NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 0648

AND NO. 2018 CW 0212

GODFREY T. FAGOT

VERSUS

DOW CHEMICAL COMPANY, THE, ET AL

Judgment rendered NOV 02 2018

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Appealed from the
18th Judicial District Court
In and for the Parish of Iberville, State of Louisiana
Trial Court No. 76,092
Honorable Robert Downing, Judge Pro Tempore

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

PETTIGREW, J.

Defendant, Turner Industries Group, L.L.C. (f/k/a Turner Industries Holding Company, L.L.C., f/k/a Nichols Construction Company, L.L.C., f/k/a Nichols Construction Corporation; and also as successor by merger to Turner Industries, L.L.C., successor by merger to National Maintenance Holding Company, L.L.C., successor by merger to National Maintenance Corporation) (hereinafter collectively referred to as "Turner") appeals from a trial court judgment granting a partial summary judgment in favor of defendant and cross-claimant, Honeywell International, Inc. as successor-in-interest to Allied Chemical Corporation (hereinafter "Honeywell"). Additionally, Turner seeks supervisory review of the trial court's judgment denying its motion for summary judgment. For the reasons that follow, we affirm the trial court's grant of a partial summary judgment in favor of Honeywell, we affirm the trial court's denial of Turner's motion for summary judgment, and we deny Turner's writ application.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Godfrey T. Fagot, filed the underlying lawsuit in July 2016, claiming he sustained substantial exposure to asbestos and asbestos-containing products while employed by various companies as a pipefitter/welder. As a result of said exposure, Mr. Fagot asserted he had developed, and was dying from, mesothelioma. In his petition, Mr. Fagot named as defendants several of his prior employers and contractors, including Turner, and premises owners, including Honeywell.

Turner was a general contractor that performed at various industrial facilities, including Honeywell's facility in Geismar, Louisiana. Mr. Fagot ultimately settled his personal injury claims against Honeywell. Honeywell filed a cross-claim against Turner for contractual indemnity and defense based on two contracts between Honeywell and Turner dated March 1, 1978 and May 1, 1985. Honeywell alleged that Turner contractually agreed to indemnify it "for injuries to employees of [Turner] whether or not such injury may have been caused or alleged to have been caused by the negligence (whether classified as active, passive or otherwise) of owner, or the condition of the premises or otherwise."

In July 2017, Honeywell filed a motion for partial summary judgment requesting judgment that the 1978 and 1985 maintenance contracts between Honeywell and Turner are unambiguous and require Turner to defend and indemnify Honeywell against all injury claims arising out of Turner's performance under the contract, unless the claim is the result of Honeywell's sole negligence, including any claims resulting from Turner's and/or any other defendant's partial or sole negligence, Honeywell's partial negligence, or the joint negligence of Honeywell and any other defendant(s), as well as any claims for strict liability. Turner responded by filing its own motion for summary judgment in September 2017, alleging no defense or indemnity were owed to Honeywell because none of the pertinent contracts entered into between Turner and Honeywell clearly and unequivocally provided indemnity for Honeywell's own negligence or Honeywell's strict liability.

Both motions were heard by the trial court on January 5, 2018. In a judgment signed on February 1, 2018, the trial court granted Honeywell's motion for partial summary judgment, finding that the indemnity provisions in the pertinent contracts were unambiguous. The trial court also granted Honeywell's motion to strike certain exhibits that were attached to Turner's opposition to the motion for summary judgment, i.e., Exhibit 1-A, the 1975 contract that was not at issue herein, and Exhibit 5, Honeywell's corporate deposition taken in another case. The trial court specifically certified and designated its judgment as a partial final judgment pursuant to La. Code Civ. P. art. 1915 (B), after expressly finding there was no just reason for delay. Turner has appealed from said judgment.

In a separate judgment also signed on February 1, 2018, the trial court denied Turner's motion for summary judgment. Turner applied to this court for supervisory review of the trial court's denial of its motion for summary judgment. In an action handed down on May 14, 2018, another panel of this court referred Turner's writ application to this panel along with Turner's appeal of the trial court's grant of Honeywell's

partial motion for summary judgment.[1] **Fagot v. Dow Chemical Company**, 2018-0212 (La. App. 1 Cir. 5/14/18) (unpublished writ action).

ASSIGNMENTS OF ERROR

1. The lower court erred, as a matter of a law, in granting Honeywell's Motion for Partial Summary Judgment and applying the wrong standard to find the contracts unambiguous, as none of the contracts expressed an intent to indemnify for Honeywell's own negligence in unequivocal terms, nor expressed an intent to indemnify for Honeywell's strict liability, nor expressed an intent to reimburse Honeywell for its defense costs, as required by Louisiana's longstanding jurisprudence. Thus, the lower court's interpretation of the contracts at issue was erroneous as they do not provide Honeywell with indemnity, by law, for the Fagot claims.

2. The lower court erred in granting Honeywell's Motion to Strike its corporate deposition from Turner's opposition as the case law cited by Honeywell was based upon the pre-2012 version of La. Code Civ. P. art. 966(B). Specifically, in 2012, the "on file" requirement for evidence was eliminated from La. Code Civ. P. art. 966(B) thereby rendering Turner's submission of Honeywell's collateral deposition testimony proper parol evidence which should have been considered in light of the ambiguities of the contracts at issue. A proffer of the corporate deposition was made. [Footnote omitted.]

3. The lower court erred in granting Honeywell's Motion to Strike the 1975 maintenance contract from evidence in light of the fact the 1978 and 1985 contracts were ambiguous and silent as to strict liability and indemnity for Honeywell's own negligence, thereby making the introduction of parol evidence permissible. A proffer of the 1975 contract was made. [Footnote omitted.]

[4.] The lower court erred, as a matter of a law, in denying [Turner's] Motion for Summary Judgment given that none of the contracts at issue expressed an intent to indemnity for Honeywell's own negligence in unequivocal terms or expressed any intent to indemnify for Honeywell's strict liability or defense cost, as required by Louisiana's longstanding jurisprudence.[2]

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[1] The denial of a motion for summary judgment is an interlocutory judgment and is appealable only when expressly provided by law. However, where there are cross-motions for summary judgment raising the same issues, this court can review the denial of a summary judgment in addressing the appeal of the granting of the cross motion for summary judgment. See **Crowe v. Bio-Medical Application of Louisiana, LLC**, 2014-0917 (La. App. 1 Cir. 6/3/16), 208 So.3d 473, 478 n.6; **MP31 Investments, LLC v. Harvest Operating, LLC**, 2015-0766 (La. App. 1 Cir. 1/22/16), 186 So.3d 750, 755.

[2] Although Turner actually assigned three errors for review in its writ application, this is the only one that differs from the errors assigned by Turner on appeal, and thus, is the only additional issue that warrants discussion by this court on review.

APPELLATE JURISDICTION

Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. **Texas Gas Exploration Corp. v. Lafourche Realty Co., Inc.**, 2011-0520 (La. App. 1 Cir. 11/9/11), 79 So.3d 1054, 1059, writ denied, 2012-0360 (La. 4/9/12), 85 So.3d 698. A partial summary judgment rendered pursuant to La. Code Civ. P. art. 966(E) may be immediately appealed during an ongoing litigation only if it has been properly designated as a final judgment by the trial court. La. Code Civ. P. art. 1915(B). Although the trial court designated the February 1, 2018 partial summary judgment to be a final judgment under Article 1915(B), that designation is not determinative of this court's jurisdiction. See **Van ex rel. White v. Davis**, 2000-0206 (La. App. 1 Cir. 2/16/01), 808 So.2d 478, 480. We must ascertain whether this court has appellate jurisdiction to review Turner's appeal of this partial judgment. Because the trial court gave reasons for certifying the judgment as immediately appealable, we review the certification applying the abuse of discretion standard. See **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664 (La. 3/2/05), 894 So.2d 1113, 1122.

Historically, our courts have had a policy against multiple appeals and piecemeal litigation. Article 1915(B) attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties. Thus, in considering whether a judgment is properly designated as a final one pursuant to Article 1915(B), a trial court must take into account judicial administrative interests as well as the equities involved. **R.J. Messinger, Inc.**, 894 So.2d at 1122; **Templet v. State of Louisiana, Department of Public Safety and Corrections**, 2005-1903 (La. App. 1 Cir. 11/3/06), 951 So.2d 182, 185. Some factors a trial court should take into account in making the certification determination are the relationship between the adjudicated and unadjudicated claims; the possibility that the need for review might or might not be mooted by future developments in the trial court; the possibility that the reviewing court might be obliged to consider the same issue a second time; and miscellaneous factors such as delay, economic and solvency

considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. **R.J. Messinger, Inc.**, 894 So.2d at 1122. However, the overriding inquiry for the trial court is whether there is no just reason for delay. *Id.* at 1122-1123.

In rendering its judgment on February 1, 2018, the trial court made a determination that the judgment was "specifically certified and designated as a partial final judgment pursuant to [La. Code Civ. P. art.] 1915(B) since the court expressly determined there is no just reason for delay." The trial court further noted that the partial final judgment was immediately appealable because "(1) this partial final judgment does not affect other adjudicated claims, (2) a reviewing court will only be required to consider this issue one time which will moot any further consideration of the issue, and (3) such a delay would cause economic expense to the parties." After reviewing the trial court's explicit reasons, we find that the trial court did not abuse its discretion in certifying the judgment as final for appeal purposes under Article 1915(B)(1). Therefore, our jurisdiction extends to this appeal.

SUMMARY JUDGMENT
(Assignment of Errors Nos. 1 and 4)

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **All Crane Rental of Georgia, Inc. v. Vincent**, 2010-0116 (La. App. 1 Cir. 9/10/10), 47 So.3d 1024, 1027, writ denied, 2010-2227 (La. 11/19/10), 49 So.3d 387. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(A)(3). The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. La. Code Civ. P. art. 966(A)(4).

The burden of proof rests on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all

essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. Code Civ. P. art. 966(D)(1). If, however, the movant fails in his burden to show an absence of factual support for one or more of the elements of the adverse party's claim, the burden never shifts to the adverse party, and the movant is not entitled to summary judgment. **LeBlanc v. Bouchereau Oil Co., Inc.**, 2008-2064 (La. App. 1 Cir. 5/8/09), 15 So.3d 152, 155, writ denied, 2009-1624 (La. 10/16/09), 19 So.3d 481.

In ruling on a motion for summary judgment, the trial 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 triable fact. **Guardia v. Lakeview Regional Medical Center**, 2008-1369 (La. App. 1 Cir. 5/8/09), 13 So.3d 625, 628. A trial court cannot make credibility decisions on a motion for summary judgment. **Monterrey Center, LLC v. Ed.ucation Partners, Inc.**, 2008-0734 (La. App. 1 Cir. 12/23/08), 5 So.3d 225, 232. In deciding a motion for summary judgment, the trial court must assume that all of the witnesses are credible. **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181 (La. 2/29/00), 755 So.2d 226, 236. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. **Willis v. Medders**, 2000-2507 (La. 12/8/00), 775 So.2d 1049, 1050.

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Bouquet v. Williams**, 2016-0134 (La. App. 1 Cir. 10/28/16), 206 So.3d 232, 237, writs denied, 2016-2077, 2016-2082 (La. 1/9/17), 214 So.3d 870, 871. Thus, appellate courts ask the same questions that the trial court does in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover

is entitled to judgment as a matter of law. **Smith v. Our Lady of the Lake Hosp., Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 750. 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 the case. **Succession of Hickman v. State Through Board of Supervisors of Louisiana State University Agricultural and Mechanical College**, 2016-1069 (La. App. 1 Cir. 4/12/17), 217 So.3d 1240, 1244.

The substantive law applicable herein is the law governing the interpretation of indemnity contracts. A contract of indemnity whereby the indemnitee is indemnified against the consequences of his own negligence is strictly construed, and such a contract will not be construed to indemnify an indemnitee against losses resulting to him through his own negligent acts unless such an intention is expressed in unequivocal terms. **Berry v. Orleans Parish School Board**, 2001-3283 (La. 6/21/02), 830 So.2d 283, 285 (citing **Perkins v. Rubicon, Inc.**, 563 So.2d 258, 259 (La. 1990)).

The general rules that govern the interpretation of other contracts likewise apply in construing a contract of indemnity. **Dean v. Griffin Crane & Steel, Inc.**, 2005-1226 (La. App. 1 Cir. 5/5/06), 935 So.2d 186, 191, writ denied, 2006-1334 (La. 9/22/06), 937 So.2d 387. The following codal principles apply and guide our interpretation of the contract, including its indemnity provisions. See **Berry**, 830 So.2d at 285. Interpretation of a contract is the determination of the common intent of the parties. La. Civ. Code art. 2045. This is an objective inquiry; thus, "a party's declaration of will becomes an integral part of his will." La. Civ. Code art. 2045, Revision Comments-1984, (b). When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. Civ. Code art. 2046. Instead, the words of a contract must be given their generally prevailing meaning. La. Civ. Code art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. La. Civ. Code art. 2048. Moreover, each provision in a contract must be interpreted in light of the other

provisions so that each is given the meaning suggested by the contract as a whole. La. Civ. Code art. 2050.

Turner argues on appeal that because the 1978 and 1985 contracts are silent as to whether claims for Honeywell's partial or concurrent negligence are to be indemnified, the contracts are ambiguous by law. Moreover, Turner maintains that the contracts failed to include an expression of intent to indemnify Honeywell for strict liability, and thus, Honeywell's motion for partial summary judgment should have been denied. Honeywell counters, arguing that the 1978 and 1985 contracts clearly and unambiguously required Turner to indemnify Honeywell against all claims, including strict liability and negligence, with only one express exception—if the claim is the result of Honeywell's sole negligence.

The indemnity provision at issue in the instant case appears in Section 9.02 of both the 1978 and the 1985 contracts between Turner and Honeywell and provides for indemnity between the parties as follows:

> [Turner] shall defend, indemnify and save [Honeywell] harmless from all claims for injuries to or death of any and all persons, including [Turner], or its subcontractors, and for damage to property, arising out of performance by [Turner], its employees, agents, representatives, or subcontractors under this contract, expressly excepting claims for injuries or death caused by the sole negligence of [Honeywell], its officers, employees, agents and representatives.

After considering the pleadings, evidence, and argument of counsel, the trial court granted Honeywell's motion for partial summary judgment and denied Turner's motion for summary judgment, finding as follows:

> Okay. 9.02 of the ... contracts of '78 and '85 do not appear ambiguous to me. All claims appears to be all claims. The cases get distinguished where contracts provide all claims plus, and they try to enumerate things. And when they try to enumerate things then lawyers argue, well, they enumerated this but they didn't enumerate that. And so you're better off saying "all claims" without trying to enumerate things, because once you set out on a slippery slope of enumeration you have some attorney who's going to say, well, you left this out.
>
> So I find it clear as a bell that all claims arising out of performance by the contractor except those caused by the sole negligence of Honeywell, its officers, employees, agents and representatives, shall be indemnified and defended by the contractor. And the contractor shall save Honeywell harmless from all those claims for injuries or death of any and all persons. And so 9.02 means what it says clearly and it is not ambiguous.

On review, we reject Turner's contention that the indemnity provision found in both the 1978 and the 1985 contracts between Turner and Honeywell is ambiguous. Instead, we find that the trial court correctly concluded that the indemnity provision herein is unambiguous and that Turner's intention, i.e., to indemnify Honeywell for "all claims for injuries to or death of any and all persons ... and for damage to property" arising out of Turner's performance, unless "caused by the sole negligence" of Honeywell, is expressed in unequivocal terms. See **Berry v. Orleans Parish School Board**, 830 So.2d at 285. The partial summary judgment granted in favor of Honeywell was warranted.

Moreover, for the same reason we find that the trial court correctly granted Honeywell's motion for partial summary judgment, we also find that the trial court correctly denied Turner's motion for summary judgment. Turner claims that it was entitled to summary judgment because there were no genuine issues of material fact and that none of the contracts entered into between Turner and Honeywell clearly and unequivocally provide indemnity for Honeywell's own negligence or indemnity for Honeywell's strict liability. However, we have thoroughly reviewed the evidence submitted by Turner in support of its own motion for summary judgment and do not find that Turner has met its burden on summary judgment. Unless the motion for summary judgment is properly supported, La. Code Civ. P. art. 967 does not shift the burden to the adverse party to set forth specific facts showing that there is a genuine issue of material fact for trial. Thus, the trial court correctly denied Turner's motion for summary judgment.

Accordingly, we hereby affirm the trial court's February 1, 2018 judgment granting Honeywell's motion for partial summary judgment, we affirm the trial court's February 1, 2018 judgment denying Turner's motion for summary judgment, and we deny Turner's supervisory writ application.

MOTION TO STRIKE
(Assignment of Errors Nos. 2 and 3)

Turner argues that the trial court erred in striking the deposition of its corporate representative and the 1975 contract, noting that parol evidence was necessary for the

trial court to ascertain the intent of the parties. We find no merit to this argument.

When a contract is clear and unambiguous, the meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol or other extrinsic evidence. La. Civ. Code art. 1848; **Allain v. Shell Western E & P, Inc.**, 99-0403 (La. App. 1 Cir. 5/12/00), 762 So.2d 709, 714; **Hampton v. Hampton, Inc.**, 97-1779 (La. App. 1 Cir. 6/29/98), 713 So.2d 1185, 1189. The use of parol or other extrinsic evidence is proper only when a contract is found to be ambiguous after an examination of the four corners of the agreement, or when it is susceptible to more than one interpretation, or the intent of the parties cannot be ascertained. **Sanders v. Ashland Oil, Inc.**, 96-1751 (La. App. 1 Cir. 6/20/97), 696 So.2d 1031, 1036, writ denied, 97-1911 (La. 10/31/97), 703 So.2d 29. Having found no ambiguity in the indemnity provisions in the contracts in the instant case, no further interpretation may be made in search of the parties' intent. See La. Civ. Code. Art. 2046. The trial court did not err in striking this extrinsic evidence from consideration in this case.[3]

DECREE

For the above and foregoing reasons, we affirm the trial court's February 1, 2018 judgments and deny Turner's application for a supervisory writ. All costs associated with this appeal are assessed against Turner Industries Group, L.L.C.

FEBRUARY 1, 2018 JUDGMENTS AFFIRMED; WRIT DENIED.

[3] We note that the corporate deposition submitted by Turner in support of its motion for summary judgment was a deposition taken in another proceeding. In addition to the parol evidence argument, Honeywell also objected to same as "collateral depositions" and not depositions "on file" for use in summary judgments pursuant to Article 966. See **Robertson v. Doug Ashy Bldg. Materials, Inc.**, 2014-0141 (La. App. 1 Cir. 12/23/14), 168 So.3d 556, 582 n.27, writ denied, 2015-0365 (La. 4/24/15), 169 So.3d 364; **Edwards v. Larose Scrap & Salvage, Inc.**, 2010-0596 (La. App. 3 Cir. 12/8/10), 52 So.3d 1009, 1012; **Bell v. Gold Rush Casino**, 2004-1123 (La. App. 3 Cir. 2/2/05), 893 So.2d 969, 973. Turner argues on appeal that all of the cases relied on by Honeywell regarding this issue apply a version of Article 966 that is no longer in effect as it was amended by 2012 La. Acts 257, §1, to remove the "on file" requirement. We find it unnecessary to reach this issue as we find no error in the trial court's decision to exclude the deposition as inadmissible parol evidence.