STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CW 1304R

SCOTT JARRED

VERSUS

GARY MICHAEL BROWN, J & J DIVING CORPORATION AND PROGRESSIVE INSURANCE COMPANY

Judgment Rendered: DEC 2 3 2015

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2010-17762

Honorable Martin Coady, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

This matter is before us on remand from the supreme court, which instructed us to convert Valiant Insurance Company and XL Specialty Insurance Company's appeal to an application for supervisory writs and consider the application on the merits. In this matter, an excess insurer of a corporation challenges the grant of a motion for summary judgment in favor of the plaintiff finding that the excess policy covered plaintiff's claims and the denial of the excess insurer's motion for summary judgment that contended that there was no coverage under the policy. For the following reasons, we reverse.

PROCEDURAL HISTORY

On May 26, 2010, around 10:45 p.m., Gary Michael Brown was driving a truck owned by his employer J&J Diving Corporation, when he collided with a St. Tammany Parish Sheriff's Department cruiser driven by Deputy Scott Jarred. After the accident, Jarred filed suit against Brown, J&J, and J&J's primary insurer Progressive Insurance Company. On May 22, 2012, Jarred filed a supplemental and amending petition for damages, adding as defendants XL Specialty Insurance Company and Valiant Insurance Company (collectively "Underwriters"), who provided a Marine Excess Liability Policy ("Bumbershoot policy") in favor of J&J. On May 24, 2012, Jarred entered into a **Gasquet**[1] release that settled all claims against J&J, Brown, and Progressive. In the release, Jarred reserved his claims against any excess and umbrella insurance policies.

On December 5, 2013, Underwriters filed a motion for summary judgment, contending that the Bumbershoot policy issued to J&J provided coverage for commercial diving contractor operations and the automobile accident was in no way related to J&J's commercial diving contractor operations. Therefore, the policy offers no coverage for Jarred's accident.

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[1] **Gasquet v. Commercial Union Insurance Company**, 391 So.2d 466 (La. App. 4 Cir. 1980), writs denied, 396 So.2d 921, 922 (La. 1981).

On February 14, 2014, Jarred filed an opposition to Underwriters' motion for summary judgment and a cross motion for summary judgment requesting that the trial court find coverage for the plaintiff under the Bumbershoot policy because the policy's use of the word "contractor" expanded the coverage of the policy, and the policy followed form with the Progressive Insurance Automobile policy that provided coverage to the plaintiff.

After a hearing on the motions for summary judgment filed by both parties, the trial court granted summary judgment in favor of Jarred and denied Underwriters' motion for summary judgment. It is from this judgment that Underwriters appealed. On first review, we dismissed the appeal for lack of appellate jurisdiction. Underwriters then applied for writ of certiorari with the supreme court. The supreme court remanded the matter back before us to convert the appeal to an application for supervisory writs and consider the application on the merits. **Jarred v. Brown**, 2015-0943 (La. 8/28/15), 174 So.3d 1157. Therefore, this matter is converted to an application for supervisory writs, and we will consider the merits of Underwriter's application. Underwriters assert that:

1. The trial court erroneously held that Brown was engaged in commercial diving contractor operations on behalf of J&J at the time of the incident.
2. The trial court's finding that the Bumbershoot policy provides coverage over the Progressive auto policy on a follow form basis was erroneous in that:
    a. The trial court ignored the plain wording of the insuring agreement of the Bumbershoot Policy.
    b. The trial court misinterpreted the unambiguous wording of exclusion "o" of the Bumbershoot policy.

FACTS

Brown was a "shop kid" employed by J&J who cleaned equipment and delivered equipment to job sites as needed. J&J is a commercial diving company that works in oil fields, industrial plants, and docks along the river. Brown split his

time "on call" with another employee of J&J. J&J allowed its employees to take the company owned trucks home and use them for personal errands.

Brown was driving a truck owned by his employer J&J when he was involved in an automobile accident with Jarred, a St. Tammany Parish Sheriff's deputy, who was responding to an emergency. At the time of the accident, Brown's girlfriend was in the truck with him. Brown was cited for failure to yield and was administered a field sobriety test that revealed he had alcohol in his system, but was below the blood alcohol level to be considered legally drunk.

According to the record, on the night of the accident, Brown, at some point that day or night, had been to Gulfport, Mississippi to retrieve his driver's license which he had left there a few nights prior to the accident. Brown had been in Gulfport with the owners of J&J to drive a vehicle with J&J's logo on it in a drag race. He had been required to give his license in order to rent a helmet at the racetrack and forgot to retrieve it before he left. Although it is unclear if Brown was on call at the time of the accident, he was not using the company truck in connection with any of the operations of J&J.

INSURANCE CONTRACT INTERPRETATION

The supreme court has summarized a number of the settled principles of judicial interpretation of insurance contracts, as follows:

> An insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts set forth in the Louisiana Civil Code. The judiciary's role in interpreting insurance contracts is to ascertain the common intent of the parties to the contract. *See* La. Civ. Code art. 2045.
>
> Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. *See* La. Civ. Code art. 2047. An insurance contract, however, should not be interpreted in an unreasonable or strained manner under the guise of contractual interpretation to enlarge or to restrict its provisions beyond what is reasonably contemplated by unambiguous terms or achieve an absurd conclusion. The rules of construction do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clearness the parties' intent.

> Ambiguous policy provisions are generally construed against the insurer and in favor of coverage. La. Civ. Code art. 2056. Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. That strict construction principle applies only if the ambiguous policy provision is susceptible to two or more *reasonable* interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable.
>
> If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written. Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation when the policy's provisions are couched in unambiguous terms. The determination of whether a contract is clear or ambiguous is a question of law.

Cadwallader v. Allstate Ins. Co., 02-1637 (La. 6/27/03), 848 So.2d 577, 580 (internal jurisprudential citations omitted).

STANDARD OF REVIEW

An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 750. The motion should be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, 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. Code Civ. P. art. 966(B)(2); **Boland v. West Feliciana Parish Police Jury**, 03-1297 (La. App. 1 Cir. 6/25/04), 878 So.2d 808, 812, writ denied, 04-2286 (La. 11/24/04), 888 So.2d 231. Whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can be properly resolved within the framework of a motion for summary judgment. **Johnson v. Evan Hall Sugar Cooperative, Inc.**, 01-2956 (La. App. 1 Cir. 12/30/02), 836 So.2d 484, 486.

Assignment of Error No. 1

Underwriters contend that the Bumbershoot policy, which provided excess marine liability insurance coverage to J&J, expressly sets forth the coverage

provided by the policy and that the coverage was limited to J&J's commercial diving operations. According to Underwriters, Brown was not involved in commercial diving operations at the time of the accident, thus no coverage is afforded for the accident pursuant to the clear and unequivocal terms of the Bumbershoot policy.

The Insuring Agreement sets forth coverage as follows:

> A. **Coverage**
>
> The Policy shall indemnify the **Insured** with respect to the operations listed in item 7 of the Declarations for the following (including such expenses listed in the definition of "**Ultimate Net Loss**"):
>
> 1. All Protection and Indemnity risks covered by the underlying Protection and Indemnity Insurance or which are absolutely or conditionally undertaken by The United Kingdom Mutual Steam Ship Assurance Association Limited.
>
> 2. General average, marine collision liabilities, salvage, salvage charges and related sue and labor arising from any cause whatsoever.
>
> 3. All other sums which the Operations **Insured** shall become legally liable to pay as **damages** on account of:
>   a. **personal injuries**, including death at any time resulting therefrom, or
>   b. **property damage**
>
>   caused by or arising out of each **occurrence** happening anywhere in the world.

Item 7 of the policy states "Item 7. Description of Operations: **Commercial Diving Contractor**." J&J's insurance policy with Underwriters specifically limits coverage to J&J's operations as a "commercial diving contractor." The policy wording is clear and unambiguously expresses the parties' intent and must be enforced as written. Thus, we must determine if Brown was involved in J&J's operations as a commercial diving contractor at the time of the accident.

Underwriters attached to its motion for summary judgment excerpts of the deposition of J&J president, Jeffrey Sikut. In his deposition, Sikut acknowledged that on the night of the accident, Brown was not using the J&J truck in connection with any operations of J&J. The accident occurred after hours, Brown had been drinking, and his girlfriend was in the vehicle with him. J&J did not allow drinking

or passengers during work hours. At the time of the accident, it is clear that Brown was using the vehicle for a personal errand. Brown's retrieval of his driver's license, even if he had been at the racetrack on an earlier date with his employer, does not qualify as an operation involving J&J's business as a commercial diving contractor. The inclusion of the word "contractor" does not expand the coverage of the Bumbershoot policy to purely personal errands of an employee after business hours. We acknowledge that ambiguous policy provisions are generally construed against the insurer and in favor of coverage; however, we find no ambiguity in the Bumbershoot policy. Brown's purely personal errand does not fall within J&J's operations as a commercial diving contractor.

Assignment of Error No. 2

In its second assignment of error, Underwriters contend that the trial court erred in determining that the Bumbershoot policy follows form as to the Progressive policy, the underlying auto policy, which provided coverage for Brown's activities. A following-form policy of excess liability insurance "follows" or adopts the conditions and agreements of the underlying primary liability insurance policy. **State ex. rel Division of Administration, Office of Risk Management v. National Union Fire Insurance Company of Louisiana**, 10-0689 (La. App. 1 Cir. 2/11/11), 56 So.3d 1236, 1244, writ denied, 11-0849 (La. 6/3/11), 63 So.3d 1023. Unless there is an express exception to the form of the underlying policy, the excess insurer under a following-form policy is governed by the underlying policy's terms. **Id.**

The trial court considered the language of exclusion o. in the Bumbershoot policy to conclude that the policy followed form with the underlying Progressive policy. Subsection "o" under the exclusions listed in the policy states that the insurance does not apply to:

> o. liability arising our [sic] of the following activities of the **Insured** unless coverage is provided in the **Underlying Insurance**, and then coverage hereunder shall only operate as excess of such coverage:
>
> (1) operation, ownership, use of any **automobile**, truck or **aircraft**...

Jarred contends that although this provision is listed under exclusions, it creates coverage grants in the Bumbershoot policy where none would have otherwise existed. Further, the trial court noted that the lack of any qualifying language in subsection "o" suggests that any activities covered by the Progressive policy are also covered by the Bumbershoot policy. Based on our review of the language in the Bumbershoot policy, we disagree.

The jurisprudence has recognized a following-form policy where the policy is clearly labeled "straight excess *following form* liability declarations" See **Toston v. Nat'l Union Fire Ins. Co. of La.**, 41,567 (La. App. 2 Cir. 11/3/06), 942 So.2d 1204, 1207, writ denied, 06-2881 (La. 2/2/07), 948 So.2d 1086. There is no clear language in the Bumbershoot policy adopting the conditions and agreements of the Progressive policy. The fact that the Bumbershoot policy states that the auto exclusion does not apply if any underlying policy provides auto liability coverage does not convert the Bumbershoot policy into a following-form policy. The Bumbershoot policy stands on its own and contains its own definitions, exclusions, and provisions. The policy limitations set forth in the Bumbershoot policy apply, including the policy's limitation covering only J&J's operations as a "commercial diving contractor."

At the time of the accident, Brown was not involved in any of J&J's operations as a commercial diving contractor; therefore, his actions do not come within the coverage of the Bumbershoot policy. Accordingly, Underwriters are entitled to summary judgment in their favor.

CONCLUSION

For the foregoing reasons, the judgment of the trial court granting summary judgment in favor of Jarred is reversed, summary judgment is granted in favor of XL Specialty Insurance Company and Valiant Insurance Company and Jared's claims

against these defendants are dismissed with prejudice. All costs are assessed against plaintiff, Scott Jarred.

APPEAL CONVERTED TO AN APPLICATION FOR SUPERVISORY WRITS; WRIT APPLICATION GRANTED; JUDGMENT REVERSED AND RENDERED.