NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0409

JESSICA M. MARINO, INDIVIDUALLY, AND AS NATURAL TUTRIX OF HER MINOR CHILD, MICHAEL "MIKEY" MATTHEW MARINO

VERSUS

XYZ INSURANCE COMPANY, MICHAEL WOODS AND REBECCA WOODS

Judgment Rendered: DEC 2 2 2021

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On Appeal from the 21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Trial Court No. 156228

Honorable Charlotte H. Foster, Judge Presiding

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BEFORE: WHIPPLE, CJ., PENZATO, AND HESTER, JJ.

PENZATO, J.

Plaintiff, Jessica M. Marino, individually and as natural tutrix of her minor child, Michael "Mikey" Matthew Marino, appeals a summary judgment in favor of defendant Hallmark Specialty Insurance Company ("Hallmark"), dismissing all claims filed against Hallmark with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 5, 2017, Mikey, age 5, drowned in a swimming pool on the premises of the home of defendants Michael and Rebecca Woods. Mikey's mother, Ms. Marino, filed a petition for wrongful death and survival damages against the Woodses and Hallmark, alleged to be the homeowner's insurer of the Woodses.[1] According to Ms. Marino's petition, the Woodses were babysitting Mikey, as well as hosting a group of minor children between the ages of 8 and 16. Ms. Marino alleged that at some point in the late night hours of July 5, 2017, the Woodses left Mikey unsupervised, to wander on their property in close proximity to their swimming pool. Ms. Marino further alleged that Mikey fell into the swimming pool due to the lack of proper supervision and drowned. Ms. Marino sought damages as a result of the fault and/or neglect of the Woodses.[2]

On July 2, 2020, Hallmark filed a motion for summary judgment. Hallmark asserted that it did not issue a homeowner's policy to the Woodses; rather, it issued a commercial general liability ("CGL") policy of insurance to Wood's Clear Water

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[1] In her original petition, Ms. Marino named "XYZ Insurance Company" with the intention of substituting the name of the Woodses' homeowner's insurer when its identity was discovered. Hallmark was substituted for "XYZ Insurance Company" in Ms. Marino's first supplemental and amending petition.

[2] Ms. Marino filed a second supplemental and amending petition adding as a defendant Philip R. Woods, father of defendant Mr. Woods and the owner of the property where the Woodses' home was located. Philip R. Woods filed a motion for summary judgment contending that he was not the responsible party for the drowning of Mikey. The trial court denied Philip R. Woods's motion for summary judgment. Thereafter, Ms. Marino and Philip R. Woods filed a joint motion for partial dismissal, and by judgment dated January 27, 2021, Philip R. Woods was dismissed from this lawsuit.

Systems LLC ("WCS"), a septic tank installation, servicing, and repair business owned and operated by Mr. Woods. Hallmark contended that its CGL policy (the "Policy") did not provide coverage to Mr. and/or Mrs. Woods in connection with Ms. Marino's lawsuit based upon two policy provisions. First, Hallmark argued that neither Mr. Woods nor Mrs. Woods met the requirements of status as "insureds" under the Policy because neither was engaged in any business activity of WCS at the time of Mikey's drowning around 10:00 p.m. Second, Hallmark contended that a Classification Limitation Endorsement ("CLE") in the Policy limited coverage to operations involving septic tank system installation, servicing, or repair, and that it was uncontested that no such operations were happening at 10:00 p.m. on July 5, 2017 around the Woodses' swimming pool.

Ms. Marino opposed the motion. She contended that on the day of Mikey's drowning, Mr. Woods held a customer appreciation party for customers of WCS and their children. She argued that the activities of the Woodses at the time of Mikey's drowning were within their course and scope of employment with WCS, thereby implicating the Policy.

Hallmark's motion for summary judgment came for hearing on September 8, 2020. The trial court took the matter under advisement, and on September 10, 2020, issued reasons for judgment. The trial court found that Mr. Woods was not performing duties related to the conduct of his business, and Mrs. Woods was not acting within the course and scope of her employment with WCS at the time of Mikey's drowning. The trial court noted that it was undisputed that all of the adult attendees of the party left the Woodses' home by the time the drowning occurred at 10:00 p.m. The trial court reasoned that even if the Woodses were considered to have been conducting business activities by hosting a "customer appreciation party" on July 5, 2017, by the time of Mikey's drowning, those alleged business activities had ceased. As such, the trial court found that neither Mr. nor Mrs.

Woods were "insureds" as defined by the Policy. The trial court further found that the CLE in the Policy limited coverage to operations involving septic tank installation, servicing, or repair; and that hosting a pool party for alleged customer appreciation was a far different, and riskier, operation than those contemplated under the Policy's CLE.

On October 21, 2020, the trial court signed a judgment in accordance with its reasons for judgment, granting Hallmark's motion for summary judgment, and dismissing all of Ms. Marino's claims against Hallmark with prejudice. Ms. Marino appeals.

LAW AND DISCUSSION

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). The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2).

The burden of proof is on the mover. La. C.C.P. art. 966(D)(1). Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion, the mover's burden does not require him to negate all essential elements of the adverse party's claim, action, or defense. Rather, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must 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). If, however, the mover 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 mover is not entitled to summary judgment. *Durand v. Graham*, 2019-1312 (La. App. 1 Cir. 6/12/20), 306 So. 3d 437, 440.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Reynolds v. Bordelon*, 2014-2371 (La. 6/30/15), 172 So. 3d 607, 610. 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. *Durand*, 306 So. 3d at 440.

A summary judgment may be rendered on the issue of insurance coverage alone, although there is a genuine issue as to liability or damages. See La. C.C.P. art. 966(E); *Myers v. Welch*, 2017-0063 (La. App. 1 Cir. 10/25/17), 233 So. 3d 49, 53, writ denied, 2017-2165 (La. 3/9/18), 238 So. 3d 454. 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.

An insurance policy is a contract between the parties and should be construed employing the general rules of interpretation of contracts set forth in the Louisiana Civil Code. *Reynolds v. Select Properties, Ltd.*, 634 So. 2d at 1183. Words and phrases used in a policy are to be construed using their generally prevailing meaning, unless the words have acquired a technical meaning. See La. C.C. art. 2047. An insurance policy is construed as a whole and each provision in the policy must be interpreted in light of the other provisions. See La. C.C. art. 2050. One provision of the policy should not be construed separately at the expense of disregarding other provisions. Thus, in determining whether an

insurance policy provides coverage, every provision of the policy must be read and interpreted, particularly the provisions relating to what is insured, who is insured, and what is excluded from coverage. Only then can a determination of coverage be made. *Succession of Fannaly v. Lafayette Ins. Co.*, 2001-1144, 2001-1343, 2001-1355, 2001-1360 (La. 1/15/02), 805 So. 2d 1134, 1139. Where the language in the policy is clear, unambiguous, and expressive of the intent of the parties, the agreement must be enforced as written. *Myers*, 233 So. 3d at 55.

In support of its motion for summary judgment, Hallmark filed a certified copy of the Policy. The Policy Declarations page identifies the named insured as "Wood's Clear Water Systems LLC" and sets forth the Business Description as "SEWAGE INSTALL/SERV/REPAIR." The location of the business is listed as "30611 SIDNEY WOODS DR, HOLDEN, LA 70744." The Premium Classification shown is "SEPTIC TANK SYSTEMS – INSTALLATION, SERVICING OR REPAIR." The Policy provides that Hallmark "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' to which the insurance applies." The Policy defines an insured as follows:

> SECTION II – WHO IS AN INSURED
>
> 1. If you[3] are designated in the Declarations as:
>
> ...
>
> c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
>
> ...
>
> 2. Each of the following is also an insured:
>
> a. Your ..."employees," ... but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.

[3] Pursuant to the Policy, "the words 'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under [the Policy]."

The Policy contains an Amendatory Endorsement that modifies the CGL coverage. Section D of the Endorsement provides as follows:

D. CLASSIFICATION LIMITATION ENDORSEMENT

> In consideration of the premium charged, it is hereby understood and agreed that coverage under the policy is specifically limited to, and applies only to those operations as described under the Description of Hazards section of the applicable coverage part of schedule designated in the Declarations page of this policy. **The policy excludes coverage for any operation not specifically listed in the coverage part, schedule or Declarations page of this policy** (emphasis in original).

In addition to the policy, Hallmark filed the depositions of Mr. Woods and Mrs. Woods in support of its motion for summary judgment. In his deposition, Mr. Woods testified that he started WCS at the end of 2016. He testified that WCS makes and installs sewer treatment systems for residential homes. Mrs. Woods performed clerical-type duties such as data entry and paperwork for WCS. The home office for WCS is the Woodses' home, located at 30611 Sidney Woods Road, in Holden, Louisiana. A swimming pool is located behind the Woodses' home. The Woodses did not have a homeowner's policy in July of 2017; they previously had homeowner's insurance but did not renew the policy when it expired.

According to the Woodses' deposition testimony, Mr. Woods "invited a couple of friends/customers to come over" around lunchtime on July 5, 2017, to eat jambalaya/pastalaya and swim in the pool. The event was a "customer appreciation party." The friends/customers were Tanya Hutchinson, along with her son Brett; Sal Drott, who brought his children; and Jill and Jake Billiot, with their two children. According to Mr. Woods, he had installed septic tanks for the Hutchinsons and for Mr. Drott's mother. He did some work for the Billiots, who were also family friends.

Also present at the Woodses' home on the afternoon of July 5, 2017, were the Woodses' three children/stepchildren, a friend of Mrs. Woods's daughter, and

three of Mrs. Woods's nieces and nephews. At some point in the afternoon of July 5, 2017, Roy Marino, Mikey's father and a friend of the Woodses, dropped Mikey and another child off at the Woodses' home while Mr. Marino attended to an unrelated family emergency.

By 9:00 p.m., the friends/customers had left the Woodses' home, although Brett Hutchison (who was also a friend of Mrs. Woods's daughter) and Addison, one of the Billiot children, remained to swim and play with the Woodses' children/stepchildren and nieces and nephews. According to Mr. Woods, after sunset on the evening of July 5, 2017, there was no business activity or entertainment going on at the Woodses' home in the pool area. Mrs. Woods confirmed that after 9:00 p.m., the Woodses were not conducting any business of WCS. Rather, after 9:00 p.m., the kids were "hanging out, swimming and playing." Around 10:00 p.m., Mrs. Woods went inside to get towels. While she was inside, Mikey fell into the pool and drowned.

Definition of Insured Under the Policy

The evidence introduced in connection with Hallmark's motion for summary judgment establishes that Mr. Woods, as a member and/or manager of WCS, qualifies as an insured "only with respect to the conduct of [WCS's] business" or his duties as WCS's manager. Similarly, Mrs. Woods, as an employee of WCS, qualifies as an insured "only for acts within the scope of [her] employment by [WCS] or while performing duties related to the conduct of [WCS's] business." On appeal, Ms. Marino argues that Mikey drowned during a customer appreciation party for WCS customers and their children. She further argues that client entertainment is an integral part of any business, and thus the trial court erred in granting Hallmark's motion for summary judgment because at the time of Mikey's death, the Woodses were engaged in activities sufficiently related to WCS's business to confer on the Woodses the statue of "insureds" under the Policy. Ms.

Marino argues that the Louisiana Supreme Court's holding in *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467 (La. 1990), mandates the conclusion that the Woodses' failure to properly supervise Mikey occurred while they were engaged in an activity/duty "with respect to" – or "related to" – "the conduct of [WCS's] business."

In *Ermert*, the president of and majority stockholder in a fence company accidentally shot a companion while at a hunting camp building duck blinds for the upcoming duck season. *Ermert,* 559 So.2d at 469-70. The Court held that the company president was acting within the scope of his employment because as chief executive and majority stockholder, he had established the practice of using the camp and his relationship with his hunting friends for the purpose of furthering the business interests of his employer, the fence company. *Id.* at 469. The Court noted that while the company president used the camp partially for his own personal enjoyment and recreation, the record also indicated that he repeatedly and consistently used it for business purposes. *Id.* at 478. The Court concluded that the fence company had made the risks associated with waterfowling (which are not normally characteristic of the activities of fence companies) a part of its business by having the company president promote and engage in the activities of the hunting camp in order to obtain direct and referral fence sales. *Id.*

Based upon our *de novo* review of the evidence submitted in connection with Hallmark's motion for summary judgment, we do not agree with Ms. Marino that the holding in *Ermert* mandates a finding that at the time of Mikey's drowning the Woodses were engaged in an activity/duty "with respect to" – or "related to" – "the conduct of [WCS's] business," thereby making them insureds under the Policy. Unlike in *Ermert*, there was no evidence that the Woodses repeatedly and consistently used the pool area of their home for business purposes, such that WCS made the risks associated with hosting a pool party (which are not normally

characteristic of the activities of a septic tank installation, servicing and, repair business) a part of its business. See *Ermert,* 559 So.2d at 478. To the contrary, Mr. Woods testified that this was the first time he had hosted a customer appreciation event.

Moreover, even if the customer appreciation party is considered "the conduct of [WCS's] business," the evidence introduced in connection with Hallmark's motion for summary judgment establishes that after 9:00 p.m. on the evening of July 5, 2017, the Woodses were not conducting any business of WCS.

Thus, we find that neither Mr. nor Mrs. Woods met the definition of an "insured" under the Policy.

Classification Limitation Endorsement

A classification limitation endorsement is essentially an exclusion that ties coverage to specifically listed operations of the insured. *Wagner v. Tammany Holding Co., LLC*, 2013-0374 (La. App. 4 Cir. 10/9/13), 135 So. 3d 77, 84. "Commercial general liability policies are designed to protect the insured against losses to third parties arising out of the operation of the insured's business. Consequently, a loss must arise out of the insured's business operations in order to be covered under the policy issued to the insured." 9A Couch on Ins. § 129:2. A classification limitation endorsement restricts coverage available under a CGL policy to specific operations of the insured while excluding coverage for activities falling outside the scope of those operations. *Wagner,* 135 So. 3d at 84. An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 93-0911 (La. 1/14/94), 630 So. 2d 759, 763. Insurance companies are not required to issue CGL policies with unrestricted or "all-risk" coverage. *Encompass Ins. Co. v. Gammon Roofing, L.L.C.*, 2007-1554

(La. App. 4 Cir. 9/24/08), 996 So. 2d 16, 21. Absent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and to enforce reasonable conditions upon the policy obligations they contractually assume. *Louisiana Ins. Guar. Ass'n*, 630 So. 2d at 763.

To determine whether a classification limitation endorsement excludes coverage for a particular claim, the following four factors should be considered:

(1) the language of the classification limitation, which usually appears in an exclusionary endorsement;

(2) the classified operations, which appear on the declarations portion of the policy;

(3) the allegations contained in the petition; and

(4) the law applicable to the claim for coverage.

Wagner, 135 So. 3d at 84.

Applying the above factors to the present case, we note that the Declarations page of the Policy describes WCS's business as "SEWAGE INSTALL/ SERV/REPAIR," and classifies the business for premium purposes as "SEPTIC TANK SYSTEMS – INSTALLATION, SERVICING OR REPAIR." The CLE excludes coverage "for any operation not specifically listed in the coverage part, schedule or Declarations page of this policy" (emphasis removed).

Ms. Marino's petition alleges that the Woodses failed to properly supervise Mikey, resulting in his drowning. She contends that she is entitled to damages pursuant to La. C.C. arts. 2315, 2315.1, and 2315.2. The law on which her claims against the Woodses is based is negligence.

On appeal, Ms. Marino argues that the purpose of a classification limitation endorsement is to exclude coverage for operations not related to the conduct of the operations of the insured, and is not meant "to exclude coverage for activities

incidental to – but nevertheless related to – the conduct of the classified operations." She further argues that "[a]ll that is required for coverage is that the activity/duty be *related to* the conduct of the business of septic tank installation, service, or repair – *e.g.*, entertaining septic tank customers." Finally, Ms. Marino argues that the Classification Limitation Endorsement is ambiguous and must be construed to afford coverage. She argues that there is no "Description of Hazards section" in the policy, thereby rendering the CLE "nonsensical." She further argues that the term "operation" does not appear in the coverage part, schedule, or Declarations page of the Policy, and is not defined within the policy. She argues that the term "operation" includes all tasks incidental to, and entailed by, the operation.

We do not find the CLE to be ambiguous. Rather, Ms. Marino's interpretation of the CLE is contrary to the express language of the CLE, which excludes coverage "**for any operation *not specifically listed***" (italics added). The CLE does not contain references to operations or activities "incidental to" or "related to" the specifically listed business purpose. Moreover, Ms. Marino has failed to cite any Louisiana law supporting her construction of the CLE. Finally, her proposed construction of the CLE is unreasonable in that it seeks to enlarge its provisions beyond what was reasonably contemplated by its terms. See *Louisiana Ins. Guar. Ass'n*, 630 So. 2d at 763. Thus, we find there is no coverage based on the language of the CLE and the allegations of the petition. Negligent supervision at the home of the Woodses is not contemplated under the Policy's CLE.

Accordingly, we find that Hallmark was entitled to a summary judgment finding that the Policy did not provide coverage to the Woodses for Mikey's drowing.

CONCLUSION

For the foregoing reasons, we affirm the October 21, 2020 judgment of the trial court granting summary judgment in favor of Hallmark Specialty Insurance Company and dismissing all of Jessica M. Marino's claims against Hallmark Specialty Insurance Company with prejudice. Costs of this appeal are assessed to Jessica M. Marino.

AFFIRMED.