NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0570

MAHDI ARDDA & ABIGAIL ARDDA

VERSUS

DANIELLE T. PETERS, SAFEWAY INSURANCE COMPANY & GOAUTO INSURANCE COMPANY

DATE OF JUDGMENT: NOV 02 2018

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 2017-0000074, DIVISION D, PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE M. DOUGLAS HUGHES, JUDGE

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: REVERSED AND REMANDED.

CHUTZ, J.

Plaintiffs-appellants, Mahdi and Abigail Ardda, appeal a summary judgment dismissing their claims against defendant-appellee, GoAuto Insurance Company. For the following reasons, we reverse the summary judgment and remand this matter to the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Abigail Ardda was involved in a vehicular accident on January 12, 2016, while driving a 2010 Mustang she co-owned with her husband, Mahdi Ardda. Abigail alleges she was waiting in the westbound lane of traffic to turn left at an intersection when a vehicle being driven eastbound by Danielle Peters entered the westbound lane and side-swiped the Mustang. As a result, plaintiffs allegedly sustained property damages to the Mustang and Abigail sustained personal injuries.

Plaintiffs subsequently filed suit against Ms. Peters and her insurer, Safeway Insurance, seeking recovery for personal injuries and property damages. Plaintiffs also named GoAuto Insurance Company as an additional defendant, alleging Abigail was entitled to coverage under GoAuto policy #398481, despite the fact that she was "negligently" listed as an "excluded driver" on the policy.

In their petition, plaintiffs alleged that immediately upon purchasing the Mustang in October 2015, they proceeded to a GoAuto office to purchase automobile insurance, accompanied by the salesman who had sold them the vehicle. Mahdi allegedly instructed the unidentified GoAuto employee who handled the insurance application that there should be coverage for both him and Abigail under the policy. Plaintiffs further allege the employee quoted them an additional premium to include Abigail, which they agreed to pay. Although Mahdi claimed he did not read the documents, he admitted to signing both the insurance application and the named driver exclusion endorsement, which each listed Abigail as an excluded driver under the policy. According to plaintiffs, it was only after

the January 2016 accident that they discovered Abigail was listed as an excluded driver.

In the answer to the petition, Safeway raised the affirmative defense of "no pay, no play," pursuant to which plaintiffs would be barred under La. R.S. 32:866 from collecting the first $15,000.00 in bodily injury damages and the first $25,000.00 in property damages if Abigail, in fact, was operating her vehicle without liability coverage.[1] Additionally, GoAuto filed a motion for summary judgment on the grounds that there was no coverage under its policy for the accident at issue since Abigail was named as an excluded driver therein.

Following a hearing, the district court ruled in favor of GoAuto and rendered summary judgment dismissing plaintiffs' claims against GoAuto with prejudice, reserving plaintiffs' rights against the remaining defendants. Plaintiffs have now appealed, arguing in a single assignment of error that the district court erred in granting summary judgment when there were unresolved issues of material fact.

LAW

Summary Judgment Standard:

Appellate courts review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the district court's determination of whether summary judgment is appropriate. ***Schultz v. Guoth***, 10-0343 (La. 1/19/11), 57 So.3d 1002, 1005-06. A motion for summary judgment

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[1] This statute provides, in pertinent part:

> A. (1) There shall be no recovery for the first fifteen thousand dollars of bodily injury and no recovery for the first twenty-five thousand dollars of property damage based on any cause or right of action arising out of a motor vehicle accident, for such injury or damages occasioned by an owner or operator of a motor vehicle involved in such accident who fails to own or maintain compulsory motor vehicle liability security.
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> B. Each person who is involved in an accident in which the other motor vehicle was not covered by compulsory motor vehicle liability security and who is found to be liable for damages to the owner or operator of the other motor vehicle may assert as an affirmative defense the limitation of recovery provisions of Subsection A of this Section.

shall be granted only if the pleadings, depositions, answers to interrogatories, written stipulations, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3) & (4). The court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of material fact. ***Hines v. Garrett***, 04-0806 (La. 6/25/04), 876 So.2d 764, 765 (*per curiam*); ***Penn v. CarePoint Partners of Louisiana, L.L.C.***, 14-1621 (La. App. 1st Cir. 7/30/15), 181 So.3d 26, 30. A genuine issue is one as to which reasonable persons could disagree. Moreover, all doubts should be resolved in the non-moving party's favor. ***Hines***, 876 So.2d at 765-66.

The burden of proof rests with the mover. La. C.C.P. art. 966(D)(1). But if the moving party will not bear the burden of proof at trial on the issue before the court on the motion, the moving party's burden is satisfied by pointing out an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party may not rest on the mere allegations or denials of his pleadings but must produce factual support sufficient to establish there is a genuine issue for trial. If the adverse party fails to meet this burden, then summary judgment, if appropriate, shall be rendered against him. La. C.C.P. arts. 966(D)(1) & 967(B).

Summary judgment is appropriate for determining issues relating to insurance coverage. In determining whether a policy affords coverage for an incident, the insured bears the burden of proving the incident falls within the policy's terms. An insurer seeking to avoid coverage through summary judgment must prove that some exclusion applies to preclude coverage. ***Miller v. Superior***

Shipyard and Fabrication, Inc., 01-2683 (La. App. 1st Cir. 11/8/02), 836 So.2d 200, 203.

Applicable Insurance Law:

An insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts set forth in the Civil Code. The judicial responsibility in interpreting insurance contracts is to determine the parties' common intent. The parties' intent as reflected by the words in the policy determines the extent of coverage. ***Samuels v. State Farm Mutual Automobile Insurance Company***, 06-0034 (La. 10/17/06), 939 So.2d 1235, 1240. If the wording of the policy clearly and unambiguously expresses the parties' intent, the insurance contract must be enforced as written. ***Edwards v. Daugherty***, 03-2103 (La. 10/1/04), 883 So.2d 932, 941. To recover on an insurance policy, an insured must prove that its loss is covered by the policy. If the insured meets this burden, the insurer then has the burden of proving the applicability of policy exclusions. ***Maldonado v. Kiewit Louisiana Company***, 13-0756 (La. App. 1st Cir. 3/24/14), 146 So.3d 210, 218.

As with other written agreements, insurance policies may be reformed if, through **mutual error or fraud**, the policy as issued does not express the agreement of the parties. ***Samuels***, 939 So.2d at 1240, quoting William Shelby McKenzie and H. Alston Johnson, III, *Louisiana Civil Law Treatise: Insurance Law and Practice,* Vol. 15, § 5, p. 14 (2nd Ed. 1996). In the absence of fraud, the party seeking reformation has the burden of proving a mutual error in the written policy. Parole evidence is admissible to show mutual error even when the express terms of the policy are not ambiguous. ***Samuels***, 939 So.2d at 1240. When a party seeks to reform a policy in a manner that does not substantially affect the risk assumed by the insurer, the burden of proof he bears is a preponderance of the evidence. In contrast, if a party seeks to prove that the insurer had insured a

substantially different and greater risk than that expressed by the written policy, the party seeking reformation bears the burden of proving mutual error by clear and convincing evidence. ***Samuels***, 939 So.2d at 1240.

DISCUSSION

Plaintiffs do not argue that the GoAuto policy is ambiguous. Rather, they contend Abigail was negligently listed as an excluded driver by a GoAuto employee contrary to their express instructions to include coverage for her in exchange for the additional premium quoted to them. Essentially, the allegations plaintiffs raise concerning GoAuto may be characterized as a claim that the insurance policy issued by GoAuto should be reformed to correct the error made by GoAuto's employee in listing Abigail as an excluded driver.

Plaintiffs filed a joint affidavit in support of their contention that summary judgment was improper due to the existence of several unresolved issues of material fact. In the affidavit, plaintiffs attested to the same facts they alleged in their petition regarding their interaction with the GoAuto employee who handled their insurance application. They deposed that they instructed the GoAuto employee to include coverage for both Mahdi and Abigail on the policy and that they agreed to pay the additional premium the employee quoted to them to provide coverage for Abigail. They stated the GoAuto employee "was clearly in a hurry to get off work" since they had arrived near to closing time, and she "rushed through the process of issuing the policy." Finally, they deposed that they were still attempting to arrange for the car salesman who witnessed the exchange with the GoAuto employee to provide information in a deposition or otherwise as to what he witnessed.

Accordingly, plaintiffs contend the district court improperly granted summary judgment since their joint affidavit raised several unresolved issues of material fact regarding whether a mutual error occurred. Specifically, they argue

genuine issues of fact exist as to: (1) whether plaintiffs told GoAuto's employee to include coverage for Abigail in the policy; (2) whether the car salesman witnessed this verbal exchange; (3) whether the GoAuto employee quoted a policy rate that included coverage for Abigail; and (4) whether GoAuto's employee negligently excluded Abigail from coverage under the policy by listing her as a named excluded driver.

Both at the motion hearing and during oral arguments before this court, counsel for GoAuto argued the plaintiffs' joint affidavit was parole evidence that was inadmissible to contradict the clear, unambiguous language of the named driver exclusion. GoAuto contends this exclusion is enforceable and must be applied as written without further inquiry. In fact, GoAuto's counsel asserted during oral arguments that what was said between plaintiffs and the GoAuto employee is immaterial in light of the insurance application and named driver exclusion signed by Mahdi. We disagree.

Initially, we note that while counsel for GoAuto argues the plaintiffs' joint affidavit constitutes inadmissible parole evidence, he failed to properly object to that document as required by La. C.C.P. art. 966(D)(2).[2] In any event, although parole evidence generally is inadmissible to vary the terms of a written contract under private signature, when a party seeks reformation of an insurance policy based on mutual error, parol evidence is admissible for the purpose of establishing the error. La. C.C. 1848; ***Samuels***, 939 So.2d at 1240; see also ***Drago v. Full Gospel United Pentecostal Church***, 10-1823, p. 4 (La. App. 1st Cir. 3/30/11) (unpublished).

Based on our review, we find no ambiguity in the language of the named driver exclusion endorsement that lists Abigail as an excluded driver.

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[2] This article provides, in pertinent part, that "[a]ny objection to a document **shall** be raised in a timely filed opposition or reply memorandum." (Emphasis added.)

Nevertheless, considering that the issue of mutual error was raised by plaintiffs and supported by their joint affidavit, the absence of ambiguity does not end our inquiry. See ***Rolston v. United Services Automobile Association***, 06-0978 (La. App. 4th Cir. 12/13/06), 948 So.2d 1113, 1118-19. A determination of mutual error is primarily a question of fact. ***Drago***, 10-1823 at p. 4; see also ***Agurs v. Holt***, 232 La. 1026, 1032, 95 So.2d 644, 646 (1957). Because GoAuto introduced no affidavit or deposition from the employee who handled the plaintiffs' insurance application, or any other contradictory evidence, plaintiffs' claim of mutual error was unrefuted. Under such circumstances, we agree with plaintiffs that genuine issues of material fact remain concerning whether the named driver exclusion endorsement resulted from a mutual error by the GoAuto employee in listing Abigail as an excluded driver on the insurance application and the endorsement and by Mahdi in signing those documents without reading them. Given these issues of material fact, the district court erred in granting summary judgment in favor of GoAuto dismissing plaintiffs' claims.[3]

Nor did we find any merit in GoAuto's contention that any liability against it is precluded under La. R.S. 22:1295.1(C) since Abigail was named in a policy endorsement as an excluded driver. Under this statute, if a driver is excluded from

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[3] We note reformation of a contract sometimes may be inappropriate if the rights of third parties who relied on the contract are affected. Generally, an instrument may not be reformed or corrected to the prejudice of third parties who are authorized to rely on the integrity of an instrument or who have relied on the public records. See ***Lewis v. Saucer***, 26,685 (La. App. 2d Cir. 4/5/95), 653 So.2d 1254, 1259; see also ***Samuels***, 939 So.2d at 1240-41 (the Louisiana Supreme Court reformed a clerical error in an insurance contract even though reformation worked to the detriment of a third party where the third party did not rely on the clerical error in the insurance contract). In this case, there was no reliance by Ms. Peters or her insurer on the insurance contract between plaintiffs and GoAuto prior to the subject accident. If plaintiffs, as they allege, intended to include coverage for Abigail under the GoAuto policy, to find that reformation was inappropriate because Ms. Peters, the alleged tortfeasor, and her insurer might be affected would be an inequitable windfall to the latter parties. The legislature enacted the "no pay, no play" law to reduce the premiums charged for motor vehicle insurance and to discourage the ownership and operation of uninsured motor vehicles. It would not advance these policies to refuse to reform the GoAuto policy if plaintiffs prove by clear and convincing evidence that they actually intended to provide coverage for Abigail and it was only through mutual error that she was excluded.

a policy pursuant to R.S. 32:900(L),[4] "the insurer shall not be liable, and no liability or obligation of any kind shall result to the insurer for bodily injury, loss, or damage under any coverage of the policy...." Clearly, if the parties actually intended to exclude coverage for Abigail under the policy, La. R.S. 22:1295.1(C) would prohibit the imposition of any liability on GoAuto. On the other hand, if the parties did not intend to exclude Abigail and her exclusion resulted from a mutual error between them, plaintiffs' consent to the contract may have been vitiated by that mutual error or mistake. See La. C.C. art. 1948; ***Rolston***, 948 So.2d at 1118-19. In that situation, the named driver exclusion would be invalid and La. R.S. 22:1295.1(C) would be inapplicable. As noted, genuine issues of material fact exist in this case as to whether the exclusion of Abigail from coverage resulted from a mutual error, which may necessitate reformation of the contract. In this posture, it is premature to consider the applicability of La. R.S. 22:1295.1(C).

CONCLUSION

For the reasons assigned, the summary judgment granted by the district court in favor of GoAuto Insurance Company dismissing Mahdi and Abigail Ardda's claims against GoAuto is hereby reversed. This matter is remanded to the district court for further proceedings consistent with the views expressed in this opinion. All costs of this appeal are assessed to defendants.

REVERSED AND REMANDED.

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[4] This provision states, in pertinent part:

> (1) ... an insurer and an insured may by written agreement exclude from coverage the named insured and the spouse of the named insured. The insurer and an insured may also exclude from coverage any other named person who is a resident of the same household as the named insured at the time that the written agreement is entered into, and the exclusion shall be effective, regardless of whether the excluded person continues to remain a resident of the same household subsequent to the execution of the written agreement. It shall not be necessary for the person being excluded from coverage to execute or be a party to the written agreement. For the purposes of this Subsection, the term "named insured" means the applicant for the policy of insurance issued by the insurer.