

SHANE SALATHE

NO. 19-C-251

VERSUS

FIFTH CIRCUIT

THE PARISH OF JEFFERSON THROUGH THE

COURT OF APPEAL

DEPARTMENT OF SEWERAGE

STATE OF LOUISIANA

July 22, 2019

Susan Buchholz

First Deputy Clerk

IN RE AMERISURE MUTUAL INSURANCE COMPANY

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE HENRY G.
SULLIVAN, JR., DIVISION "M", NUMBER 749-298

Panel composed of Judges Fredericka Homberg Wicker,
Jude G. Gravois, and Robert A. Chaisson

WRIT GRANTED IN PART; DENIED IN PART

Relator, Amerisure Insurance Company, seeks review of the trial court's partial summary judgment in favor of plaintiffs on the issue of insurance coverage under an Amerisure insurance policy. For the following reasons, we deny the writ in part as to the issue of coverage but grant the writ in part to vacate the portion of the trial court judgment finding that the policy necessarily applies if the insured is found liable.

On November 7, 2014, Jefferson Parish (hereinafter "the Parish") and Fleming Construction Company, LLC (hereinafter "Fleming") entered into a contract "for replacement or restoration of existing sewer mains (gravity or force)" in Jefferson Parish. That contract required Fleming to procure certain insurance policies including a commercial general liability policy and an owner's and contractor's protective (hereinafter "OCP") liability policy.¹

On or about December 1, 2014, Fleming procured from Amerisure an OCP policy bearing Policy Number GL 20943750102, identifying the Parish as the named insured and Fleming as the designated contractor for coverage during the sewer repair contract for the period December 1, 2014 to December 1, 2016. On

¹ The factual and procedural history is taken from this Court's previous writ disposition in *Salathe v. The Parish of Jefferson*, 17-C-601 (La. App. 5 Cir. 11/14/17) (unpublished writ disposition).

January 8, 2015, the Parish issued a “Work Order” to Fleming to “Change all 4 Discharge Base Elbows, rails & all piping in wet wells” at Lift Station E7-6 in Metairie. On February 5, 2015, plaintiff Shane Salathe, a Fleming foreman, went down into the wet well to perform his work. Plaintiff alleged that when he attempted to exit the wet well, the hatch door failed and slammed, which knocked plaintiff off the ladder. That day, plaintiff fell almost thirty feet to the bottom of the well and suffered a traumatic brain injury and paraplegia.

On May 1, 2015, plaintiff filed a petition for damages, naming, among others, the Parish and Amerisure as defendants. On April 6, 2017, Amerisure filed a motion for partial summary judgment, arguing that the OCP policy in question is a “specialized policy that only provides coverage to the [Parish] for two specific claims: 1) any vicarious liability the [Parish] may have for the negligence of [Fleming] or 2) any claim that the [Parish] negligently supervised the work of Fleming.” Amerisure attached a copy of the OCP policy to its motion.

On October 4, 2017, the trial court issued a judgment granting partial summary judgment after finding that “the response in discovery and the facts of the case do not lend themselves to the broad construction interpretation of the phrase ‘general supervision’ in the Amerisure policy as argued by the Plaintiff.” The judgment granted partial summary judgment in favor of Amerisure and dismissed plaintiff’s claims with respect to the OCP. Plaintiff sought review of that judgment with this Court. On November 14, 2017, this Court granted plaintiff’s writ application, reversed the granting of partial summary judgment in favor of Amerisure, and found that “genuine issues of material fact [] preclude summary judgment at this stage of the litigation.” *See Salathe v. The Parish of Jefferson*, 17-601 (La. App. 5 Cir. 11/14/17) (unpublished writ disposition). In our writ disposition, this Court recognized that, “a summary judgment declaring *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 in support of the motion for summary judgment, under which coverage could be afforded.” *Id.*, citing *Davis v. Scottsdale Insurance Company*, 13-255 (La. App. 5 Cir. 10/30/13), 128 So.3d 471 (emphasis added).

Subsequently, plaintiff filed a motion for partial summary judgment on the same issue, the applicability of the OCP policy to plaintiff’s damages. In support of his motion, plaintiff attached various documents and depositions considered previously in connection with Amerisure’s motion for partial summary judgment in addition to the deposition of a Parish employee, Mr. Brett Todd.

Mr. Todd, the current Director of the Department of Sewerage for Jefferson Parish², testified that Mr. Cook, a Parish employee and the project coordinator, would be the individual in charge of “monitoring the progress of the job.”³ He

² Mr. Todd testified that he was not the Director of the Department at the time of the accident at issue but served as the assistant director at that time.

³ In his deposition, Mr. Cook testified that he would “document the progress that the contractor is making” on a job.

further agreed that the Parish “sets forth the location and the type of work to be done” at the jobsite. In opposition to the motion for partial summary judgment, Amerisure again pointed to the Parish’s answers to discovery, in which the Parish indicated that it had no “supervisory responsibility” over Fleming employees. Amerisure also pointed to Mr. Cook’s deposition, previously considered in connection with Amerisure’s motion for partial summary judgment, in which he also testified that he did not “directly supervise” the Fleming project and that no Parish employee was present at the time of the accident at issue.

On May 16, 2019, the trial judge issued a written judgment granting plaintiffs’ motion for partial summary judgment, finding that the policy at issue applies if the Parish is found responsible for plaintiffs’ damages.⁴

Appellate courts review motions for summary judgment *de novo*, asking the same questions as the trial court to determine whether summary judgment is appropriate. *Champagne v. Ward*, 03-3211 (La. 1/19/05), 893 So.2d 773, 776. In determining whether there are any genuine issues of material fact, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. *Davis v. Scottsdale Ins. Co.*, 13-255 (La. App. 5 Cir. 10/30/13), 128 So.3d 471, 475-77.

The Louisiana Supreme Court has instructed the following concerning interpretation of an insurance contract between parties:

[T]he responsibility of the judiciary in interpreting insurance contracts is to determine the parties’ common intent. *See*, LSA–C.C. art. 2045; *Edwards*, 03–2103, p. 11, 883 So.2d at 940; *Cadwallader*, 02–1637 at 3, 848 So.2d at 580; *Blackburn v. National Union Fire Insurance Co. of Pittsburgh*, 00–2668, p. 6 (La.4/3/01), 784 So.2d 637, 641. Courts begin their analysis of the parties’ common intent by examining the words of the insurance contract itself. *See*, LSA–C.C. art. 2046; *Succession of Fannaly v. Lafayette Insurance Co.*, 01–1355, p. 3 (La.1/15/02), 805 So.2d 1134, 1137; *Blackburn*, 00–2668 at 6, 784 So.2d at 641 (“[T]he initial determination of the parties’ intent is found in the insurance policy itself.”). In ascertaining the common intent, words and phrases in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning, in which case the words must be ascribed their technical meaning. *See*, LSA–C.C. art. 2047; *Edwards*, 03-2103 at 11, 883 So.2d at 940-941; *Cadwallader*, 02-1637 at 3, 848 So.2d at 580; *Succession of Fannaly*, 01–1355 at 3, 805 So.2d at 1137.

Sims v. Mulhearn Funeral Home, Inc., 07-0054 (La. 5/22/07), 956 So.2d 583, 589.

The determination of whether a contract is clear or ambiguous is a question of law. *Id.* Generally, an ambiguous contractual provision is construed against

⁴ After plaintiff’s death, his parents were substituted as parties-plaintiffs.

the insurer and in favor of coverage. *Id.*; *See also* La. C.C. art. 2056. Upon *de novo* review, we find that the term “general supervision” in the policy at issue is an ambiguous provision susceptible to multiple interpretations. Accordingly, we construe this provision in favor of coverage and against the drafter of the policy, Amerisure. Thus, we find no error in the trial court’s grant of partial summary judgment on the issue of coverage in this matter and we deny the writ as to that portion of the trial court judgment.

However, we grant the writ in part to vacate a portion of the trial court’s judgment. The trial court judgment, in addition to granting the partial summary judgment as to the issue of coverage, further ordered:

[I]n the event defendant Consolidated Sewerage District No. 1 of the Parish of Jefferson becomes legally obligated to pay damages because of bodily injuries suffered by deceased plaintiff Shane Salathe as claimed by plaintiffs Karen G. Salathe and Wayne Salathe in the main demand, then Owners and Contractors Protection Liability Policy Number GL 20943750102 issued by Amerisure to the Parish of Jefferson applies to such bodily injuries and provides insurance coverage of such damages within its terms and limits.

Because there are various theories of liability under which the Parish could be found liable to plaintiff under the facts of this case and because only certain theories of liability (*e.g.*, liability arising out of the Parish’s negligent “general supervision” of Fleming’s work) would result in applicability of the Amerisure policy, we find this portion of the trial court judgment overbroad. Accordingly, we grant the writ in part and vacate this portion of the trial court judgment. In all other respects, this writ is denied.

Gretna, Louisiana, this 22nd day of July, 2019.

FHW
JGG
RAC

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
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JUDGES



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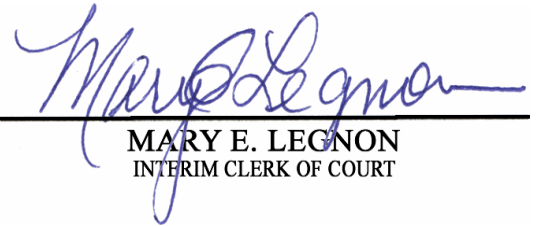
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FIRST DEPUTY CLERK

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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **07/22/2019** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY



MARY E. LEGNON
INTERIM CLERK OF COURT

19-C-251

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