NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 1331

FLORIDA GAS TRANSMISSION COMPANY, LLC

VERSUS

TEXAS BRINE COMPANY, LLC

Judgment Rendered: DEC 2 2 2016

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Assumption, Louisiana
Docket Number 34316

Honorable Thomas J. Kliebert, Jr., Judge Presiding

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Theriot, J. concurs in the result.

McClendon, J. concurs.

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

WHIPPLE, C. J.

Defendant, Liberty Insurance Underwriters, Inc. ("Liberty"), appeals the trial court's judgment that granted, in part, two motions for summary judgment regarding the issues of exhaustion of certain insurance policies and the application of Louisiana law to the exhaustion issue. For the following reasons, we dismiss the appeal as having been taken from a judgment lacking proper decretal language and further as an appeal from a partial judgment improperly designated as final pursuant to LSA-C.C.P. art. 1915(B).

RELEVANT PROCEDURAL HISTORY

A full recitation of the pertinent facts and procedural history related to this litigation arising from the Bayou Corne sinkhole is set forth in the companion case of Florida Gas Transmission Company, LLC v. Texas Brine Company, LLC, 2015-1332 (La. App. 1st Cir. __/__/__) ("the companion appeal"), also handed down this date.

In this appeal, Liberty, an excess insurer of defendant, Texas Brine Company, LLC ("Texas Brine"), challenges the trial court's February 10, 2015 summary judgment rendered in favor of Texas Brine and two of Texas Brine's other insurers, Zurich American Insurance Company ("Zurich") and American Guarantee and Liability Insurance Company ("AGLIC"), which provided the first two layers of insurance coverage to Texas Brine for the 2012-2013 policy year.[1] Specifically, the February 10, 2015 judgment at issue in this appeal granted Texas Brine's motion for partial summary judgment, in part, and Zurich and AGLIC's motion for summary judgment, in part, finding that the primary insurance policy issued by Zurich and the umbrella insurance policy issued by AGLIC for the 2012-

[1]The companion appeal contains a chart setting forth Texas Brine's tower of insurance coverage for the 2012-2013 policy year.

2013 policy year were exhausted.[2] Additionally, the judgment on appeal granted Texas Brine's motion for partial summary judgment, in part, insofar as Texas Brine sought a declaration regarding the application of Louisiana law to insurance coverage issues.

On October 8, 2015, after the lodging of this appeal, Zurich and AGLIC jointly filed a motion to dismiss Liberty's appeal herein, contending that the February 10, 2015 judgment was not a final judgment subject to immediate appeal in that it did not dismiss all claims asserted against either Zurich or AGLIC and was not designated as final by the trial court pursuant to LSA-C.C.P. art. 1915(B). On October 12, 2015, Zurich and AGLIC filed another motion to dismiss Liberty's appeal, which was identical to the motion to dismiss filed on October 8, 2015. Additionally, on October 13, 2015, defendant, Arch Specialty Insurance Company ("Arch"), another excess insurer of Texas Brine, filed a motion to dismiss the appeal on the basis that the **March 11, 2015** judgment (i.e., the judgment at issue in the companion appeal) was not final and appealable in that it did not dismiss all claims asserted against Arch and was not designated as final pursuant to LSA-C.C.P. art. 1915(B).[3]

Thereafter, this court issued a rule to show cause and ordered a remand of the matter to the trial court for the limited purpose of inviting the trial court to: (1) advise this court in writing that the judgment does not need or warrant a LSA-C.C.P. art. 1915(B) designation; or (2) sign a judgment with a LSA-C.C.P. art.

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[2]In the companion appeal, Liberty and Chubb Custom Insurance Co. ("Chubb") challenge a subsequent March 11, 2015 judgment, which granted, in pertinent part, the remaining portion of Zurich and AGLIC's joint motion for partial summary judgment pertaining only to exhaustion of the AGLIC's excess policy; motions for summary judgment by excess insurers' Arch Specialty Insurance Company ("Arch") and Westchester Fire Insurance Company ("Westchester"); and the remaining portion of Texas Brine's motion for partial summary judgment pertaining to exhaustion of the AGLIC, Arch, and Westchester excess policies in its 2012-2013 tower of coverage.

[3]As discussed above, the instant appeal seeks appellate review of the February 10, 2015 judgment, whereas the companion appeal pertains to the March 11, 2015 judgment of the trial court. Accordingly, Arch's motion to dismiss filed in this appeal, which raises issues concerning the appealability of the March 11, 2015 judgment, was an apparent oversight.

1915(B) designation; and (3) in the case of a finality designation, provide a *per curiam* to this court addressing why such a determination is proper. By orders dated April 21, 2016, all motions to dismiss the appeal and this court's rule to show cause order were referred to the panel to which this appeal was assigned.

Additionally, Liberty, Zurich, and AGLIC filed motions to supplement the record on appeal. By orders dated April 21, 2016, these motions were also referred to the panel to which the appeal was assigned.

Accordingly, we will first address the motions to supplement, then motions to dismiss the appeal and this court's rule to show cause order.

MOTIONS TO SUPPLEMENT BY LIBERTY, ZURICH, AND AGLIC

As discussed in the companion appeal, following this court's issuance of the rule to show cause order, various parties filed pleadings with the trial court regarding whether the judgment should or should not be designated as final. As these pleadings were filed with the trial court subsequent to the lodging of this appeal, Liberty, Zurich, and AGLIC filed motions to supplement the record on appeal with these additional pleadings, which address or are relevant to the appealability issues currently before this court. These motions to supplement are identical to the motions to supplement filed by Liberty, Zurich, and AGLIC in the companion appeal. Liberty's motion to supplement includes a *per curiam* order of the trial court signed on November 3, 2015, wherein the trial court designates the February 10, 2015 and March 11, 2015 judgments as final and provides reasons therefor. Zurich and AGLIC's motion to supplement seeks to supplement the record with a *per curiam* order of the trial court dated November 5, 2015, and, therefore, it is not the same November 3, 2015 *per curiam* order that Liberty seeks to file into the record. The November 5, 2015 *per curiam* also designates the respective judgments as final and provides similar reasons for the trial court's

designation. Similar to the companion appeal, we hereby grant **Liberty's** motion to supplement and **Zurich** and **AGLIC's** motion to supplement the record on appeal as the supplemental pleadings are material to the determination of whether this court has subject matter jurisdiction over the instant appeal.

MOTIONS TO DISMISS APPEAL FILED BY ARCH, AGLIC, AND ZURICH

Also pending before us on appeal is a motion to dismiss the appeal filed by Arch and joint motions to dismiss the appeal filed by AGLIC and Zurich.[4] As mentioned above, the basis of Arch's motion to dismiss the appeal is that the **March 11, 2015** judgment is a partial judgment not designated as final pursuant to LSA-C.C.P. art. 1915(B). Inasmuch as the judgment before the court in this appeal is the **February 10, 2015** judgment, **Arch's** motion is denied. The basis of Zurich and AGLIC's motions is that the appeal should be dismissed as it is an appeal of a partial judgment that was not designated as final by the trial court pursuant to LSA-C.C.P. art. 1915 (B). However, these motions were filed prior to the issuance of this court's rule to show cause order and prior to the trial court's *per curiam* orders, wherein the trial court designated the judgment as final. As the trial court has now designated the judgment as final, **Zurich** and **AGLIC's** motions to dismiss, filed on October 8 and October 12, 2015, are now moot and are hereby denied as moot.

THIS COURT'S RULE TO SHOW CAUSE ORDER REGARDING APPELLATE JURISDICTION

Although the motions to dismiss are dismissed as moot, this does not end this court's inquiry as to whether this court has subject matter jurisdiction over the appeal.

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[4]As noted above, AGLIC and Zurich filed a motion to dismiss the appeal on October 8, 2015. A few days later, on October 12, 2015, AGLIC and Zurich filed another identical motion to dismiss the appeal.

The February 10, 2015 judgment at issue in this appeal states in pertinent part:

> Zurich and AGLIC's Motion for Summary Judgment is **GRANTED** as to the claims of plaintiff Florida Gas Transmission Company, LLC, and Texas Brine's Motion for Partial Summary Judgment Regarding Exhaustion of the Zurich Primary Policy and the AGLIC Umbrella Policy that are the subject of the motions are **GRANTED**.
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> Texas Brine's Motion for Summary Judgment as to Application of Louisiana Law is **GRANTED** as to the exhaustion issue which was before the Court.

This court's appellate jurisdiction extends to "final judgments," which are those that determine the merits in whole or in part. LSA-C.C.P. arts. 1841 & 2083; See Van ex rel. White v. Davis, 2000-0206 (La. App. 1st Cir. 2/16/01), 808 So. 2d 478, 483. However, a judgment that only partially determines the merits of an action is a partial final judgment and, as such, is immediately appealable only if authorized under LSA-C.C.P. art. 1915. Rhodes v. Lewis, 2001-1989 (La. 5/14/02), 817 So. 2d 64, 66. Whether a partial judgment is immediately appealable is determined by examining the requirements set forth in LSA-C.C.P. art. 1915(A) and (B)(1). State, Department of Transportation and Development v. Henderson, 2009-2212 (La. App. 1st Cir. 5/7/10), 39 So. 3d 739, 741. Subpart A of LSA-C.C.P. art. 1915 designates certain categories of partial judgments as final judgments subject to immediate appeal.[5] Subpart (B)(1) of LSA-C.C.P. art. 1915 provides, in pertinent part, that when a trial court renders a partial summary

[5]The February 10, 2015 judgment at issue herein does not fall within any of the categories identified in Subpart A of LSA-C.C.P. art. 1915. The judgment does not: (1) dismiss the suit as to any party; (2) grant a motion for judgment on the pleadings; (3) pertain to an incidental demand that was tried separately; (4) adjudicate the issue of liability when that issue has been tried separately; or (5) impose sanctions or disciplinary action. Moreover, while the judgment does grant motions for summary judgment, these motions constitute summary judgments brought under the provisions of LSA-C.C.P. art. 966(E), which authorizes the grant of a summary judgment "dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case as to that party or parties." Summary judgments granted pursuant to LSA-C.C.P. art. 966(E) are specifically excluded from the types of partial summary judgments that are immediately appealable under LSA-C.C.P. art. 1915(A) without the need for a designation of finality. See LSA-C.C.P. art. 1915(A)(3).

judgment, it may designate the judgment as a final judgment, subject to immediate appeal, when there is no just reason for delay. However, a trial court's designation of finality is not determinative of this court's jurisdiction. Templet v. State ex. rel. Dept. of Public Safety and Corrections, 2005-1903 (La. App. 1st Cir. 11/3/06), 951 So. 2d 182, 185.

Additionally, Louisiana courts require that judgments be "precise, definite and certain." Laird v. St. Tammany Safe Harbor, 2002-0045 (La. App. 1st Cir. 12/20/02), 836 So. 2d 364, 365. When a claim is dismissed, it should be evident from the language of the judgment without reference to other documents in the record. Laird, 836 So. 2d at 366.; see also Spanish Lake Restoration, L.L.C. v. Shell Oil Company, 2015-0837 (La. App. 1st Cir. 4/18/16) (unpublished opinion).

Applying these legal precepts, we must resolve whether this court has subject matter jurisdiction over the instant appeal. For ease of discussion, we separately discuss two different rulings in the February 10, 2015 judgment that are at issue herein: (1) the grant of Zurich and AGLIC's motion for summary judgment and Texas Brine's motion for partial summary judgment, in part as to Zurich's primary policy and AGLIC's umbrella policy, all regarding exhaustion; and (2) the grant of Texas Brine's motion for partial summary judgment, in part, as to the application of Louisiana law.

I. Zurich, AGLIC, and Texas Brine's Motions for Summary Judgment Regarding Exhaustion

Liberty's argument in this appeal, as to the purported ruling on the motions for summary judgment regarding "exhaustion," is substantially similar to the arguments raised by Liberty in the companion appeal. Liberty contends that its obligations to Texas Brine as an excess insurer are triggered only if the underlying carriers have paid out their policy limits for "covered losses" and that sums paid by underlying carriers for losses not covered under their respective policies do not

trigger Liberty's excess layer. Liberty contends that issues of fact exist as to whether the underlying payments were made, at least in part, for non-covered losses. Moreover, Liberty argues that the combined effect of the February 10, 2015 judgment and the March 11, 2015 judgment is to trigger its excess policy.

The language of the February 10, 2015 judgment granting the motions for summary judgment regarding exhaustion is similar to the language in the March 11, 2015 judgment, as addressed in the companion appeal, granting the insurers' and Texas Brine's motions for summary judgment regarding exhaustion. Accordingly, for the reasons set forth in the companion appeal, we likewise conclude herein that the ruling in the February 10, 2015 judgment on Zurich and AGLIC's motion for summary judgment and Texas Brine's motion for summary judgment regarding exhaustion is not precise, definite, or certain. As noted in the companion appeal, we find no provision in the judgment declaring or ordering that Liberty's coverage has been triggered or setting forth any determination as to the "trigger point of the next insurance layer." Specifically, we are unable to locate a ruling by the trial court as to whether the payment of non-covered losses, if there were such, applies toward reaching the attachment point for the excess insurers. Moreover, had such a ruling been evident in the judgment, we are also unable to discern a ruling by the trial court as to which payments made by the underlying insurers, in the exhaustion of their policy limits, were for "covered claims" or for non-covered claims, if any. Accordingly, despite this court's best efforts, we are unable to discern from the language of the judgment precisely what issues have been determined and what effect these coverage rulings may have vis-à-vis a final determination of the various parties' and insurers' respective rights and obligations.

Moreover, to the extent that we are able to review the propriety of the trial court's finality designation, despite the lack of clear, precise and definitive language in this portion of the judgment, our conclusion after applying the Messinger factors herein is similar to our Messinger analysis in the companion appeal.[6] As stated in the companion appeal, the need for review of the ruling in the judgment regarding exhaustion could be rendered moot by further developments in the trial court. Specifically, there would be no reason to review the arguments of Liberty as raised herein if Texas Brine is ultimately determined after a trial on the merits to not be liable for the damages alleged by Florida Gas. Moreover, issues of fact undisputedly still remain as to precisely when Florida Gas's alleged damages occurred and, thus, if there is coverage available under policies issued prior to the 2012 policy year. If there is coverage under pre-2012 policies, this may preclude the "triggering" of Liberty's policy for the 2012-2013 policy year.

Thus, to the extent that we are able to conduct a Messinger analysis on the record in its present posture, we are constrained to find error in the trial court's certification of the February 10, 2015 judgment as final for the purpose of allowing immediate appellate review of its rulings granting Zurich and AGLIC's motion for summary judgment and Texas Brine's motion for partial summary judgment, in

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[6]Where a trial court gives explicit reasons for the certification of a partial judgment as final pursuant to LSA-C.C.P. art. 1915(B), we must determine whether the trial court abused its discretion in designating the judgment as final. Templet, 951 So. 2d at 185. In making this determination, we consider the "overriding inquiry" of "whether there is no just reason for delay," as well as the other non-exclusive criteria trial courts use in making the determination of whether certification is appropriate, known as the Messinger factors, which include:

> (1) The relationship between the adjudicated and the unadjudicated claims;
> (2) The possibility that the need for review might or might not be mooted by future developments in the trial court;
> (3) The possibility that the reviewing court might be obliged to consider the same issue a second time; and
> (4) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Templet, 951 So. 2d at 185-86, citing R.J. Messinger, Inc. v. Rosenblum, 2004-1664 (La. 3/2/05), 894 So. 2d 1113, 1122-23.

part, regarding exhaustion, because the need for appellate review of this ruling could be rendered moot by further developments in the trial court.

II. Texas Brine's Motion for Summary Judgment Seeking a Choice-of-Law Declaration

As to the portion of the judgment declaring that Louisiana law applies to the exhaustion issue before the court, we likewise find error by the trial court in certifying this part of the judgment as final.

We note at the outset that Texas Brine's motion for partial summary judgment sought a declaration "regarding the application of Louisiana law to **all** insurance issues in this matter." (Emphasis added). However, the February 10, 2015 judgment of the trial court at issue herein granted Texas Brine's motion as to the application of Louisiana law only "as to the exhaustion issue which was before the [c]ourt." Despite the limited scope of the trial court's ruling, Texas Brine seeks a ruling from this court as to the appropriate choice of law, Louisiana or Texas, as to all insurance coverage issues that may arise.[7] While we are mindful of the parties' (and the trial court's) desire for prompt and efficient resolution of the parties' respective rights, claims and obligations in this complex ongoing litigation, we must limit our Messinger analysis of the choice-of-law ruling to the exhaustion issue, as the trial court determined only that Louisiana law applies to the exhaustion issue. See Omega General Const. LLC v. Parish of St. Tammany, 2012-1734 (La. App. 1st Cir. 6/7/13) (unpublished opinion) (Although this court has broad supervisory jurisdiction, this court will not act on the merits of a claim not yet acted upon by the lower tribunal.)

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[7]See "Texas Brine's Original Brief Regarding Appealability of the District Court's February 10, 2015 Judgment," wherein Texas Brine states, "Texas Brine also asks for a definitive and final ruling as to the body of law that will govern interpretation of the insurance policies implicated in this suit."

In designating the February 10, 2015 judgment as final, the trial court, in its November 3, 2015 *per curiam,* stated, in pertinent part, that: (1) a final judgment concerning choice of law cannot be mooted by future developments; (2) a final judgment will more likely be respected by the courts of Texas, decreasing the likelihood of inconsistent judgments as to matters already litigated in Louisiana; (3) a final determination of choice of law will provide the parties with certainty as to the scope of financial exposure if the case were to proceed to trial; and (4) a new trial would be necessary if the choice-of-law issue were resolved differently on a post-trial appeal. On review, we find the record does not support the bases set forth in support of immediate review.

As noted above, the exhaustion issue could be rendered moot by future events in the trial court and, thus, the choice-of-law issue as to the exhaustion issue would likewise be rendered moot. Moreover, a "final determination" of choice of law as to the exhaustion issue will not provide "certainty as to the scope of financial exposure" of the remaining insurers as there are many other insurance coverage issues that remain unresolved.[8] Lastly, a different resolution of the choice-of-law issue on post-trial appeal would not necessarily require a remand for a new trial, as a determination of the appropriate choice of law presents a question of law for which this court has the plenary and unlimited constitutional power and authority to review *de novo.* Succession of Flood v. Flood, 2012-0561 (La. App. 1st Cir. 5/10/13) (unpublished opinion), writ denied, 2013-1303 (La. 9/20/13), 123 So. 3d 176. And, where an error of law affects a trial court's findings, the appellate court is required, if it can, to render judgment on the record on appeal, applying the correct law and determining the essential material facts *de novo.* See Wilkerson v. Buras, 2013-1328 (La. App. 1st Cir. 8/12/14), 152 So. 3d 969, 974,

[8]See our discussion in our companion appeal regarding the pollution exclusion in Liberty's policy.

writ not considered, 2014-2138 (La. 11/26/14), 152 So. 3d 894. Thus, for the foregoing reasons, we conclude that the particular circumstances and procedural posture of this matter do not support a conclusion that there is no just reason for delay of appellate review of this ruling.

Accordingly, for the above and foregoing reasons, we conclude that the trial court erred in certifying the February 10, 2015 judgment as final for purposes of immediate appeal pursuant to LSA-C.C.P. art. 1915(B). Because the judgment contains only partial rulings, the review of which may be mooted by further developments in the case, and rulings that are not clear, definite and precise, this court lacks appellate jurisdiction to review the judgment on appeal.

CONVERTING THE APPEAL TO AN APPLICATION FOR SUPERVISORY WRITS

The final issue is whether this court should convert the appeal of the February 10, 2015 judgment to an application for supervisory writs and review the judgment under our supervisory jurisdiction. While this court has the discretion to convert an appeal to an application for supervisory writs and rule on the writ application, Stelluto v. Stelluto, 2005-0074 (La. 6/29/05), 914 So. 2d 34, 39, there are limitations on this authority.

Under the factors set forth in Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., 396 So. 2d 878 (La. 1981) (*per curiam*), we find there is no readily apparent basis warranting the exercise of this court's supervisory jurisdiction herein. In Herlitz, the Louisiana Supreme Court directed that appellate courts should consider an application for supervisory writs under their supervisory jurisdiction, even though relief may be ultimately available to the applicant on appeal, in such circumstances where the trial court judgment was arguably incorrect, a reversal would terminate the litigation (in whole or in part), and there was no dispute of fact to be resolved.

In the instant case, as discussed above, a reversal of the trial court's judgment insofar as it grants the "exhaustion" or "choice-of-law" motions for summary judgment would not terminate the litigation, in whole or in part. Herlitz, 396 So. 2d 878. Moreover, we note that Liberty previously filed an application for supervisory writs with this court seeking review of the exhaustion and choice-of-law rulings in the February 10, 2015 judgment, which was denied by this court.[9] Florida Gas Transmission Company, LLC v. Texas Brine, LLC, 2015 CW 0314 (La. App. 1st Cir. 6/5/15). Liberty further sought review from the Louisiana Supreme Court through supervisory writs, and that relief was likewise denied. Florida Gas Transmission Company, LLC v. Texas Brine Company, LLC, 2015-1311 (La. 10/2/15), 178 So. 3d 989. Additionally, as to the "choice-of- law" issue, we are unable to conclude that the interest of justice would be best served by converting the appeal to an application for supervisory writs, as the ruling: does not determine or resolve to finality whether there is a conflict between Louisiana and Texas law governing the issue of exhaustion; fails to identify the controlling Louisiana law and its effect, if any, on the outcome of these proceedings; and, most importantly, does not state how the application of the chosen law affects the determination of the ruling on exhaustion or the ultimate liability of any party for any claims asserted in these proceedings. Accordingly, for all of these reasons, we decline to convert the appeal of the February 10, 2015 judgment to an application for supervisory writs.

CONCLUSION

For the above and foregoing reasons, the motions to supplement filed by Liberty, Zurich, and AGLIC are hereby granted. Additionally, the motion to

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[9]Chubb also filed an application for supervisory writs with this court seeking review of the February 10, 2015 judgment, which was denied. Florida Gas Transmission Company, LLC v. Texas Brine Company, LLC, 2015 CW 0312 (La. App. 1st Cir. 6/5/15).

dismiss the appeal filed by Arch is denied, and the motions to dismiss the appeal filed AGLIC and Zurich on October 8 and October 12, 2015 are hereby denied as moot. Moreover, we find that the instant appeal filed by Liberty is improper, as having been taken from a judgment lacking proper decretal language and further as taken from a partial judgment improperly certified as final and subject to immediate appeal. Therefore, the appeal by Liberty is dismissed *ex proprio motu* for lack of appellate jurisdiction. Costs of this appeal are assessed against appellant, Liberty Insurance Underwriters, Inc.

LIBERTY INSURANCE UNDERWRITERS, INC.'S MOTION TO SUPPLEMENT GRANTED; ZURICH AND AGLIC'S MOTION TO SUPPLEMENT GRANTED; ARCH'S MOTION TO DISMISS APPEAL DENIED; AGLIC AND ZURICH'S MOTIONS TO DISMISS APPEAL DENIED AS MOOT; APPEAL DISMISSED.