NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0129

TROY FRAZIER AS CURATOR OF
THE INTERDICT ELDRIDGE FRAZIER

VERSUS

LOUISIANA CNI, LLC, F/D/B/A SHAY COMMUNITY HOME, D/B/A SOUTHPARK HOME, AND D/B/A GOODWOOD GROUP HOME

Judgment Rendered: June 11, 2010.

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 542,966

Honorable Todd W. Hernandez, Judge Presiding

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BEFORE: CARTER, C.J., GUIDRY AND PETTIGREW, JJ.

Guidry, J. concurs
Pettigrew, J. Concurs

CARTER, C. J.

The plaintiff-appellant, Troy Frazier, as curator for his interdicted brother, appeals an adverse partial summary judgment in favor of the defendant, Lexington Insurance Company, finding no insurance coverage for the interdict's personal injury claims asserted against Lexington's insured, Louisiana CNI, LLC, the owner/operator of a group home in which the interdict resided. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The interdict, Eldridge Frazier, is a profoundly mentally retarded adult man who was institutionalized at the age of five or six, and has resided since that time in various group homes for the mentally handicapped. Eldridge is extremely limited in his ability to communicate, relying entirely upon the staff of the various group homes where he has lived for his complete custody, supervision, and care. In April 2004, Eldridge was diagnosed with Human Immunodeficiency Virus ("HIV") that had developed into Acquired Immune Deficiency Syndrome ("AIDS"). It is undisputed that Eldridge was most likely exposed to HIV/AIDS through non-consensual sexual contact while a resident at one of the group homes owned and operated by defendant, Louisiana CNI, LLC ("LCNI") or its predecessor, Community Network, Inc., sometime in the mid-to-late 1990's, and definitely prior to October 2000.[1]

In 2005, Eldridge's family sought and was granted the interdiction of Eldridge, with his brother, Troy Frazier, designated as curator. On July 18, 2005, Troy brought suit for damages on behalf of Eldridge (hereafter we

[1] LCNI bought the group homes from Community Network, Inc. in 1999.

refer to the plaintiff-appellant as "the Fraziers"), alleging that LCNI had breached its duty of custody and care owed to Eldridge, causing him to suffer a permanent, debilitating, and potentially fatal personal injury. After the Fraziers filed multiple amending petitions naming additional defendants, LCNI's liability insurer, Lexington Insurance Company ("Lexington"), filed two separate motions for partial summary judgment.

In its motions, Lexington contended that the Social Service Commercial General Liability ("CGL") Policy and the Sexual Misconduct Liability ("SML") Policy it had issued to LCNI specifically excluded coverage for Eldridge's alleged injury. Lexington primarily relied on the undisputed fact that the alleged sexual misconduct that caused Eldridge's eventual diagnosis of AIDS in 2004 occurred years prior to the January 14, 2003 retroactive date in both of the insurance policies it had issued to LCNI. Lexington also pointed out specific exclusions in the CGL policy that precluded coverage for (1) sexual misconduct; (2) injury arising out of, based upon, or attributable to the transmission of AIDS; and (3) any act, error, or omission in the furnishing of professional services. The Fraziers opposed the motions, contending that LCNI negligently breached its duty of care owed to Eldridge by failing to take actions within the policy periods that would have resulted in the discovery and prevention of ongoing sexual misconduct directed toward Eldridge, as well as Eldridge being diagnosed and treated for AIDS at an earlier date.

On July 15, 2009, the trial court issued reasons for granting Lexington's motions for partial summary judgment and dismissing all claims

against Lexington.[2] The trial court found that Lexington's SML policy only provided coverage for "insured events taking place after January 14, 2003," the policy's retroactive date. The trial court also found that the SML policy provided that "in the event one or more claims are made which allege multiple acts of sexual misconduct to any one victim, coverage is provided only **if the first such alleged act of sexual misconduct occurs after the retroactive date.**" The trial court further reasoned, that because the expert testimony clearly established that "Eldridge was definitely HIV positive in October 2000," the SML policy did not provide coverage because the first such alleged act of sexual misconduct clearly did not occur after the policy's January 14, 2003 retroactive date.

Similarly, the trial court found that Lexington's CGL policy specifically and unambiguously excluded coverage for: (1) bodily injury which occurred prior to the retroactive date of January 14, 2003; (2) "sexual misconduct committed by any insured or by any person for whom the insured is legally liable"; (3) bodily injury "arising out of, based upon or attributable to the transmission of or infection caused by the transmission of AIDS, …, however caused"; and (4) liability arising out of "any act, error or omission in the furnishing of professional services." Finally, the trial court concluded that the CGL policy was not intended to provide coverage for the alleged negligent act of failing to have Eldridge diagnosed with AIDS or any of the neglect alleged by the Fraziers.

After their motion for new trial was denied, the Fraziers appealed, asserting that genuine issues of material fact remain regarding the breach of

[2] A final judgment was signed in accordance with the trial court's reasons on November 23, 2009.

LCNI's duty to properly care for Eldridge during Lexington's policy periods, and further, that the breach of the duty to care is independent and separate from the original sexual misconduct that caused Eldridge's transmission or infection with AIDS. Lexington's response is that all of the Fraziers' claims for damages arose from allegations of non-consensual acts of sexual misconduct, which led to the transmission of AIDS, and which was perpetrated against Eldridge prior to the retroactive date of both insurance policies. Consequently, Lexington maintains that any claim for damages connected with the Fraziers' allegations of negligent breach of the duty to properly provide for Eldridge's care are clearly and unambiguously excluded from coverage.

LAW AND ANALYSIS

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Gonzales v. Kissner**, 08-2154 (La. App. 1 Cir. 9/11/09), 24 So.3d 214, 218. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966B; **Gonzales**, 24 So.3d at 217. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. **Gonzales**, 24 So.3d at 218.

On a motion for summary judgment, the burden of proof is on the mover. If the moving party will not bear the burden of proof at trial on the matter, that party's burden on a motion for summary judgment is to point out

an absence of factual support for one or more essential elements of the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact, and the mover is entitled to summary judgment. LSA-C.C.P. art. 966C(2); **Robles v. ExxonMobile**, 02-0854 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

Interpretation of an insurance contract is usually a legal question which can be properly resolved within the framework of a motion for summary judgment. **Waguespack v. Richard Waguespack, Inc.**, 06-0711 (La. App. 1 Cir. 2/14/07), 959 So.2d 982, 984. However, summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. **Reynolds v. Select Properties, Ltd.**, 93-1480 (La. 4/11/94), 634 So.2d 1180, 1183; **Doe v. Breedlove**, 04-0006 (La. App. 1 Cir. 2/11/05), 906 So.2d 565, 570.

An insurance policy is a contract between the parties, and should be construed employing the general rules of interpretation of contracts. **Doe v. Breedlove**, 906 So.2d at 570. Further, an insurance policy should not be interpreted in an unreasonable or strained manner so as to enlarge or restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. **Id.** An insurer has the burden of proving that a loss comes within a policy exclusion. **Id.**

We have thoroughly reviewed the evidence in the record and agree with the trial court's conclusion that summary judgment was appropriate in

this case. In support of its motions for summary judgment, Lexington submitted evidence that both of the policies it issued to LCNI excluded coverage because the alleged injury occurred before the retroactive date of the policies.[3] It was undisputed that Eldridge was subjected to sexual misconduct and contracted HIV that eventually led to AIDS sometime prior to October 2000.[4] Both of Lexington's policies provided a retroactive date of January 14, 2003, on the declarations page, and the policy language specifically stated that the policies did not apply to bodily injury or an insured event that occurred before the retroactive date.[5] The CGL policy goes on to explain that "[a]ll **claims** for **damages** because of **bodily injury** to the same person, including **damages** claimed by any person ... for care, loss of services, or death resulting at any time from the **bodily injury**, will

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[3] Copies of both of the Lexington policies were admitted into evidence at the hearing on the motions for summary judgment, and they were attached to and filed in support of Lexington's motions.

[4] This undisputed fact was established by the deposition testimony of the Fraziers' expert in the area of infectious diseases and HIV/AIDS related infections, Dr. Waref Azmeh, which was attached to and filed in support of Lexington's motions for summary judgment.

[5] Page 1 of the CGL policy provided, in pertinent part:

> **SECTION 1 – COVERAGES**
> **A. COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
> **1. Insuring Agreement**
> a. ***
> This insurance does not apply to **bodily injury** or **property damage** which occurred before the **Retroactive Date**, if any, shown in the Declarations.

Page 1 of the SML policy provided, in pertinent part:

> I. **INSURING AGREEMENTS**
> **A. COVERAGE**
> ***
> 2. This Policy applies only if:
> ***
> b. The **Insured Event** out of which the **Claim** arises takes place or commences after the **Retroactive Date**[.]

be deemed to be one **claim** and to have been made at the time the first of those **claims** is made against any **insured**."[6] Likewise, the SML policy explicitly states that "[a]ll **Claims** arising out of one **Insured Event** shall be considered to be one **Claim** and shall be deemed to be made at the time the first of such **Claims** is made."[7] The SML policy further provides that "[i]n the event one or more **Claims** are made which allege multiple acts of **Sexual Misconduct** to any one **Victim**, coverage is provided only if the first such alleged act of **Sexual Misconduct** occurs after the **Retroactive Date**."

Language in an insurance policy which is clear, expresses the intent of the parties, and does not violate a statute or public policy, must be enforced as written. See **Livingston Parish Sch. Bd. v. Fireman's Fund Am. Ins. Co.**, 282 So.2d 478, 481 (La. 1973). Moreover, insurers have the right to limit liability and enforce conditions or limitations. **Anderson v. Ichinose**, 98-2157 (La. 9/8/99), 760 So.2d 302, 306. Limitations based upon a policy's retroactive date have been specifically upheld in Louisiana jurisprudence. See **Guidry v. Lee Consulting Engineering, Inc.**, 06-279 (La. App. 5 Cir. 10/31/06), 945 So.2d 785, 791.

The Fraziers were required to come forth with evidence to support their allegations that Eldridge's damages for bodily injury occurred after the retroactive dates of Lexington's policies. The Fraziers argue that the affidavit of Dr. Paul Dammers, a clinical psychologist and

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[6] The limiting language is found on page 1 of the CGL policy, in the "Insuring Agreement" section, paragraph a(ii), and on page 1 of the SML policy in the "Insuring Agreements" section, parts C and D.

[7] The Definitions section on page 4 of the SML policy defines "**Insured Event**" as follows: "**Insured Event** means an act of **Sexual Misconduct** or a series of related acts of **Sexual Misconduct** against any one **Victim** by an Insured(s) while performing duties related to their employment or, in the case of Volunteer(s) or Member(s), while participating in activities sponsored by Named Insured."

neuropsychologist, establishes that isolated incidents of sexual misconduct against Eldridge also occurred during Lexington's policy periods. However, even if that issue of fact could be established, it is not material to Lexington's coverage defense that the bodily injury and/or insured event is deemed to have occurred at the time of the first of such sexual misconduct, which was before the retroactive date of either policy.[8] And as for the Fraziers' argument that LCNI breached its duty of care owed to Eldridge during the policy periods and that Eldridge's injuries manifested during the policy periods, we again find that without the initial acts of sexual misconduct leading to Eldridge's eventual diagnosis of AIDS, there is no damage. The Fraziers' claim that LCNI negligently breached its duty of care in Eldridge's AIDS diagnosis and his treatment was not independent from the initial acts of sexual misconduct that caused Eldridge to be exposed to HIV/AIDS. Without the initial underlying sexual misconduct, there would have been no bodily injury, and obviously no basis for a suit against LCNI for negligence. Thus, all of the claims for damages arose out of events that are clearly excluded from coverage under the express language in the two Lexington policies, because the injury-causing event occurred prior to the retroactive date in the policies.[9] Therefore, we find no genuine issue of material fact, and Lexington is entitled to summary judgment as a matter of law.

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[8] A material fact is one whose existence may be essential to a cause of action. See **Champaigne v. Ward**, 03-3211 (La. 1/19/05), 893 So.2d 773, 777.

[9] Because the bodily injury/insured event occurred prior to the retroactive date in the Lexington policies, it is unnecessary to analyze the remaining possible policy exclusions.

CONCLUSION

The judgment of the trial court granting Lexington's motions for partial summary judgment and dismissing the Fraziers' claims against it is affirmed. Costs of this appeal are assessed to Troy Frazier as curator of the interdict Eldridge Frazier.

AFFIRMED.