NOT DESIGNATED FOR PUBLICATION

FRED PETERSON NO. 01-CA-330

VERSUS FIFTH CIRCUIT

GIBRALTAR SAVINGS & LOAN
CLUB WEST, INC., THE GALLERIA
INVESTMENT CORPORATION
D/B/A GALLERIA ONE AND/OR
THE GALLERIA, ET AL

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 377-041 C/W 379-798, DIVISION "A"
HONORABLE WALTER J. ROTHSCHILD, JUDGE

FEBRUARY 13, 2002

THOMAS F. DALEY
JUDGE

Panel composed of Judges James L. Cannella,
Thomas F. Daley, and Clarence E. McManus

A. BRUCE NETTERVILLE
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Gretna, Louisiana 70053

AND

WILLIAM W. HALL
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ATTORNEYS FOR PLAINTIFF/APPELLANT

HARRY ROSENBERG
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ATTORNEYS FOR DEFENDANT/APPELLEE,
CROSS/APPELLANT, RELIANCE INSURANCE COMPANY

JAY C. ZAINEY
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ATTORNEY FOR DEFENDANT/APPELLEE,
AL M. THOMPSON

AFFIRMED

T.P.
JFC
CEM

The underlying facts of this case are set out in Peterson v. Gibraltar Savings and Loan, 98-1601 (La. 5-18-1999), 733 So2d 1198. On September 3, 1999, the Louisiana Supreme Court granted a rehearing solely on the issue of whether sanctions should be imposed on the Gibraltar defendants and their attorneys for failure to timely disclose the existence of a ten million dollar ($10,000,000.00) excess insurance policy written by Reliance Insurance Company (Reliance). The positions of the parties as set forth in the rehearing opinion Peterson v. Gibraltar Savings and Loan, 98-1601 (La. 9-3-1999), 751 So2d 820 at p. 821-2 are:

> Plaintiff asserts that the Gibraltar defendants and the attorneys representing them introduced into evidence at trial Reliance's one million dollar ($1,000,000.00) [98-1609 La. 2] insurance policy, implying, if not suggesting, to the court and to the plaintiff that it was the only available insurance policy. Plaintiff further contends that the Gibraltar defendants, and Reliance in particular, failed to disclose to the plaintiff during discovery, and to the district court during trial, the existence of a $10,000,000.00 excess insurance policy also written by Reliance. According to plaintiff, the Gibraltar defendants, including

> Reliance, and their attorneys did not disclose the existence of the excess policy until after the court of appeal rendered judgment in plaintiff's favor. Plaintiff further contends that the Gibraltar defendants, Reliance, and their attorneys only disclosed the insurance policy after plaintiff notified them that he was seeking to "purchase" the rights of the Gibraltar defendants' successors against the insurer for failure to settle within policy limits. The Gibraltar defendants respond that Reliance inadvertently failed to disclose the existence of the excess policy to the plaintiff and that it acknowledged the existence of the policy in the court of appeal once it was discovered. To date, neither the Gibraltar defendants nor Reliance have produced the policy.

Because no record exists to aid the Supreme Court in evaluating plaintiff's allegations of discovery abuse, the Supreme Court remanded the case to the district court for a contradictory hearing to determine what, if any, sanctions are appropriate. The Supreme Court in its opinion *Id.* p.822 set the scope of the contempt hearing:

> The scope of the hearing should encompass all issues relevant to the nondisclosure of the excess policy, including but not limited to whether the Gibraltar defendants and/or their attorneys intentionally (or with some lesser degree of fault), and in bad faith, failed to disclose the excess policy.

The trial court conducted an evidentiary hearing on April 10, 2000, August 15, 2000, and November 2, 2000. The scope of the hearing encompassed all issues relevant to the nondisclosure of excess insurance policy and specifically addressed whether Gibraltar Savings and Loan and/or their attorneys intentionally and in bad faith failed to disclose the excess policy.

The trial court's Reasons for Judgment following the contempt hearing succinctly set forth the fact applicable to the contempt proceedings:

> In May of 1988, the plaintiff in this case, Mr. Fred Peterson, was allegedly abducted from the Galleria Building parking lot, taken to another location, and raped by person or persons unknown. He later was diagnosed as being HIV positive, allegedly as a result of the aforementioned rape. Suit was filed by plaintiff and initial negotiations were unsuccessful. Some nine (9) adjustors handled the case during its history spanning some seven (7) years. In December of 1996, the case went to trial before a jury in Jefferson Parish and that jury found for the defendants. During the trial, the defendants offered into evidence a

policy of insurance written by Reliance Insurance Company (Reliance) for one million dollars ($1,000,000.00). In response to previous discovery requests by attorneys for the plaintiff, Reliance responded that the only coverage was the one million dollar ($1,000,000.00) policy.

As early as May of 1989, Don Collier, a Reliance adjuster, notified his supervisor that there was primary coverage of one million dollars ($1,000,000.00) and an excess policy coverage of ten million dollars ($10,000,000.00). Mr. Collier testified during the hearing that he had mistakenly informed the attorneys for Reliance, in response to their request, that there was only one million dollars ($1,000,000.00) in coverage. He stated that he did not do this to gain any type of advantage over the plaintiff and that it had always been his habit to follow company policy which is to reveal all coverage. He mistakenly assumed that only primary coverage was being requested, not all coverages. He admitted that he was wrong. He denied that anyone at Reliance instructed him to conceal the excess coverage. Neither he, nor anyone else employed by Reliance, ever told their attorneys, Berrigan, Litchfield, Schoenkas & Mann, that there was anything other than a one million dollar ($1,000,000.00) policy during discovery, through trial, and until the case had proceeded to the Fifth Circuit Court of Appeal. As a consequence, two discovery requests were filed by the plaintiff and they were answered by the Reliance attorneys, indicating there was the single primary coverage amount of one million dollars ($1,000,000.00).

During the trial of this case before the jury, Bob Clancy, another Reliance adjustor, communicated with Jack Downey, his superior, by e-mail that there was one million dollars ($1,000,000.00) in primary coverage and an additional ten million dollars ($10,000,000.00) in excess coverage. Clancy was apparently in constant communication with the Reliance trial team and never told any of them about the ten million dollars ($10,000,000.00) in coverage. Downey testified at the hearing in this matter that it was and has always been the policy at Reliance to reveal any and all coverages to plaintiff when requested; however, during his testimony, he also stated that coverage would not be revealed unless requested by plaintiff formally since to reveal same was "highly prejudicial" to the insured and to reveal same could change the way plaintiff did things. He continued to maintain, however, that when a request is made, any and all coverages should be revealed. He further stated that should he find a Reliance employee to have intentionally hidden coverages from a plaintiff, he would fire them "on the spot." Downey also testified that he was not aware that the plaintiff had been informed only of the one million dollar ($1,000,000.00) coverage and that a representation had been made in court that this was the only coverage in the case.

Following the jury verdict, the case was appealed to the Fifth Circuit Court of Appeal and the judgment of the trial court jury was reversed. The Court of Appeal ordered payment to the plaintiff of

millions of dollars. After the Fifth Circuit's ruling, attorneys for Reliance were informed by the company of the possible existence of the excess coverage and they immediately informed their client that the excess coverage should be reported to the Court of Appeal and to the plaintiff's attorney. Reliance hired the firm of Blanchard, Walker, O'Quin & Roberts, specifically ex-Justice Pike Hall of that firm because of his appellate expertise, to advise them as to the proper course of action they should take regarding this excess coverage. Justice Hall recommended filing a pleading with the Court of Appeal revealing the excess coverage, which was ultimately done. Plaintiff was never directly informed of the excess policy; however, he was forwarded and did receive a copy of the judicial confession regarding the excess coverage, which was filed in the Court of Appeal.

The defendants appealed the Court of Appeal reversal of the jury to the Supreme Court for the State of Louisiana. As of the date of the hearing before the Supreme Court, plaintiff had still not received an actual copy of the excess insurance policy - even though a letter from the Reliance trial attorney seems to indicate that a copy had been attached to correspondence sent to him. It was not until sometime following the hearing before the Supreme Court that plaintiff finally received a copy of the policy in question. The excess policy had apparently been cancelled due to nonpayment of policy premium, although a copy of the policy with any such notation was not introduced into the record and the attorney for Reliance indicates in his brief that the policy was cancelled by the insured, not by any action of Reliance. In addition, it was stipulated by Reliance that the excess coverage was in full force and effect at the time of the alleged injury to the plaintiff. Plaintiff asserts that had he known of this cancellation, he could have used this information to suggest to the jury at trial that the defendants were not able to pay their debts and that is why they decreased security measures at the Galleria, creating a heightened risk to the plaintiff.

The trial court found that Reliance's adjuster, Mr. Don Collier, failed to reveal to the attorneys for Reliance that there was excess coverage in this case. The court found that the failure to reveal the excess coverage was knowingly and willfully done and constituted a sanctionable violation of the discovery rules by Reliance, finding that Reliance was in contempt of court. The court ordered Reliance to pay a fine of $2,500.00 to the 24th Judicial District Court, Parish of Jefferson, and ordered Reliance to pay plaintiff's attorney fees for contempt proceedings, which were set at $8,000.00. The trial court did not, however, find that the attorneys representing

Reliance committed any willful or contemptuous action. The trial court found that although the attorneys for Reliance made false assertions regarding the timeliness of discovery, the trial court did not believe that these assertions were made in bad faith or in willful disregard of the discovery rules. The court found, "Although an attorney should investigate facts, allegations, and assertions before they are made, the Court does not believe that the attorneys' actions in this case rise to the level of contempt of court."

The appeal as to the contempt finding against Reliance was severed due to an Order of Liquidation of Reliance Insurance Company's Assets, which stayed any direct proceedings against Reliance. This Court agreed to sever the appeal affecting Reliance and proceed with a review of the trial court's ruling concerning the attorneys for Reliance.

Appellant, Fred Peterson, asserts that the trial court erred when it did not find Mr. Al Thompson, counsel for Reliance, in contempt for failure to produce the excess policy and failure to amend his discovery responses concerning excess insurance. Appellants assert that Mr. Thompson refused to comply with his continued obligation to supplement his discovery responses and that he admitted in his affidavit and testimony at the contempt proceeding that he knew of the false response at least as of February 27, 1998. Additionally, appellant argues that Mr. Thompson falsely represented to his co-counsel that he, on behalf of Reliance, did not respond to the Motion for Production of Documents, which called for the production of the insurance policy in question because the Request for Production was untimely, when in fact, Mr. Thompson on behalf of Reliance did answer the discovery with the response that, "the policy of insurance in question, upon information and belief, has already been provided."

On April 8, 1998, Mr. John Litchfield, Sr., an attorney representing Reliance with the same firm as Mr. Thompson and Mr. Thompson, Sr., wrote a letter to Reliance advising them that the discovery requesting a copy of the insurance company was not responded to because it was filed after the discovery deadline.

"To find a person guilty of constructive contempt, the trial court must find that he or she violated an order of court intentionally, knowingly and purposefully, without justifiable excuse."[1] It has been well-settled by the courts of this State that proceedings for contempt must be strictly construed; the policy of Louisiana law does not favor extending the scope of contempt proceedings.[2]

Appellant has the burden of showing that the trial court committed manifest error in its findings of facts. We are not called upon to decide ourselves whether Mr. Thompson's conduct was contemptible, but rather whether the trial court's finding can be supported by the record. In this situation, there was no proof beyond a reasonable doubt that Mr. Thompson intentionally, knowingly, and purposely concealed the excess insurance policy. Also, there is no evidence that Mr. Thompson intentionally, purposely, and willfully obstructed or interfered with the orderly administration of justice. We, therefore, affirm the finding of the trial court as to Mr. Thompson's conduct.

AFFIRMED

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[1]Kaiser Aluminum & Chemical Corp. v. United Steelworkers of America Int'l, No. 00-1851, 2001 WL 456767 (La. App. 4th Cir. 4/24/01); Parish of Jefferson v. LaFreniere Park Foundation, 98-345 (La. App. 5th Cir. 9/15/98), 720 Do.2d 359, 364, writ denied, 98-2598 (La. 10/28/98), 723 So.2d 965.

[2]Pittman Constr. Co., Inc. v. Pittman, p. 7, 96-1079 (La. App. 4th Cir. 3/12/97), 691 So.2d 268, 273, writ denied, 97-0960 (La. 6/16/97), 693 So.2d 803; Lacombe v. Randy Theriot Construction, 657 So.2d 531 (La. App. 3rd Cir. 1994).

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY FEBRUARY 13, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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