NOT DESIGNATED FOR PUBLICATION

STATE FARM FIRE AND CASUALTY COMPANY, AS SUBROGEE TO THE RIGHTS OF PERRY O. CRESPO, TIMOTHY R. DAUTERIVE, CARLA P. DAUTERIVE, BARBARD B. ORDES, TRACY E. HENRY AND MICHAEL LEE	*	**NO. 2001-CA-1047**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
VERSUS	*	
	* * * * * * *	
RAY KELLER, JR., ABC INSURANCE COMPANY AND XYZ INSURANCE COMPANY		

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 75-339, DIVISION "C"
Honorable Wayne Cresap, Judge
* * * * * *

Judge Patricia Rivet Murray
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Steven R. Plotkin, Judge Patricia Rivet Murray, Judge Terri F. Love)

ARMSTRONG, J., DISSENTS

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REVERSED

Northland Insurance Company appeals the district court's judgment finding coverage under Northland's policy for property loss suffered by Ray Keller, Jr. during a fire at his hunting lodge, and awarding damages, a statutory penalty and attorney fees to Mr. Keller. For the reasons that follow, we reverse.

On November 20, 1993, a fire destroyed a hunting lodge in Boligee, Alabama that had been purchased by Ray Keller, Jr. and was leased to the Les Bon Temps Roule Hunting Club, of which Mr. Keller was a member. Stored at the lodge was personal property belonging to six other members of the hunting club. State Farm Fire and Casualty Company, the insurer of that personal property, paid its insureds' claims; then, on November 8, 1994, State Farm filed suit as subrogee to its insureds' rights against Mr. Keller, alleging that the fire was caused by a defective electric blanket owned by him. In an amended petition, State Farm also named as defendants

Northland Insurance Company, Mr. Keller's liability insurer, and Sunbeam Corporation, the alleged manufacturer of the blanket. On January 9, 1995, Mr. Keller asserted a "cross claim" for indemnity and defense against both Northland Insurance Company and Carpenter Insurance Service, the agent through which Mr. Keller had obtained the Northland policy. In the cross claim, Mr. Keller also sought compensation for his own property loss resulting from the fire. On January 13, 1998, State Farm dismissed its claims against Mr. Keller and Northland pursuant to a settlement. Remaining to be tried were Mr. Keller's property damage claim, his assertion that Northland had arbitrarily denied payment of that claim, and his claim against Northland for its failure to defend State Farm's subrogation claim. The trial transcript reflects that on the morning of trial, the parties reached a settlement as to attorney fees owed Mr. Keller by Northland for its failure to defend, and that claim was subsequently formally dismissed. On May 1, 2000, a one-day bench trial was held on Mr. Keller's two remaining claims against Northland. At the conclusion of trial, the trial court ruled in favor of Mr. Keller. One year later, on May 23, 2001, the judgment was reduced to writing. The judgment awarded Mr. Keller $25,000.00 under the

Northland policy, as well as a ten percent penalty and $6875.00 in attorney fees pursuant to La. R.S. 22:658 on account of Northland's arbitrary refusal to satisfy Mr. Keller's claim.

Northland takes a suspensive appeal, contending that the policy by its terms provides liability coverage only, not property damage coverage. Northland additionally argues that because the trial court erred by finding coverage, it also erred by concluding that Northland had arbitrarily denied payment of Mr. Keller's claim. Finally, Northland argues that the trial court erred by qualifying one of plaintiff's witnesses as an expert in property appraisal. Mr. Keller answers the appeal, contending that the trial court erred by limiting his recovery to $25,000.00.

Upon review, we find that the trial court committed legal error by interpreting the insurance policy as providing coverage for Mr. Keller's property damage. An insurance policy is an agreement between the parties and should be interpreted by using ordinary contract principles. If the language of the policy is clear and unambiguous, the agreement must be enforced as written. *Smith v. Matthews,* 611 So.2d 1377, 1379 (La. 1993) (citing *Central Louisiana Electric Co. v. Westinghouse*, 579 So. 2d 981 (La.

1991). The determination of whether an insurance contract is clear or ambiguous is a question of law. *Louisiana Insurance Guaranty Association v. Interstate Fire & Casualty Co.,* 93-0911 (La. 1/14/94), 630 So. 2d 759, 764. When the language of the policy is clear, courts lack the authority to change or alter its terms under the guise of interpretation. *Id.*

The title of the policy in question is "Commercial General Liability Insurance Protection for Hunting Clubs." The policy was in effect from November 16, 1993, through November 16, 1994, which includes the date of the fire. Named as insureds are the Les Bon Temps Roule Hunting Club and Mr. Keller. The operative language of the policy is as follows:

> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages….
>
> * * * * *
>
> No other obligation or liability to pay sums or perform acts or

services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B.

* * * * *

2. Exclusions
This insurance does not apply to:

* * * * *

j. "Property damage" to:
(1) Property you own, rent, or occupy;

* * * * *

(4) Personal property in the care, custody or control of the insured.

This policy, which expressly provides coverage for "sums that the insured becomes legally obligated to pay as damages," and excludes coverage for the insured's own property, is a classic liability policy. The language is not ambiguous; the coverage is clearly limited to claims brought against Northland's insured(s) by third parties. There is no additional coverage provided for in the SUPPLEMENTARY PAYMENTS section, which mentions only certain expenses related to litigation against the insured(s). In addition to the plain language of the policy, the declarations page shows only a premium charged for liability coverage, none for property damage.

The claim in question herein is not a liability claim, as it does not concern any sum Mr. Keller is obligated to pay to another party as damages. Any potential liability claim was resolved when State Farm dismissed its action against Mr. Keller. The only remaining claims were Mr. Keller's

personal claim against Northland for his own property that was lost or damaged during the fire, and an ancillary claim that Northland had arbitrarily denied him payment of that "first party" property damage claim. The evidence at trial showed that in addition to the Northland policy, Mr. Keller had a standard fire policy from Alpha Insurance Company, which provided $50,000.00 of first party coverage on the hunting lodge and $10,000.00 on its contents, but did not provide liability protection. This fact further supports our conclusion that the Northland policy does not provide coverage for Mr. Keller's property loss.

At trial, Mr. Keller contended that there was coverage under the Northland policy for his property loss because the declarations page lists a $25,000.00 "fire damage limit" under "Limits of Insurance." Although the trial court did not issue reasons for judgment, it presumably accepted this argument because it limited the damages awarded in the judgment to $25,000.00. A careful reading of the policy itself, however, clearly refutes this argument. In "**Section III – Limits of Insurance**," it states, in pertinent part:

> **6.** …[T]he Fire Damage Limit is the most we will pay under Coverage A for damages because of "property damage" to premises rented to you arising out of any one fire.

This provision clearly refers to a liability claim (damages owed by the

insured to a third party, as provided in Coverage A) that arises because of a fire affecting premises *rented to* the insured. The hunting lodge was not rented to Mr. Keller; he owned it. He is not making a claim for damages he owes to a third party because of the fire; rather, his claim is for the loss of his own property in the fire. Such a claim is clearly not covered by the Northland policy. An insurance policy must be construed as a whole; one policy provision is not to be construed separately from the other provisions. La. Code Civ. Art. 2050; *Louisiana Insurance Guaranty Association v. Interstate Fire & Casualty Co., supra*, at 763.

On appeal, Mr. Keller for the first time argues that he is pursuing this claim "in his capacity as landlord" of the premises, and that the Les Bon Temps Roule Hunting Club, which is also an insured under the Northland policy, is "strictly liable" to him for the loss of his property. This argument fails for several reasons. First, Mr. Keller never asserted such a claim in any pleading, nor was it considered by the trial court. Secondly, even if properly asserted, the claim would fail under the Northland policy's aforementioned exclusion "j," which excludes coverage of property owned by the insured, because Mr. Keller himself is the owner of the damaged

property. Finally, had Mr. Keller actually asserted a claim that another insured under the Northland policy (i.e., the hunting club) was at fault in causing the fire and was therefore strictly liable for his property loss, he would have had the burden of proving that claim at trial. To succeed in an action based on strict liability under the pre-1996 version of Louisiana Civil Code article 2317, the plaintiff must prove three elements: (1) The thing which caused the damage was in the care, custody, and control of the defendant; (2) The thing had a vice or defect which created an unreasonable risk of harm; and (3) The injuries were caused by the defect. *Sistler v. Liberty Mutual Insurance Co.*, 558 So.2d 1106, 1112 (La. 1990). However, despite his contention that article 2317 applies, Mr. Keller introduced absolutely no evidence at trial concerning the cause of the fire, who was at fault, who had custody and control of the blanket which he now claims was the cause, or the existence of a defect in the blanket.

We therefore conclude that the trial court erred by holding that the Northland policy provided coverage for Mr. Keller's property loss, and we reverse the award of damages to him. Having found no coverage under the policy, we also reverse the penalty and attorney fees awarded by the trial court on the basis that Northland had

arbitrarily refused to satisfy Mr. Keller's claim. Finally, our reversal of the trial court's judgment moots consideration of Northland's final assignment of error, relating to the qualification of an expert witness, and also of Mr. Keller's claim in answer to the appeal that his award should not have been limited to $25,000.00.

Accordingly, for the reasons stated, the judgment of the trial court is reversed.

REVERSED