NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 1047

VELOCITY EXPRESS, LLC

VERSUS

PROGRESSIVE PALOVERDE INSURANCE COMPANY

Judgment rendered December 21, 2018.

******

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, State of Louisiana
Trial Court No. 652256
Honorable Timothy E. Kelley, Judge

******

C. DAVID VASSER, JR.
BATON ROUGE, LA

ATTORNEY FOR
PLAINTIFF-APPELLANT
VELOCITY EXPRESS, LLC

ANDREW W. EVERSBERG
SEAN AVOCATO
BATON ROUGE, LA

ATTORNEYS FOR
DEFENDANT-APPELLEE
PROGRESSIVE PALOVERDE INSURANCE COMPANY

******

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

J. Chutz, J. Concurs

PETTIGREW, J.

In this suit for defense and indemnity under an insurance policy, the plaintiff appeals a summary judgment in favor of the insurer, dismissing its petition with prejudice. For the reasons set forth herein, we reverse.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Velocity Express, LLC ("Velocity"), is a company that provides local delivery services for general commodities, freight, documents, and general merchandise, among other things, for its customers. In connection with the operation of its business, Velocity engages independent contractors to pick up, transport, and deliver items for its customers. Warren Wright, Jr., a truck driver, formed a company called Wright Way, LLC ("Wright Way") and purchased a 2001 International 4700 box truck ("delivery truck") for the purpose of contracting with Velocity to deliver freight to Velocity's customers. Wright and Velocity executed an "Independent Contractor Agreement For Transportation Services," whereby Wright agreed to provide a vehicle and driver to perform transportation services for Velocity. In connection with the above-referenced agreement, Wright and Velocity also executed a DOT Required Vehicle Lease Agreement, whereby Wright leased the delivery truck to Velocity, as required by federal regulations governing authorized motor carriers. Progressive Paloverde Insurance Company ("Progressive") issued a commercial automobile insurance policy to Wright Way, which listed Wright as the rated driver and the delivery truck as an insured auto. Velocity was named as an additional insured on the policy, as required by the contract between Wright and Velocity.

Wright later sued Velocity in the Eighteenth Judicial District Court,[1] alleging that on March 4, 2013, while he was unloading freight that had been loaded in his truck by Velocity's employees, the freight shifted and fell on him, causing injuries. Wright alleged that the negligence of Velocity's employees in improperly loading the freight caused his

---

[1] Wright also named two other companies as defendants: Dynamex, Inc., a Texas corporation; and Transforce, Inc., a Canadian corporation. Wright alleged that these two corporations are successor corporations of Velocity Express and that "[a]ll defendants are solitarily [sic] bound in the state of Louisiana as a legally owned subsidiary of the other." Dynamex, Inc. and Transforce, Inc. are not parties to the instant litigation.

injuries, and that Velocity was liable for its employees' negligence. Wright's suit was later removed to federal court. Velocity made a demand upon Progressive for defense and indemnity under the policy issued to Wright Way, but Progressive denied coverage, including the duty to defend. Progressive's denial was based upon its investigation and subsequent conclusion that Wright was injured while on the job as an employee of Wright Way, unloading a vehicle used in the business of Wright Way. As a result of this conclusion, Progressive determined that coverage under the policy, including the duty to defend, was excluded by the terms of the policy governing bodily injury to an employee or fellow employee of an insured.

Following the denial of coverage, Velocity filed a petition for damages in the Nineteenth Judicial District Court against Progressive, who was not a party to Wright's suit in federal court, seeking reimbursement of the attorney fees and costs incurred in the defense of Wright's suit; indemnity; and penalties and attorney fees under the Insurance Code for the arbitrary and capricious denial of defense and indemnity.

Progressive filed a motion for summary judgment on the issue of coverage under the policy. Although Velocity's petition had requested indemnity, in addition to reimbursement of defense costs, and penalties and attorney fees, counsel for Velocity and Progressive informed the trial court at the hearing on Progressive's motion for summary judgment that Wright's federal court suit had been dismissed by a judgment in favor of Velocity, finding no liability; thus, Progressive's duty to indemnify Velocity was no longer an issue. After the hearing, the trial court found that Velocity was not covered under the Progressive policy either as an insured or as an additional insured, and therefore there was no duty to defend. The trial court granted Progressive's motion for summary judgment, dismissing Velocity's claims with prejudice. Velocity filed a motion for new trial, which was denied, and thereafter filed the instant appeal.

DISCUSSION

Summary judgment procedure is favored and "is designed to secure the just, speedy, and inexpensive determination of every action . . . and shall be construed to accomplish these ends." La. C.C.P. art. 966(A)(2). In reviewing the trial court's decision

on a motion for summary judgment, this court applies a de novo standard of review using the same criteria applied by the trial court to determine whether summary judgment is appropriate. **Louisiana Workers' Compensation Corp. v. Landry**, 11-1973, p. 5 (La.App. 1 Cir. 5/2/12), 92 So.3d 1018, 1021, **writ denied**, 12-1179 (La. 9/14/12), 99 So.3d 34.

The burden of proof is on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court, the mover is not required to negate all essential elements of the adverse party's claim, but only to point out to the court the absence of factual support for one or more of the elements necessary to the adverse party's claim. 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. C.C.P. art. 966(D)(1).

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that 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). A genuine issue is a triable issue, which means that an issue is genuine if reasonable persons could disagree. If, on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. A fact is "material" when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. **Kasem v. State Farm Fire & Cas. Co.**, 16-0217, p. 8 (La.App. 1 Cir. 2/10/17), 212 So.3d 6, 13. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Tate v. Outback Steakhouse of Florida**, 16-0093, p. 3 (La.App. 1 Cir. 9/16/16), 203 So.3d 1075, 1077.

Whether an insurance policy provides or precludes coverage is a dispute that can be properly resolved within the framework of a motion for summary judgment. **Crosstex Energy Services, LP v. Texas Brine Co., LLC**, 17-0895, p. 5 (La.App. 1 Cir. 12/21/17), 240 So.3d 932, 936, **writ denied**, 18-0145 (La. 3/23/18), 238 So.3d 963. Under

Louisiana law, the duty to defend is broader than the duty to indemnify. **Maldonado v. Kiewit Louisiana Co.**, 13-0756, p. 11 (La.App. 1 Cir. 3/24/14), 146 So.3d 210, 218. The issue of whether a liability insurer has a duty to defend a civil action against its insured is determined by application of the "eight-corners rule," under which an insurer must look only to the "four corners" of the plaintiff's petition and the "four corners" of its policy to determine whether it owes that duty. **Id.**

The insurer's duty to defend suits brought against its insured is determined by the factual allegations of the injured plaintiff's petition, and the insurer is obligated to furnish a defense unless it is clear from the petition that the policy unambiguously excludes coverage. This is true even where a plaintiff's petition alleges numerous claims for which coverage is excluded under an insurer's policy; a duty to defend will still exist if there is at least a single factual allegation in the petition under which coverage is not unambiguously excluded. **Henly v. Phillips Abita Lumber Co.**, 06-1856, pp. 5-6 (La.App. 1 Cir. 10/03/07), 971 So.2d 1104, 1109. Assuming the factual allegations of the petition are true, if there could be both (1) coverage under the policy, and (2) liability to the plaintiff, the insurer must defend the insured regardless of the outcome of the suit. **Maldonado**, 13-0756 at pp. 11-12, 146 So. 3d at 218-19. Additionally, the factual allegations of the petition are to be liberally interpreted in determining whether they set forth grounds which bring the claim within the scope of the insurer's duty to defend the suit brought against its insured. **Id.** If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured. When uncontroverted facts preclude the possibility of a duty to indemnify, the duty to defend ceases and the duty to indemnify is negated. **Id.** However, the test for whether a duty to defend exists is not whether the allegations unambiguously assert coverage, but only that they do not unambiguously **exclude** coverage. **Vaughn v. Franklin**, 00-0291, p. 6 (La.App. 1 Cir. 3/28/01), 785 So.2d 79, 84, **writ denied**, 01-1551 (La. 10/5/01), 798 So.2d 969.

When a party files a motion for summary judgment regarding the duty to defend, the court may consider only the plaintiff's petition and the face of the policies; the parties

cannot present any evidence such as affidavits or depositions. **Milano v. Board of Commissioners of Orleans Levee District**, 96-1368, pp. 4-5 (La.App. 4 Cir. 3/26/97), 691 So.2d 1311, 1314. Factual inquiries beyond the petition for damages and the relevant insurance policy are prohibited with respect to the duty to defend. **Martco Ltd. Partnership v. Wellons, Inc.**, 588 F.3d 864, 872 (5th Cir. 2009). Any ambiguities within the policy are resolved in favor of the insured to effect, not deny, coverage. **Doerr v. Mobil Oil Corp.**, 00-0947, p. 5 (La. 12/19/00), 774 So.2d 119, 124.

In support of its motion for summary judgment, Progressive filed a certified copy of the policy at issue; Wright's petition for damages from the underlying suit against Velocity Express; and Wright's deposition transcript from the instant litigation. In opposition, Velocity filed the transcript of Wright's trial testimony in his federal civil jury trial against Velocity; the independent contractor agreement and lease agreement between Wright and Velocity; a 2012 Form 1099-MISC issued to Wright Way by Velocity; Wright's 2011 Individual Income Tax Return; and the affidavit of John W. Dickerson, III, Velocity's Southeastern Regional Vice President during the time of the accident. Because there were no objections to any of the documents attached to the motion and opposition, the trial court accepted all of the documents into evidence at the hearing. While such evidence outside of the petition and the insurance policy may be considered, and is in fact indispensable, in assessing the duty to indemnify, it could not be considered by the trial court in reference to the duty to defend. **See Martco**, 588 F.3d at 872. Likewise, we are limited to the allegations of the petition and the provisions of the policy, without resort to extrinsic evidence, when conducting our de novo review of the summary judgment on Progressive's duty to defend.

The Progressive policy, as amended by the Louisiana Amendatory Endorsement, provides, in pertinent part:

> A. When used in Part I - Liability To Others, **insured** means:
>
> . . .
>
> 2. Any person while using, with your express or implied permission, and within the scope of that permission, an **insured auto you** own, hire, or borrow except:

. . .

(b) A person, other than one of **your** employees, partners (if **you** are a partnership), members (if **you** are a limited liability company), officers or directors (if **you** are a corporation), or a lessee or borrower or any of their employees, while he or she is moving property to or from an **insured auto**.

For purposes of this subsection A.2., an **insured auto you** own includes any **auto** specifically described on the **declarations page**.

3. Any other person or organization, but only with respect to the legal liability of that person or organization for acts or omissions of any person otherwise covered under this Part I – Liability to Others.

EXCLUSIONS – PLEASE READ THE FOLLOWING EXCLUSIONS CAREFULLY.[ ]IF AN EXCLUSION APPLIES, COVERAGE FOR AN ACCIDENT OR LOSS WILL NOT BE AFFORDED UNDER THIS PART I – LIABILITY TO OTHERS.

Coverage under this Part I does not apply to:

. . .

5. **Employee Indemnification and Employer's Liability**
   Bodily injury to:
   a. An employee of any **insured** arising out of or within the course of:
      (i) That employee's employment by any **insured**; or
      (ii) Performing duties related to the conduct of any **insured's** business; or

. . .

This exclusion applies:
a. Whether the **insured** may be liable as an employer or in any other capacity; and
b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

. . .

6. **Fellow Employee**
   Bodily Injury to:
   a. a fellow employee of an **insured** injured while in the course of their employment or while performing duties related to the conduct of **your** business.

The Progressive policy also contains an Additional insured endorsement, naming Velocity as an additional insured, which provides:

The person or organization named above is an **insured** with respect to such liability coverage as is afforded by the policy, but this insurance applies to said **insured** only as a person liable for the conduct of another **insured**

and then only to the extent of that liability. **We** also agree with **you** that insurance provided by this endorsement will be primary for any power unit specifically described on the **Declarations Page**.

In ruling that there was no coverage for Wright's claims against Velocity under the policy, the trial court found that Velocity was not an insured for purposes of Part I – Liability to Others; specifically, the trial court held that Velocity and its employees were excluded as insureds by the language of section A.2.(b). We disagree. Section A.2.(b) states that a person is an insured for purposes of their liability to others while using the delivery truck with Wright Way's express or implied permission, and within the scope of that permission, **except** while that person is moving property to or from the delivery truck, **unless** that person is a lessee or borrower of the delivery truck or any of their employees. Further, section A.3. extends coverage as an insured to any organization that is legally liable for the acts or omissions of a person who is an insured under section A.2.(b), but only to the extent of the organization's liability for the section A.2.(b) insured. In other words, if Velocity was a lessee or borrower of the delivery truck, then Velocity and its employees were insureds while moving property to or from the delivery truck with Wright Way's express or implied permission, and within the scope of that permission; and Velocity was also an insured under section A.3., to the extent of its liability for the negligence of its employees, who are insureds under section A.2.(b). Although Wright's petition does not allege that Velocity was a lessee or borrower of the delivery truck, nor does it allege that Velocity's employees were loading his delivery truck with (and in the scope of) his permission, this is not necessary for Progressive to have a duty to defend. The standard is not whether the petition alleges facts which fall within coverage under the policy; it is whether the allegations of the petition unambiguously exclude coverage, which they do not.

Progressive also asserts that an exclusion applies, which would preclude coverage, including the duty to defend. The exclusions quoted hereinabove and relied upon by Progressive (sections 5 and 6) both assume Wright's status as an employee of Wright Way. Although there is evidence in the record on the motion for summary judgment relating to whether or not Wright was working as an employee of Wright Way at the time

of his accident, this evidence cannot be considered in determining the duty to defend. The petition contains no allegations whatsoever that Wright was an employee of Wright Way; thus, for purposes of the duty to defend, coverage is not unambiguously excluded by the allegations of the petition, and the duty to defend remains.

Finally, Velocity's status as an additional insured under the policy was not unambiguously excluded by the allegations of the petition. The Additional insured endorsement states that Velocity is an insured for purposes of liability coverage under the policy, but only to the extent Velocity is liable for the conduct of another insured. Since the petition alleges that Velocity is responsible for its employees' negligence, and since we have determined that the allegations of the petition do not unambiguously exclude coverage for Velocity's employees as insureds under A.2.(b), coverage is likewise not excluded for Velocity under the Additional insured endorsement.

Because we have determined that coverage was not unambiguously excluded by the allegations of the petition and the provisions of the insurance policy, summary judgment in favor of Progressive, finding no coverage under the policy, was not appropriate.

CONCLUSION

The March 26, 2018 judgment of the trial court, granting Progressive Paloverde Insurance Company's motion for summary judgment and dismissing Velocity Express, LLC's claims with prejudice, is reversed. Costs of this appeal are assessed to defendant-appellee, Progressive Paloverde Insurance Company.

REVERSED.