could differ, we would reverse the district court. New Jersey liability insurance policies "are to be construed broadly in favor of the insured and injured persons to effectuate the strong legislative policy of assuring financial protection for innocent victims of automobile accidents." *Home State,* 713 A.2d at 559 (citation omitted). In this case, however, Appellant's injuries are the direct result of an assault unrelated to the maintenance or operation of an insured vehicle. Thus, we agree with the district court's ultimate holding.

Because the Appellant failed to establish substantial nexus between his injuries and the use of an insured vehicle, the order of the district court is AFFIRMED.

Charles R. TATE, Plaintiff–Appellant,

v.

FARMLAND INDUSTRIES, INC., Defendant–Appellee.

No. 99–6329.

United States Court of Appeals, Tenth Circuit.

Oct. 10, 2001.

Former employee with history of focal seizures brought action against former employer alleging violations of the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). The United States District Court for the Western District of Oklahoma, Tim Leonard, J., granted employer's motion for summary judgment on the ADA claim and granted employer's motion to dismiss for failure to state a claim on the FMLA claim. Employee appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) employer could rely on a reasonable interpretation of the Department of Transportation's (DOT) medical advisory criteria to establish physical requirements for its commercial motor vehicle (CMV) operators; (2) employee was not qualified for his position; and (3) employee's failure to specifically allege that he had worked 1,250 hours in the twelve months immediately preceding his employer's alleged violation of FMLA did not warrant dismissal with prejudice of his FMLA claim.

Affirmed in part, and reversed and remanded in part.

Briscoe, Circuit Judge, dissented and filed an opinion.

1. Civil Rights ⚿173.1

To establish a prima facie case of discrimination under the ADA, employee must demonstrate that: (1) he is disabled within the meaning of the ADA; (2) he is qualified, with or without reasonable accommodation; and (3) he was discriminated against because of his disability. Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a).

2. Civil Rights ⚿173.1

Provided that any necessary job specification is job-related, uniformly-enforced, and consistent with business necessity, the employer has the right to establish what a job is and what is required to perform it under the ADA. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8); 29 C.F.R. § 1630.2(m).

3. Civil Rights ⚿173.1

Under the ADA, employer could rely on a reasonable interpretation of the Department of Transportation's (DOT) medi-