STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0186

M&R DRYWALL, INC.

VERSUS

MAPP CONSTRUCTION, LLC, SOUTHGATE TOWERS, LLC, AND R. W. DAY AND ASSOCIATES, INC.

CONSOLIDATED WITH

NO. 2017 CA 0187

MAPP CONSTRUCTION, LLC

VERSUS

SOUTHGATE PENTHOUSE, LLC, R. W. DAY DEVELOPMENT, LLC, ROBERT W. DAY, JANICE E. DAY, AND LIONSAY, LLC

CONSOLIDATED WITH

NO. 2017 CA 0188

SOUTHGATE RESIDENTIAL TOWERS, LLC, SOUTHGATE PENTHOUSE, LLC

VERSUS

MAPP CONSTRUCTION, INC., ET AL

Judgment Rendered: APR 2 9 2019

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C529351 c/w C550534, c/w C544997

The Honorable Wilson Fields, Judge Presiding

KW Welch J. concurs without reasons.

PMc McClendon, J. concurs in part and dissents in part and assigns reasons.

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* * * * * * * *

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

THERIOT, J.

Southgate Residential Towers, LLC and Southgate Penthouses, LLC (collectively, "Southgate") challenge decrees favoring five insurers/appellees that afford excess coverage to their respective defendants/insureds in the underlying defective construction dispute. This appeal addresses the insurers/appellees' liability to Southgate. Additionally, these insurers/appellees each answered the appeal, seeking various relief. Further, while Southgate does not appeal the judgment as it relates to a sixth defendant/insurer, that insurer has filed an answer to the appeal.

For the following reasons, we amend in part, and affirm as amended.

PERTINENT FACTS AND PROCEDURAL HISTORY

This litigation involves construction defects and deficiencies in Southgate Towers, a residential apartment complex located in Baton Rouge, Louisiana. Construction took place from 2003-2005. Southgate contracted with MAPP Construction, LLC, to serve as the general contractor on the project. MAPP then hired multiple subcontractors to perform various work on the project. Pertinent among them are: M&R Drywall, Inc., Atlas Air Conditioning Company, Power Design, Inc. ("PDI"), and Thrasher Waterproofing, Inc.

Southgate, MAPP, and the subcontractors have been engaged in litigation over various construction defects since 2006. The trial court proceedings were stayed by order of this court on June 26, 2007, pending arbitration. *See* **Southgate Residential Towers, LLC Southgate Penthouses, LLC v. MAPP Construction, Inc.**, 07-0489 (La. App 1 Cir. 6/26/07). Prior to the commencement of the arbitration proceedings, Southgate entered settlements with MAPP and Thrasher pursuant to **Gasquet v. Commercial Union Ins. Co.,** 391 So.2d 466 (La. App 4 Cir. 1980), *writ denied*, 396 So.2d 921 (La. 1981), *writ denied*, 396 So.2d 922 (La. 1981). In accordance with the terms of the agreements, MAPP and Thrasher were

released from further personal liability, but Southgate reserved all claims against Great American Alliance Insurance Company and Great American Insurance Company (collectively, "GA-MAPP") and National Union Fire Insurance Company of Pittsburgh, PA, as MAPP's excess insurers, and American International Specialty Lines Insurance Company ("ASIC"), as Thrasher's excess insurer. Consequently, MAPP and Thrasher were not parties to the arbitration proceeding. Southgate also entered a **Gasquet** release with M&R, reserving its rights to proceed against M&R's excess insurer, American Guarantee & Liability Insurance Company ("AGLIC"). M&R likewise did not participate in the arbitration.

Southgate, Atlas, and PDI, along with other subcontractors, proceeded to arbitration over the course of 34 days from June to October 2010. None of the insurers participated. The arbitration panel rendered its decision in December 2010. *See* **MAPP Construction, LLC v. Southgate Penthouses, LLC and Southgate Residential Towers, LLC**, case no: 69 110 J 09920 06 before the American Arbitration Association. The Arbitration Award was subsequently confirmed as a final judgment in February 2012. *See* **Southgate Penthouses, LLC and Southgate Residential Towers, LLC v. MAPP Construction, Inc.**, 548,119 19th Judicial District Court, Parish of East Baton Rouge.

In 2012, after the stay was lifted, Southgate filed an Amended and Restated Master Petition for Damages and Declaratory Judgment. Southgate sought to enforce the Arbitration Award and corresponding final judgment against the insurers of those subcontractors who participated in the arbitration. Relevant here are Southgate's claims against Great American Insurance Company, Atlas' excess insurer ("GA-Atlas"), and Ohio Casualty Insurance Company, PDI's excess insurer.

Southgate further sought a judgment against the insurers for MAPP and those subcontractors who did not participate in arbitration but with whom Southgate had entered a **Gasquet** settlement. Relevant here are Southgate's claims against GA-MAPP and National Union, both as MAPP's excess insurers; AGLIC, as M&R's excess insurer; and ASIC, as Thrasher's excess insurer.

Southgate's claims against these defendant insurers proceeded to trial before a jury in September 2015. The jury's pertinent findings are summarized as follows: M&R breached its contract but no damages are owed to Southgate. MAPP breached its contract during National Union's policy period from 4/1/2003–4/1/2004 (misplaced corings), entitling Southgate to $370,000 in damages. MAPP also breached its contract during GA-MAPP's policy period from 4/1/2004 and 4/1/2005 (failure to supervise subcontractors), entitling Southgate to $2,500,000 in damages. However, Southgate failed to mitigate its damages in this regard, resulting in damages of $59,000. The reasonable cost to repair the property damage to the building envelope caused by Atlas's failure to caulk the HVAC vents is $59,000. Concerning PDI's work, the reasonable cost to complete/repair defective fire caulking of all penetrations in the corridor firewalls, as ordered in the Arbitration Award, is $564,000 and the reasonable cost to complete/repair defective grounding is $114,000. Finally, Thrasher did not breach its contract and, therefore, owes no damages to Southgate.

The trial court accepted the jury verdict then "determined the legal issues presented regarding insurance coverage." Relying on prior rulings and recommendations made by the special master and adopted by the trial court, as well as insurance policies introduced at trial, the trial court applied credits against the jury verdict in the amounts of the underlying policy limits and other available insurance coverage, thereby reducing the damages the insurers owed to Southgate. This judgment, from which Southgate appeals, was entered on December 16, 2015.

Southgate timely filed a motion for devolutive appeal. Each defendant insurer answered the appeal, asserting that the trial court erred by failing to award court costs in its favor against Southgate. Each insurer also raised additional, alternative assignments of error to be addressed only if this court reversed the trial court's judgment.

Admissibility of Arbitration Award and Settlement Details

Southgate first challenges the admissibility of the Arbitration Award. It argues that the trial court legally erred by admitting the Arbitration Award into evidence, over its objection, because the Arbitration Award is inadmissible hearsay and does not fall within one of the exceptions. *See* La. C.E. arts. 801, 802, and 803. Southgate further argues the trial court violated La. C.E. art. 413 by allowing the defendants to introduce the Arbitration Award into evidence because it contains details regarding Southgate's settlement with other defendants. Southgate argues the admission of the Arbitration Award caused a "cascade of unprecedented legal errors" which tainted the jury verdict and asks this court to conduct a *de novo* review of all evidence.

The insurers disagree. For example, GA-MAPP argues that the "trial was not a 'do over' in which Southgate could try to get a second chance to prove conditions, causation, or damages that were considered and determined in the arbitration. Nor was it a vehicle to obtain double recoveries." Further, it asserts that the Arbitration Award became the "baseline of facts to which Southgate itself was bound." At trial, Southgate was limited to seeking factual determinations not already tried to conclusion in the arbitration proceeding. The admission of the Arbitration Award was important so that the jury would not be misled into re-trying or confusing facts already decided and to which Southgate was bound. Thus, GA-MAPP argues, not only was the Arbitration Award highly relevant, it was necessary evidence.

The insurers point particularly to the catch-all exception to the hearsay rule, La. C.E. art 804(B)(6), which provides:[1]

> **Other exceptions.** In a civil case, a statement not specifically covered by any of the foregoing exceptions if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy, and the proponent of the evidence has adduced or made a reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates and the proponent of the statement makes known in writing to the adverse party and to the court his intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it. If, under the circumstances of a particular case, giving of this notice was not practicable or failure to give notice is found by the court to have been excusable, the court may authorize a delayed notice to be given, and in that event the opposing party is entitled to a recess, continuance, or other appropriate relief sufficient to enable him to prepare to meet the evidence.

"When invoking this exception, the court must first determine that the hearsay evidence is material, is 'more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts,' and that the admission of the evidence will serve general purposes of the evidence rules and the 'interests of justice.'" **Buckbee v. United Gas Pipe Line Co. Inc.,** 561 So.2d 76, 82 n.10 (La. 1990) (internal citation omitted).

As the Supreme Court more fully explained in **Trascher v. Territo**, 11-2093 (La. 5/8/12), 89 So.3d 357, 366, "[t]his exception exists to provide a trial court with discretion to admit a statement by an unavailable declarant which is not specifically covered by any other hearsay exception, if the statement was made under sufficient assurances of trustworthiness, the evidence in the statement

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[1] The insurers also mention La. C.E. art. 801(D)(3)(c), which provides that a statement is not hearsay if:

> In a civil case, a statement by a declarant when the liability, obligation, or duty of the party against whom it is offered is derivatively based in whole or in part upon a liability, obligation, or duty of the declarant, or when the claim or right asserted by that party is barred or diminished by a breach of duty by the declarant, and when the statement would be admissible if offered against the declarant as a party in an action involving that liability, obligation, or breach of duty[.]

generally is otherwise unavailable, and the opponent is given a fair opportunity to meet the evidence in the statement." The exception is intended to apply only in extraordinary circumstances.

We conclude that, under the circumstances of this case, the trial court did not err in admitting the Arbitration Award into evidence. While the Arbitration Award would arguably qualify as inadmissible hearsay evidence,[2] Southgate incorporated the Arbitration Award into the present litigation. Its Amended and Restated Master Petition for Damages and Declaratory Judgment states that "Southgate is filing claims in this proceeding to enforce the insurance and indemnity obligations owed by the Insurers of the Subcontractors based upon the Arbitration Award, the final judgment [and two other documents]."

Further, the Arbitration Award is trustworthy, reliable, and material. All parties involved in the present litigation were either directly or indirectly involved or affected by the arbitration. A judgment was rendered that not only confirmed the arbitral awards, but also specifically made the awards decrees of the court.[3] Thus, Southgate and the insurers were bound by the facts and liability determinations established in the arbitration proceeding, and those conclusions necessarily formed the foundation of the present litigation. The written, well-reasoned Arbitration Award is the best evidence of the findings of the panel; no other available, more reliable source exists. Finally, regarding notice, Southgate had direct knowledge that the insurers intended to introduce and rely on the Arbitration Award. In August 2015, the special master recommended granting the defendant insurers' motions in limine to allow the Arbitration Award to be admitted into evidence. The

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[2] *See* La C.E. art. 801(C), "'Hearsay' is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted."

[3] "For an arbitral award to be made enforceable by law, it must first be confirmed by a court." **FIA Card Services, NA v. Weaver**, 10-1372 (La. 3/15/11), 62 So.3d 709, 712.

special master likewise recommended that Southgate's motion in limine on the issue be denied.

Furthermore, we find that Southgate failed to satisfy its burden of proving that it was prejudiced by the trial court's evidentiary ruling. "On appeal, the reviewing court is required to consider whether the particular ruling complained of was erroneous, and if so, whether the error prejudiced the complaining party's cause. If a substantial right was not prejudiced or affected by the evidentiary ruling, a reversal is not warranted." **Schexnayder v. Bridges**, 15-0786, 15-0787 (La. App. 1 Cir. 2/26/16), 190 So.3d 764, 770-71. A reviewing court must determine whether the allegedly erroneous evidentiary ruling, when compared to the record in its totality, had a substantial effect on the outcome of the case to the detriment of the challenging party. **Id.** at 771. *See also* La. C.E. art. 103.

After considering the challenged evidentiary ruling, compared to the record in its totality, we conclude that the admission of the Arbitration Award did not have a substantial effect on the outcome of the case to Southgate's detriment. For reasons already discussed, there was simply no way to avoid discussing and relying on the Arbitration Award to determine whether damages were owed to Southgate, in some instances, and the amount of damages owed to Southgate, in others.

We also find that any error in admitting the terms of the prior settlements into evidence was harmless. Southgate relies on La. C.E. art 413, which states: "Any amount paid in settlement or by tender shall not be admitted into evidence unless the failure to make a settlement or tender is an issue in the case." Since the failure to make a settlement is not an issue in this case, Southgate argues that the trial court erred in admitting or failing to redact this information from the Arbitration Award before admitting it into evidence over Southgate's objection. However, Southgate offers no explanation for how it was damaged or what substantial effect this error had on the outcome of this case. Under these

circumstances, where Southgate has shown no prejudice or substantial effect on the jury, we find no reversible error. *See* **Schexnayder**, 190 So.3d at 770-71.

Apportionment of Costs

The insurers answered Southgate's appeal to challenge the trial court's judgment insofar as it orders each party to bear its own costs. "While the general rule is that the party cast in judgment should be assessed with court costs, the trial court may assess costs in any equitable manner and against any party in any proportion it deems equitable, even against the party prevailing on the merits." **Bourg v. Cajun Cutters, Inc.**, 14-0210 (La. App. 1 Cir. 5/7/15), 174 So.3d 56, 73, *writ denied*, 15-1306 (La. 4/4/16), 190 So.3d 1201, *writ denied,* 15-1253 (La. 4/4/16), 190 So.3d 1205. *See* also La. C.C.P. art. 1920.

The insurers argue that, because there is no evidence that they incurred costs needlessly, the trial court abused its discretion in failing to award costs in their favor and against Southgate. Several First Circuit cases address this issue. In **Townes v. Liberty Mut. Ins. Co.**, 09-2110 (La. App. 1 Cir. 5/7/10), 41 So.3d 520, 531-32, the trial court ordered each party to bear its own costs although there was a zero verdict and no indication that either party incurred costs needlessly; this court found no abuse of discretion. In **Anglin v. Anglin**, 09-0844 (La. App. 1 Cir. 12/16/09), 30 So.3d 746, 753-54, this court recognized that a trial court may assess costs against a party who prevails to some extent on the merits. *See also* **Adams v. Rhodia, Inc.**, 07-0897 (La. App. 1 Cir. 2/13/09), 5 So.3d 288, 289. In **Brown v. Mathew**, 13-2974 (La. App. 1 Cir. 12/30/14), 2014 WL 7455038 at *14 (unpublished), the plaintiff was the losing party, but the defendant was taxed with costs.

In light of this court's recent pronouncements, we cannot conclude that the trial court abused its broad discretion in ordering each party to bear its own costs.

GREAT AMERICAN ("GA-MAPP") – Excess Insurer for MAPP Construction, LLC

Application of Credit for Other Insurance

The jury found that MAPP breached its duty to supervise subcontractors during GA-MAPP's policy period (4/1/04 – 4/1/05) and awarded Southgate $2,500,000 in damages. The trial court accepted the jury verdict but applied a credit against the award in the total amount of $39,176,459, representing a $1,000,000 credit for the limits of the underlying Bituminous policy, a $2,000,000 credit for the limits of the Indian Harbor professional liability policy, and a $36,176,459 credit for the "overlapping coverage" provided by the RLI Builder's Risk policy. These policies were issued to MAPP for all or a portion of the 4/1/04 – 4/1/05 policy period.

Southgate asks this court to reverse the credits applied in favor of GA-MAPP and reinstate the jury verdict awarding it $2,500,000 for MAPP's failure to supervise the subcontractors. In this regard, Southgate argues that GA-MAPP had the burden of proving the existence of other insurance that covered the same risk and loss awarded by the jury. However, according to Southgate, GA-MAPP waived the issue by failing to introduce evidence on the issue and failing to submit this factual issue to the jury.

The credit applied to the jury verdict against GA-MAPP stems from the special master's report and recommendation granting GA-MAPP's motion for partial summary judgment on "other insurance" coverage.[4] In its motion, GA-MAPP argued that it was entitled to a credit in the amount of all underlying insurance policies issued to MAPP for the same policy periods as the relevant GA-MAPP policies. GA-MAPP relied on the "other insurance" provision of its policies which states,

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[4] After trial, GA-MAPP filed a motion for entry of judgment on coverage issues, urging the trial court to reduce the jury verdict pursuant to the special master's report and recommendation on its motion regarding "other insurance."

> The insurance afforded by this policy is excess over any other valid and collectible insurance available to the "insured," whether or not described in the schedule of underlying policies (except insurance purchased specifically to apply excess of the limits of Insurance of this policy).

The special master concluded that the limits of three insurance policies, issued by Bituminous, Indian Harbor, and RLI to MAPP, must be exhausted before GA-MAPP's coverage was triggered. The special master specifically recognized the availability of a credit in the amount of $1,000,000 – the limits of the underlying Bituminous policy. The special master further found that GA-MAPP was "entitled to a credit from any overlapping coverage provided by the Indian Harbor Insurance Company policy and the RLI policy." However, the special master did not identify the policy limits or policy numbers for these two underlying policies. No amount of available coverage was identified. The special master made no findings on the terms of these policies, their triggering events, or any other information necessary to determine whether or how much coverage was available to apply against the $2,500,000 judgment against MAPP before GA-MAPP's excess insurance would be triggered. Therefore, this court finds the recommendation is ambiguous and incomplete.

The uncertainty of this ruling left the issue concerning the amount of other available insurance unresolved. Yet, as Southgate correctly points out, GA-MAPP presented no evidence at trial regarding the available amounts of coverage afforded by the Indian Harbor and RLI policies, their terms, or conditions. Consequently, Southgate contends, GA-MAPP failed to satisfy its burden of proving the existence of other insurance, an affirmative defense, at trial. *See* **Nippert v. Baton Rouge Railcar Servs., Inc.**, 526 So.2d 824, 828 (La. App. 1 Cir. 1988), *writ denied*, 530 So.2d 84, 87, 91 (La. 1988) ("[r]eliance upon an exclusion contained in an insurance contract is deemed to be an affirmative defense"). *See also* **Willie v. Am. Cas. Co.**, 547 So.2d 1075, 1087 (La. App. 1 Cir. 1989), *determination*

sustained, 553 So.2d 467 (La. 1989). *See also* **LAD Services of Louisiana, L.L.C. v. Superior Derrick Servs., L.L.C.**, 13-0163 (La. App. 1 Cir. 11/7/14), 167 So.3d 746, 756, "[t]he party asserting the affirmative defense has the burden of proving it by a preponderance of the evidence."

Significantly, neither the Indian Harbor policy nor the RLI policy was introduced into evidence at trial; therefore, the trial court was prohibited from considering these policies, introduced for purposes of the pre-trial motion, in its post-verdict review of this insurance issue. It is well settled that "[a] court may not consider exhibits filed in the record which were not filed into evidence unless it is introduced and is admissible at the trial or hearing." **Landis Const. Co. v. State,** 15-1167 (La. App. 1 Cir. 2/29/16), 199 So.3d 1, 2 n.1. For the same reason, this court is likewise unable to consider these policies. "Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. Appellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence." **Id.** at 3.

Accordingly, we conclude that the trial court erred in finding that the Indian Harbor and RLI insurance policies, identified in the December 2015 judgment, afford coverage such that GA-MAPP's excess insurance was not triggered. Consequently, we vacate that portion of the December 16, 2015 judgment which applies a credit in favor of GA-MAPP in the amount of $2,000,000 for the Indian Harbor policy and a credit in the amount of $36,176,459 for the RLI Builder's Risk policy.

As to the Bituminous policy, however, the special master's report and recommendation provides the amount of credit due to GA-MAPP, *i.e.* $1,000,000. Southgate appeals this determination and offered alternative explanations regarding the risks insured and exhaustion of the Bituminous policy; however, we conclude that Southgate failed to show that the trial court erred in granting this

portion of GA-MAPP's motion for partial summary judgment and finding that GA-MAPP was entitled to a credit in the amount of $1,000,000 for the underlying coverage provided by Bituminous. Therefore, that portion of the December 16, 2015 judgment applying the $1,000,000 credit for limits of the Bituminous policy is affirmed.

We further find the judgment fails to account for the jury's finding that Southgate failed to mitigate its damages in connection with MAPP's failure to supervise subcontractors. The jury attributed $59,000 of damages due to Southgate's failure to mitigate; therefore, the amount owed by GA-MAPP must be reduced accordingly.

Considering this, the December 16, 2015 judgment is hereby amended to reflect a single credit in favor of GA-MAPP in the amount of $1,000,000, representing the limits of the underlying Bituminous policy issued to MAPP, effective 4/1/04 – 4/1/05. The judgment is further amended to reflect damages attributable to Southgate's failure to mitigate, $59,000. It is ordered, adjudged, and decreed that GA-MAPP is liable to Southgate for damages in the amount of $1,441,000, with interest from the date of demand.

Unpaid Balance of Flooring Judgment

Southgate argues that GA-MAPP is liable to it for the unpaid balance of a judgment entered by the arbitration panel, and confirmed by the trial court in the arbitration proceeding, against three of MAPP's flooring subcontractors (referred to by the parties as the "flooring judgment"). According to Southgate, the unpaid balance is $1,112,821.25, after a credit from an alleged settlement is given and interest is included. Southgate contends that the trial court erred in dismissing its claim for the unpaid balance.

The final judgment at issue does not specifically address the flooring judgment and makes no ruling for or against Southgate on damages for defective

installation of flooring in the building project. The final judgment contains only a general reference to all the claims not specifically addressed: "IT IS FURTHER ORDERED, ADJUDGED, and DECREED that any and all claims of Southgate Residential Towers, LLC and Southgate Penthouses, LLC against defendants are hereby dismissed with full prejudice …."

In pursuing the alleged balance of the flooring judgment from GA-MAPP, Southgate argued on appeal that it pleaded the claim in its Amended and Restated Master Petition. During trial, however, Southgate offered no evidence to prove its entitlement to have GA-MAPP cast in judgment for the unpaid balance. Southgate did not introduce the flooring judgment into evidence, offered no evidence as to the calculation of the sum allegedly owed, and failed to establish how the claimed offsets and costs were calculated to reach the amount it claims to be due.

Following trial, Southgate filed a motion seeking, among other things, to have GA-MAPP cast in judgment for the remaining balance of the flooring judgment. In support, Southgate offered the affidavit of its counsel which states, without explanation or corroboration, the total amount allegedly owed. However, Southgate may not rely on post-trial hearsay evidence to satisfy its burden of proof at trial. On our review of the record, we conclude that Southgate failed to offer evidence at trial to establish that GA-MAPP is liable to it for the unpaid balance of the flooring judgment. Accordingly, we find the trial court did not err in failing to include a special jury interrogatory in this regard, in failing to reference the flooring judgment in the December 16, 2015 judgment, or in failing to award damages to Southgate.

Due to this disposition, we pretermit discussion of the parties' arguments regarding the availability of underlying insurance to be exhausted before GA-MAPP's policy provides coverage for the flooring judgment and regarding the

interaction between the professional services exclusion and the subcontractor exceptions contained in GA-MAPP's excess insurance policy.

Denial of GA-MAPP's Summary Judgment on Professional Services Exclusion

In its answer to Southgate's appeal, GA-MAPP argues that the trial court erred in failing to grant its motion for summary judgment to dismiss Southgate's claims against it based on the professional services exclusion contained in its policy.[5] However, we find no basis for appellate review of this judgment.

"An appeal does not lie from the court's refusal to render any judgment on the pleading or summary judgment." La. C.C.P. art. 968 (in pertinent part). Appellate courts do not have appellate jurisdiction to consider a trial court's denial of a motion for summary judgment even though the denial addresses issues identical to those raised in a restricted appeal of the grant of a summary judgment. **Hood v. Cotter**, 08-0215 (La. 12/2/08), 5 So.3d 819, 823. However, an appellate court could choose to consider an interlocutory ruling under its supervisory jurisdiction. **Hood**, 5 So.3d at 823-824.

The appeal presently before this court was taken from a final judgment on the merits, after the presentation of all evidence. In **Hopkins v. Am. Cyanamid Co.**, 95-1088 (La. 1/16/96), 666 So.2d 615, 624, the Louisiana Supreme Court explained why it would be error for an appellate court to render judgment on evidence presented in support of a motion for summary judgment once a full trial had been conducted:

> [O]nce a case is fully tried, the affidavits and other limited evidence presented with a motion for summary judgment—later denied by the district court—are of little or no value. Appellate courts should not rule on appeal after a full merits trial on the strength alone of affidavits in support of a motion for summary judgment that was not

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[5] While a formal judgment adopting the recommendation to deny GA-MAPP's motion concerning the professional liability exclusion cannot be found in the record, the December 2015 judgment recites that the trial court "determined the legal issues presented regarding insurance coverage in considering the policy exclusions ... and reached the following determinations[.]" The judgment reflects that the trial court acted consistently with the recommendation to deny the motion.

sustained in the district court. In such cases, appellate courts should review the entire record.

We recognize this pronouncement has been interpreted by this court to support this court's more recent jurisprudence discussing the availability of appellate review from the denial of a motion for summary judgment; however, we decline to exercise our supervisory jurisdiction to review this interlocutory ruling after a full trial and presentation of the evidence on the merits has taken place.

Further, it does not appear that the questions concerning application and interpretation of the professional services exclusion were presented to the trial court after the special master's recommendation or during the trial of the matter. Therefore, this assignment of error lacks merit.

AMERICAN GUARANTEE ("AGLIC") – Excess Insurer for M&R Drywall, Inc.

AGLIC is the excess insurer for M&R, the subcontractor retained to build the interior and exterior wall systems for the complex. The jury found that, although M&R breached its subcontract with MAPP, Southgate suffered no property damage other than damage related to repair or replacement of M&R's work. No damages were awarded to Southgate for M&R's breach.

Southgate raises three assignments of error relating to the judgment concerning AGLIC. AGLIC answered Southgate's appeal, raising five assignments of error, including, "The trial court committed reversible error in finding that the AGLIC Policy issued on 12/18/05 was triggered in light of significant evidence and testimony known to Southgate regarding pre-policy moisture intrusion damage." Because we find the trial court erred in granting Southgate's motion for partial summary judgment on manifestation/trigger of coverage, we pretermit discussion of the remaining assignments of error raised by Southgate and AGLIC.

The AGLIC policy provided coverage from 12/18/05 – 12/18/06. Southgate filed a motion for partial summary judgment seeking a ruling that damages from

water intrusion into the project's walls manifested during AGLIC's coverage period.[6] The trial court adopted the August 13, 2015 recommendation of the special master granting the motion, finding no genuine issue as to material fact existed concerning the manifestation of damage from water intrusion into the project's walls during AGLIC's policy period. The recommendation specifically found, "there is no issue of material fact concerning when Property Damage to the drain plane resulting from the Vertical Felt Defect and No Taping of Sheathing Defect manifested itself." AGLIC challenges the trial court judgment, arguing that the evidence filed in connection with and in opposition to the motion for partial summary judgment shows that the property damage from water intrusion manifested prior to the effective date of its insurance coverage.[7]

AGLIC and Southgate agree, as do we for reasons expressed below, that the manifestation theory should be applied to determine the date on which property damage "occurred." Under the manifestation theory, property damage is considered to have "occurred" when it first becomes manifest, regardless of when the act that caused the damage occurred. **Mangerchine v. Reaves**, 10-1052 (La. App. 1 Cir 3/25/11), 63 So.3d 1049, 1055. ("The determination of when damage to property occurs, strictly speaking, involves only an objective analysis of the time at which actual physical injury to the property takes place." **Id.**, 63 So.3d at 1056.) This court applies the theory to both first-party and third-party claims. **Id.**

Even so, the determination of when coverage for a loss is "triggered" must begin with an analysis of the policy language,[8] as the policy expresses the parties'

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[6] Southgate's motion was entitled "Motion for Partial Summary Judgment for Insurance Coverage – Property Damage from Defective Installation of Vertical Felt and Lack of Taping of Sheathing" and is referred to as Motion 335.

[7] Generally, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings in addition to the review of the final judgment. **MACWCP II LLC v. Williams**, 17-0004 (La. App. 1 Cir. 9/15/17), 231 So.3d 665, 672.

[8] "The 'trigger' of coverage is the event or condition that determines whether (and when) a policy responds to a specific claim." **Mangerchine**, 63 So.3d at 1054.

mutual intent and its language determines the operative conditions upon which the insurer's obligation to indemnify the insured is based. **Id.** at 1055. (Internal citations omitted.) "The application of the appropriate theory of the trigger of coverage also depends upon the specific policy language of the particular policy at issue, as the various trigger theories developed by the courts are themselves direct outgrowths of the interpretation of relevant terms used in policies, such as 'occurrence.'" **Id.** Nonetheless, the clear weight of authority in more recent cases adopts the manifestation theory. **Id.** at 1058 n.8.

Like the policy at issue in **Mangerchine**, 63 So.3d at 1057, the AGLIC policy provides that the loss must "occur" during the policy period. Because the AGLIC policy is a follow form policy, it adopts the definition of "occurrence" set forth in the underlying Amerisure policy: "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." More particularly, the AGLIC policy provides:

> The insurance afforded under Coverage A and Coverage B applies to ... property damage only if prior to the policy period, no designated insured knew that the ... property damage had occurred, in whole or in part. If such a designated insured knew, prior to the policy period, that the ... property damage occurred, then any continuation, change or resumption of such ... property damage during or after the policy period will be deemed to have been known prior to the policy period.
>
> . . .
>
> [P]roperty damage will be deemed to have been known to have occurred at the earliest time when any designated insured:
>
> ***
>
> 3. Becomes aware by any other means that ... property damage has occurred or begun to occur.

Here, AGLIC argues that Southgate was aware, before the effective date of the policy, 12/18/05, that property damage had occurred or had begun to occur. As

such, AGLIC asserts that, under the terms of its policy, it afforded no coverage for property damage.

Motion for Partial Summary Judgment

Southgate's motion for partial summary judgment was filed in November 2014. Under the law in effect at the time, as well as the most recent revision of La. C.C.P. art. 966, appellate courts review motions for summary judgment *de novo*, using the same criteria that govern the trial court's determination of whether the motion should be granted. Thus, the appellate court asks the same questions as the trial court, *i.e.* whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Jones v. Anderson**, 16-1361 (La. App. 1 Cir. 6/29/17), 224 So.3d 413, 417.

In support of its motion for partial summary judgment, Southgate claims that it could not have known of damage to the drainage plane within the project's walls prior to the policy period because the improper vertical felt and sheathing defects were concealed until January 2006 when an expert it hired opened up a section of the wall.[9] Southgate contends that water damage in the project's exterior wall system was caused by four different construction defects: installation of vertical, rather than horizontal, felt; failure to tape the exterior sheathing on wall board; failure to flash and caulk the exterior cladding penetration by HVAC and bathroom vents; and, failure to caulk and seal the exterior cladding at various other locations. Southgate claims that it limited the motion for partial summary judgment at issue to property damage caused by the vertical felt defect and the lack of taping of sheathing defect.

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[9] As one of Southgate's experts explained in a February 2010 deposition, "the drainage plane is basically just a collection-and-weep system that has a rain screen, a weather-resistive barrier that collects the water, directs it down the flashings and weeps that then discharge that moisture from the wall."

In January 2006, an engineering firm hired by Southgate to inspect the property sent a letter to R.W. Day, the project's owner and manager, notifying him that the felt water barrier in the interior of the exterior wall system may have been improperly shingled and installed. Southgate argued that it had no knowledge of the existence of a drainage plane or its suspected defects until it received this report. According to Southgate, the date of occurrence for triggering coverage under the AGLIC policy was April 25, 2006, the date its engineering expert confirmed the existence and extent of these defects.

In opposition to Southgate's motion, AGLIC offered its own motion for summary judgment on manifestation/trigger of coverage along with supporting exhibits.[10] AGLIC asserted that ample evidence exists from which a factfinder could determine that damage from water intrusion into the walls manifested as early as September 2005. AGLIC pointed to the "Southgate Towers Notice of Defects" (referred to by the parties as the "Blue Book") prepared for Day by civil engineer, Art Colley. Day forwarded this 300+ page Blue Book to MAPP and others in September 2005. Chapters One and Two of the Blue Book address "defects with products and work causing leaks and damage from leaks" and "defects with stucco products and work."

Particularly, Chapter One reports that "[t]here are leaks all over the building." Water was entering the building from rain and "some other outside source." "Fur down" leaks are stated as being the most serious.[11] These leaks are reported as showing a repetitive pattern and are "especially numerous." Chapter One provides that "[u]sually by the time the resident reports a fur down leak, significant damage is done, and it is possible water has been present for some

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[10] This motion is entitled "American Guarantee & Liability Insurance Company's Motion for Summary Judgment" and is referred to as Motion 313.

[11] The Blue Book contains photographs to illustrate water damage and leaking as a result of "fur down" leaks.

time." Chapter One further demonstrates that the bottom of the fur down had been cut such that one could "see water on the inside of the outer wall, not coming through this apartment's vent, but from above." The Blue Book states, "that many of the defects described here and which are visible and definable [are] more likely to indicate the presence of possibly larger damages not as easy to see at this time."

Chapter Two recognizes that the stucco has been seriously damaged by water from "AC and other sources, leaks." "What has now become clear, these leaks also go into the wall structure, wetting the wall structure and the adjacent apartments." The September 2005 Blue Book contains many pictures of stucco leaks in the project.

In opposition to Southgate's motion, AGLIC also offered a report authored by Frank Krenek, an architect retained by Southgate. Day referred to Krenek as a "water leak expert" in a November 2005 email to representatives of MAPP and the project architect. Krenek's report, dated November 2005, explained, "The purpose of our site visit was to review the existing conditions at the project to determine the source of water intrusion through the building envelope." Krenek identified numerous locations where moisture had penetrated the building envelope, causing damage to the interior and exterior of the building. He found the stucco in "various stages of disrepair due to water intrusion." Addressing closely related matters, Krenek further observed:

> There were a number of locations where moisture is entering the stucco assembly at the HVAC grille areas. There is a lack of adequate sealant applications at the wall penetrations and openings (i.e., guardrail connections at walls, around vent covers, air conditioning grills, doorframes, windows, etc.). Based on our observations the stucco finish is sustaining water damage throughout the project (based on the discoloration of the stucco finish). Additional damage to the interior finishes was observed (mainly at the furr downs where water has intruded around the vent covers and over the drywall furr downs). Without the benefit of destructive testing at the HVAC grilles and vents, it is hard to sustain how the flashing and /or waterproofing were installed around these penetrations and openings prior to stucco work. Nevertheless, it is apparent that there is a lack of adequate flashing

> and waterproofing. We recommend that several HVAC grills be removed along with the surrounding stucco to verify the adequacy of the underlying waterproofing and flashing. (Emphasis in original.)

Krenek's report identified areas where exterior walls were improperly installed such that water was unable to drain from behind the stucco and areas where flashing materials and sealants were not installed behind the stucco wall, resulting in visible damage to the building and moisture on the underlying sheathing. Krenek's report showed numerous examples of improper flashing and waterproofing. Finally, Krenek reported that, "During demolition of the stucco, we observed the vapor barrier installed vertically instead of horizontally." Notably, Southgate seeks to recover under AGLIC's policy for property damage caused by M&R's allegedly improper vertical installation of this felt or vapor barrier.[12]

Krenek's conclusion in his November 2005 report recommended "that the moisture intrusion issues be addressed immediately to prevent further damage to the building interiors.... Furthermore, you should consider addressing some of the water intrusion problems to prevent further damage to the property...."

In support of its opposition to Southgate's motion, AGLIC additionally argued that excerpts from Day's deposition show that damage to the project's drainage plane manifested prior to the effective date of its insurance policy. AGLIC pointed to the following colloquy:

> Attorney: All right. Who was it that first determined that – that water was entering the building as a result of the lack of flashing and caulking around those penetrations?
>
> Day: Well, there was – we had water entering the building, that was documented in the [B]lue [B]ook.
>
> Attorney: Correct.
>
> Day: And then we didn't know why. As you state, louvers were mentioned as a possible source. We had concerns, and we

[12] Although Southgate argued in its brief to this court that the felt was not defectively installed, it took a different position in its motion for partial summary judgment and at trial.

> expressed those to the architect, the architect recommended we hire Mr. Krenek. Mr. Krenek came out in November of 2005."

Under these facts and circumstances, we find on our *de novo* review that genuine issues of material fact exist that preclude Southgate from being entitled to judgment as a matter of law regarding the manifestation of its claimed damages. *See* La. C.C.P. art. 966(B). Particularly, questions as to material fact at least exist regarding whether Southgate was aware that the claimed property damage resulting from water intrusion into the project's exterior walls occurred or began to occur prior to the effective date of the AGLIC insurance policy. Neither the insurance policy at issue nor Louisiana law require an insured to know the extent and cause of damage before insurance coverage is triggered. Pertinently, under the policy, property damage is deemed "to have been known to have occurred" when the insured becomes aware by any means that property damage "has occurred or begun to occur." Therefore, we reverse the trial court judgment that granted Southgate's motion, and we deny Southgate's motion for partial summary judgment.

Review of Evidence

"When [a] prejudicial error of law skews the trial court's finding of a material issue of fact and causes it to pretermit other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*." **Tanana v. Tanana**, 12-1013 (La. App. 1 Cir. 5/31/13), 140 So.3d 738, 741-42. On the merits, Southgate argues that AGLIC never provided any evidence to contest when moisture damage was discovered in the encapsulated wall drainage plane. Southgate further argues that AGLIC presented no evidence to show any testing of the drainage plane prior to the hiring of an engineer in January 2006. Additionally, Southgate contends that the mere appearance of moisture does not trigger coverage "for all unknown damage to concealed building components." Rather, citing **Mangerchine**,

Southgate avers that for insurance coverage to be triggered, an insured must suffer an actual loss and "the insured must have knowledge of the loss and a reasonable belief as to the time and origin of the loss." *See* **Mangerchine**, 63 So.3d at 1057. Southgate contends that it only became aware of and reported the property damage to the drainage plane resulting from M&R's failure to tape the sheathing during the AGLIC coverage period.

Additional evidence on this issue was introduced at trial, along with the Blue Book and Krenek's report. Southgate correctly argues that new evidence cannot be considered in reviewing the summary judgment granted in Southgate's favor, and we did not consider such evidence in reaching our conclusion that genuine issues as to material fact existed such that summary judgment should not have been granted. We do, however, consider all admissible evidence on our *de novo* review of the merits. *See* **Maldonado v. Kiewit Louisiana Co.**, 12-1868 (La. App. 1 Cir. 5/30/14), 152 So.3d 909, 918, *writ denied*, 14-2246 (La. 1/16/15), 157 So.3d 1129.

While testifying at trial, Day acknowledged that he was aware of water intrusion problems in August 2005, that the Blue Book was issued in September 2005, and that he received Krenek's report in November 2005. Day confirmed his contemporaneous knowledge of the contents of these documents. Day testified that he retained Krenek on behalf of Southgate to examine all of the construction issues and damage identified in the Blue Book. Day identified a series of emails between himself and Mike Polito of MAPP. In particular, Day identified one dated November 1, 2005 in which he stated, "In addition, the leaks are happening in the walls and DO NOT always show up in a unit with a leak or at all." [Emphasis original]. Day explained that he knew water was intruding into the building, but that he did not know the extent of the problem or exactly why it was happening. He also expressed a need for destructive testing.

Day testified that, in the fall of 2005, he believed the water intrusion was solely related to the failure to caulk the HVAC vents; however, when questioned regarding the architect's initial response to the water intrusion issue noted in the Blue Book, Day testified, "...there is not one clear cause that we have 100 percent identified. There is water. We don't know 100 percent what the solution is or why it's there and we're being told to further investigate." The trial evidence further shows that on December 16, 2005, two days before the effective date of the AGLIC policy, Day emailed the project architect emphasizing that water was "pouring" into the apartments and it was raining at least twice a week, resulting in more problems. Finally, Southgate's expert, Warren French, testified that the orientation of the felt would have been obvious during construction.

On our *de novo* review of the evidence, we find that damage to the interior of the exterior walls manifested prior to the effective date of AGLIC's policy. While the evidence does not specifically address the drainage plane in the walls or damage arising from the felt defect, we find that Southgate was aware that water intrusion into the project's exterior walls caused property damage to begin to occur prior to December 18, 2005, the effective date of AGLIC's insurance coverage. The manifestation theory does not require knowledge of the extent of property damage or of the specific cause. *See* **Mangerchine**, 63 So.3d at 1059-60. Consequently, we conclude that, since the property damage did not occur within AGLIC's policy period, its insurance coverage was never triggered. Finding merit in AGLIC's first assignment of error in its answer to Southgate's appeal, we conclude that neither the jury nor the trial court erred in declining to award Southgate damages against AGLIC.

GREAT AMERICAN ("GA-Atlas") – Excess Insurer for Atlas Air Conditioning Company

Atlas was the subcontractor hired to design and install Southgate's HVAC system. GA-Atlas was Atlas' excess insurer on the project. The arbitration panel determined that Atlas, MAPP, and M&R were equally responsible for the failure to flash and caulk 900 HVAC penetrations on the exterior of the building. Atlas was ordered to pay Southgate one-third of the estimated costs to repair the vent penetrations. In the instant subsequent proceeding, the special master concluded, and the trial court agreed, that the arbitration panel did not determine whether the failure to flash and caulk the vents caused damage to the exterior building envelope. The jury was asked to answer this question and determine what, if any, additional damages were owed to Southgate as a result of the damage to the exterior wall system. The jury answered this question in the affirmative and found that Southgate was owed $59,000 from Atlas to make the necessary repairs to the exterior of the building. Because the arbitration panel assigned one-third liability to Atlas, the trial court reduced the jury verdict by one-third to $19,667.00. The trial court further ruled that GA-Atlas was entitled to have this sum credited against the limits of the underlying Zurich American Insurance Company policy ($1,000,000) issued to Atlas. Thus, the trial court rendered judgment against GA-Atlas, finding that it owed nothing ($0.00) to Southgate.

Southgate's first assignment of error concerning the admissibility of the vent portion of the Arbitration Award lacks merit for the reasons discussed above. The jury could not have determined the nature and extent of any damage to the exterior wall system without knowing the findings of the arbitrators regarding liability and damages connected to the vent installation. For this reason, we also reject Southgate's third assignment of error, *i.e.* that the trial court erred by allowing the

jury to review the Arbitration Award to determine what "additional" damages were owed to Southgate. Southgate challenges the interrogatory which asked the jury:

> Do you find that there is any additional property damage to the building envelope than was previously found by the arbitrators?

According to Southgate, this required the jury to conduct an appellate review of the Arbitration Award to determine the "reasonableness of the award." We disagree and find the challenged interrogatory properly indicated to the jury that the arbitration panel previously determined that Atlas was liable for some damages related to its failure to caulk and flash the HVAC vents and that its role was to determine what additional damages were due as a result of damage sustained to the building envelope. The trial court's instructions to the jury likewise made this distinction. *See* **Townes,** 09-2110, 41 So.3d 520 at 527: "Jury interrogatories must fairly and reasonably point out the issues to guide the jury in reaching an appropriate verdict." Employing the manifest error, abuse of discretion standard of review, as we must, we find that Southgate failed to demonstrate the jury verdict form or the challenged interrogatory was "so inadequate that the jury [was] precluded from reaching a verdict based on correct law and facts." **Id.** at 527 (Internal citations omitted.).

In Southgate's final assignment of error relating to this defendant, it argues:

> The trial court erred in allowing the experts to explain to the jury the legal scope of the Award and refute the trial court's prior legal ruling by arguing that the damages to the exterior wall system had already been paid by Atlas. (Emphasis deleted.).

We have reviewed the challenged testimony and conclude that the examination and testimony were directed to elicit the existence and extent of damage to the exterior building envelope or non-existence of such damage. While Southgate argued at trial that the examination of the specified witnesses was inherently prejudicial, Southgate had the opportunity to clarify or correct any perceived misstatements on cross-examination. Further, we cannot conclude that

Southgate has proven that it was prejudiced by any particular opinion rendered or how such opinions had a substantial effect on the outcome of the case. *See* **Schexnayder**, 190 So.3d at 770-71.

Since we find no merit in Southgate's assignments of error in connection with GA-Atlas, we pretermit discussion of GA-Atlas's remaining assignments of error raised in the alternative.

OHIO CASUALTY - Excess Insurer for Power Design, Inc. ("PDI")

Ohio Casualty was the excess insurer for PDI, the subcontractor responsible for installing the project's electrical system. The arbitration panel found PDI, MAPP, and Southgate shared responsibility for the failure to fire caulk around certain penetrations. The panel apportioned costs of this repair to be shared one-third by PDI and two-thirds by MAPP/Southgate.[13] However, no credible evidence was presented to the arbitrators to establish the costs to repair these defects; therefore, the jury was asked to determine the costs and appropriate amount of damages. The jury found that the total cost to repair the defective fire caulking of all penetrations in the corridor firewalls as ordered in the Arbitration Award was $564,000. The jury also found that the reasonable cost to repair pertinent defective grounding was $114,000.

The trial court entered judgment on the jury verdict and awarded Southgate $114,000 for grounding damages. In accordance with the arbitration panel's assignment of one-third liability to PDI for fire caulking damages, the trial court reduced the jury verdict from $564,000 to $188,000. The trial court, however, rendered judgment reflecting that Ohio Casualty owed nothing to Southgate after

[13] The trial court rendered a judgment in February 2012 confirming the Arbitration Award, specifically ordering judgment in favor of Southgate and against PDI "in the amount equal to one third of the costs required to repair the firecaulking at Southgate as ordered in paragraphs 42 to 43 of the Arbitration Award rendered by the Arbitration Panel on December 20, 2010."

applying a credit of $1,000,000 for the limits of the underlying primary policy issued to PDI by Crum & Foster Specialty Ins. Co.

Southgate's primary challenge to the judgment as it relates to Ohio Casualty is that the trial court erred by allowing "experts and witnesses to give testimony on the meaning of the Arbitration Award" and by permitting the jury to interpret the Arbitration Award, rather than instructing the jury on its meaning as determined by the court.[14]

Southgate and Ohio Casualty disagree regarding the scope of repairs ordered by the arbitrators. According to Southgate, the Arbitration Award requires the responsible parties to repair the inadequate fire caulking both above and below the ceiling. Conversely, Ohio Casualty argues the Arbitration Award only requires these parties to repair fire caulking above the ceiling.

The relevant paragraphs of the Arbitration Award state:

> A. Fire Stopping Issues Regarding The Corridor And Unit Walls
>
> 41. The photographs introduced into **evidence relative to the lack of fire caulking above the ceiling in the corridors** reveal that, in fact, there are numerous penetrations through the rated wall which do not have any firecaulking. Further, some of the firecaulking provided may or may not comply with the plans and specifications or local codes.
>
> 42. Unfortunately, the record is devoid of any credible evidence **as to the cost to repair these defects**. Additionally, the record is devoid of any evidence as to the allocation of defects between Southgate, MAPP Construction, Inc., Southern States Plumbing, PDI, and Firestop International, Inc. The Panel is of the opinion that the defects need to be cured and that **the only way they can be cured is the removal of a portion, if not all, of the sheetrock ceiling in the corridor and the installation of appropriate firecaulking where it is not installed, and the repair of defective installations of firecaulking. (Emphasis added.)**

Southgate interprets paragraph 42 as making two distinct orders: (1) remove the sheetrock ceiling in the corridors and (2) install proper fire caulking where it is

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[14] Louisiana Code of Civil Procedure art. 2129 provides that "[a]n assignment of errors is not necessary in any appeal." However, "[a]ll assignments of error and issues for review must be briefed. The court may consider as abandoned any assignment of error or issue for review which has not been briefed." La. Unif. R. Ct. App. 2-12.4 (B)(4).

not installed. Southgate contends that this second order requires removal of the wall below the ceiling, where necessary. While the sentence containing this language, in isolation, could possibly be interpreted as Southgate suggests, the first sentence of paragraph 42 clearly limits the scope of the paragraph to "the cost of repair of these defects." In paragraph 41, the Arbitration Award identifies the defects under review as "the lack of fire caulking above the ceiling in the corridors."

Southgate puts forth various arguments and reasons why the Arbitration Award cannot be interpreted in this matter; however, adopting any other interpretation of the Arbitration Award would ignore the clear wording and intent of the arbitration panel and, consequently, run afoul of the judgment confirming the Arbitration Award.

We also reject Southgate's argument that Ohio Casualty's expert was erroneously allowed to testify regarding the scope of the Arbitration Award. Notably, the trial court sustained Southgate's objections to questions posed by Ohio Casualty's counsel to its witness, preventing counsel from asking questions which may have elicited the witness' conclusion or opinion concerning the meaning or scope of the Arbitration Award. Our review of the record also shows that Southgate did not object to other questions posed by Ohio Casualty which were likely to elicit such a response. "The failure to make a contemporaneous objection during the trial waives the right of a party to complain on appeal that the evidence was improperly admitted at trial." **Louisiana State Bar Ass'n v. Carr & Assocs., Inc.**, 08-2114 (La. App. 1 Cir. 5/8/09), 15 So.3d 158, 172, *writ denied*, 09-1627 (La. 10/30/09), 21 So.3d 292. We find the testimony provided by Ohio Casualty's expert was offered to establish the estimated repair costs, which necessarily required the witness to consider the scope of the work.

Southgate also argues that the trial court erred by allowing the jury to determine the scope of the Arbitration Award. Specifically, Southgate challenges this jury interrogatory:

> What was the reasonable cost to complete/repair defective fire caulking of all penetrations in the corridor firewalls as ordered by the arbitration award?

In this regard, we first note that Southgate did not object to this interrogatory at trial. Although Southgate objected to a similar jury interrogatory concerning Thrasher, it did not specifically object to interrogatory no. 3 in Part Two concerning M&R's work. "Under La. C.C.P. art. 1793(C) a party is prevented from asserting as error the giving or failure to give an instruction without objecting to the instruction. This article has been applied to special interrogatories." **Crawford v. Bon Marche, Inc.**, 540 So.2d 376 (La. App. 1 Cir. 1989). By failing to timely object to this interrogatory, Southgate waived its right to raise this issue on appeal.

Second, this interrogatory asked the jury to perform its primary function, *i.e.*, determine a disputed issue of fact. The jury was presented with two repair estimates and conflicting testimony from witnesses for Southgate and Ohio Casualty. Particularly, Ohio Casualty's witnesses testified that the fire proofing work performed by Southgate, for a cost of $1,900,000, far exceeded what was necessary to repair the fire caulking deficiencies attributable to PDI. Ohio's evidence further established that alternative repair methods could have been utilized, which would have reduced costs. Based on our review of the record, and in light of the great deference given to the jury's credibility determinations and factual conclusions, we conclude that the jury was not manifestly erroneous in finding total damages to repair the fire caulking defect as required by the arbitrators to be $564,000. *See* **Myles v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par.,** 17-1014 (La. App. 1 Cir. 4/6/18), 248 So.3d 545, 550, "where the fact finder's determination is based on its decision to credit the testimony of one of two

or more witnesses, that finding can virtually never be manifestly erroneous. This rule applies equally to the evaluation of expert testimony, including the evaluation and resolution of conflicts in expert testimony."

Finally, Southgate contends that the trial court erred in concluding that Ohio Casualty's excess insurance was not triggered and in reducing the award against Ohio Casualty/PDI by $1,000,000, the limits of the Crum & Forster policy. Southgate argues that, by doing so, the trial court summarily reversed the jury verdict.

Southgate argues that Ohio Casualty waived its entitlement to a credit by failing to prove at trial that Southgate's prior settlement with Crum & Foster released PDI from all liability for the fire caulking deficiencies. In response, Ohio Casualty asserts that Southgate judicially confessed that it was entitled to a credit of $1,000,000 before its coverage was triggered. In particular, Southgate's pretrial inserts, signed by its counsel, acknowledge Ohio Casualty's entitlement to the credit:

> 151. The total cost of repair of the fire caulking is $1,917,280.00. The total potential coverage of Ohio Casualty for the fire caulking repairs is $917,280.00 **after deducting the policy limits of Crum**. (Emphasis added.)

Further, during trial, Southgate's counsel acknowledged in open court:

> As to the exhaustion or the limits, **we agree that the court [is] entitled to give Ohio Casualty a million dollar credit against any judgment that would be rendered**, and that's the proper way to move forward. (Emphasis added.)

Louisiana Civil Code art. 1853 defines a judicial confession as follows:

> A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.
>
> A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

A declaration made by a party's attorney or mandatary has the same effect as one made by the party himself. La. C.C art. 1853, Comment (b); **C.T. Traina, Inc. v. Sunshine Plaza, Inc.**, 03-1003 (La. 12/3/03), 861 So.2d 156, 159. A judicial confession must be explicit and cannot be implied. **Yesterdays of Lake Charles, Inc. v. Calcasieu Par. Sales & Use Tax Dep't**, 15-1676 (La. 5/13/16), 190 So.3d 710, 729. A judicial confession has the effect of waiving evidence relating to the subject matter of the admission and withdrawing the subject matter of the confession from issue. **Traina**, 861 So.2d at 159-160.

We agree with Ohio Casualty that the above representations by Southgate's counsel are judicial confessions and that Ohio Casualty was not required to offer affirmative proof at trial that it was entitled to a credit of $1,000,000 before its coverage was triggered. The statements, made by Southgate's counsel during the course of the judicial proceeding, explicitly recognize that Ohio Casualty is entitled to a credit in the amount of Crum's $1,000,000 policy limits. Southgate did not claim to revoke the statements, and it has neither shown nor argued that the statements were made in error. As such, we cannot conclude that the trial court erred in crediting the limits of the Crum & Forster policy against the judgment rendered against Ohio Casualty and in favor of Southgate.

We pretermit discussion of Southgate's arguments related to whether Ohio Casualty owed the full amount of damages or a fraction of that amount and whether various terms and conditions of Ohio's policy apply to make it liable for the full damage award. Even assuming Ohio Casualty is liable for the full amount of the damage award for the fire caulking deficiencies in addition to the amount for grounding damages (which totals $678,000), the $1,000,000 credit more than offsets this amount. We, therefore, find no error in the $0.00 judgment rendered against Ohio Casualty. Because we find no merit in Southgate's assignments of

error in connection with this defendant, we pretermit discussion of Ohio Casualty's assignments of error unrelated to the assignment of costs, discussed above.

NATIONAL UNION – Excess Insurer for MAPP Construction, LLC

National Union provided excess liability insurance to MAPP from 4/1/03 – 4/1/04. The policy provided coverage only for damages in excess of $1,000,000 in underlying primary insurance. The jury found that MAPP breached its contract during National Union's policy period and awarded damages to Southgate in the amount of $370,000 for misplaced corings. The trial court applied a $1,000,000 credit against the award to account for the coverage limit of the underlying Bituminous policy and held that National Union owed Southgate $0.00. Accordingly, Southgate has not shown any error in this regard.

Southgate argues that the trial court erred by reducing the jury award in the amount of the Bituminous policy limits because the National Union policy does not identify Bituminous as the underlying insurer. Southgate correctly observes that Bituminous is not listed as an underlying insurer in the National Union excess policy. The "Schedule of Underlying Insurance" in the National Union policy provides, in pertinent part:

> Schedule of Underlying Insurance
>
> Issued to: MAPP CONSTRUCTION, INC. Policy Number: BE 32055714
>
> By: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.
>
> | TYPE OF POLICY OR COVERAGE | LIMITS |
> | --- | --- |
> | GENERAL LIABILITY | $1,000,000
EACH OCCURRENCE
$2,000,000
GENERAL AGGREGATE
$2,000,000
PRODUCTS/C. OPS. AGGREGATE
$2,000,000
PER PROJECT AGGREGATE |

Southgate asserts that, because National Union is the only insurer identified in the "Schedule of Underlying Insurance," it is also the underlying primary insurer and is, therefore, liable for the full amount of damages ($370,000) awarded by the jury. Southgate suggests that the trial court erroneously reformed the National Union policy to name Bituminous as the underlying insurer. Alternatively, Southgate argues that the policy is ambiguous and the principles of contract interpretation require the policy to be interpreted in favor of providing coverage.

Conversely, National Union argues that, regardless of which insurance company provided coverage as the underling insurer, the excess policy at issue unambiguously states that coverage will only be triggered when the named insured, MAPP, is legally obligated to pay damages in excess of $1,000,000. But, since the jury found that MAPP was only required to pay Southgate $370,000 for property damages caused by an occurrence during the National Union policy period, no payments were due under the excess insurance policy.

"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." **Kirby v. Ashford**, 15-1852 (La. App. 1 Cir. 12/22/16), 208 So.3d 932, 937. Interpretation of a contract is the determination of the common intent of the parties and when the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. "Each provision of the policy must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole, and it must be interpreted to cover only those things it appears the parties intended to include." **Id.** at 937. *See also* La. C.C. arts. 2045–2051.

In reviewing the National Union policy, we recognize that the "Schedule of Underlying Insurance" fails to name an underlying insurer. Nevertheless, we reject

Southgate's argument that the excess policy at issue and the underlying policy allegedly identified in the schedule are "one and the same." No instrument in the record contains terms, conditions, exceptions, premiums, or any other indicia that National Union issued a commercial general liability policy to insure MAPP's liability for sums below the damages needed to make payments due under National Union's excess policy at issue. Identifying an insurance company by name in a schedule is insufficient to create a binding insurance contract. We find that Southgate failed to establish that National Union provided primary insurance coverage for MAPP's liability. Instead, the National Union policy clearly and unambiguously provides excess coverage. Subsection III. "Limits of Insurance" of the National Union policy provides, in pertinent part:

> E. Retained Limit
>
> We will be liable only for that portion of damages in excess of the Insured's Retained Limit which is defined as the greater of either:
>
> 1. The total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance [$1,000,000 each occurrence] and the applicable limits of any other underlying insurance providing coverage to the Insured; or
>
> 2. The amount stated in the Declarations as Self Insured Retention [$10,000] as a result of any one Occurrence not covered by the underlying policies listed in the Schedule of Underlying insurance nor by any other underlying insurance providing coverage to the insured;
>
> and then up to an amount not exceeding the Each Occurrence Limit as stated in the Declarations."

The policy also provides that it will be in excess of "other valid and collectible insurance [that] applies to a loss that is also covered by this policy." *See* Section VI. Subpart J. Section VI. Conditions, subpart P., further provides "[c]overage under this policy will not apply unless and until the Insured or the Insured's underlying insurer is obligated to pay the Retained Limit." We agree with National Union that the policy does not require that a particular carrier

provide the underlying primary coverage and find the policy at issue unambiguously provides excess coverage, above $1,000,000.

Finally, Southgate argues that the jury should have decided whether the Bituminous policy was underlying; however, we find no error in the trial court's review and determination of the attendant legal issue regarding the interpretation and application of the Bituminous and National Union policies, which were introduced into evidence at trial. The interpretation of an insurance policy usually involves a legal question. **Kirby**, 208 So.3d at 936. As such, Southgate's assignments of error in this regard are without merit. Because we find no error in the judgment, we pretermit discussion of National Union's additional assignments of error, to be considered only if this court reversed the judgment.

AIG SPECIALTY f/k/a AMERICAN INTERNATIONAL ("ASIC") – Excess Insurer for Thrasher Waterproofing, Inc.

ASIC provided excess liability coverage for Thrasher, a subcontractor responsible for caulking and waterproofing certain areas of the buildings. The jury found that Thrasher did not breach its subcontract and awarded no damages to Southgate. Southgate did not appeal the judgment as it pertains to ASIC; however, ASIC timely answered Southgate's appeal, seeking to reverse the trial court's failure to award costs to ASIC and against Southgate. ASIC further sought to have the appeal dismissed as frivolous and requested an award of attorney's fees and costs pursuant to La. C.C.P. art. 2164. For reasons stated, we decline to amend the judgment to award court costs to ASIC. We also decline to award attorney fees to ASIC and against Southgate for filing a frivolous appeal. Southgate did not file this appeal against ASIC. Further, ASIC has not prevailed on its assignment of error. Accordingly, we find no basis to grant an award of attorney fees.

DECREE

We find the trial court erred in reducing the jury verdict in favor of Southgate for MAPP's failure to supervise subcontractors from 4/1/04 – 4/1/05 by the limits of the Indian Harbor and RLI policies. Accordingly, we reverse this portion of the judgment. We conclude the record supports only a credit against this award in the amount of $1,000,000 for the limits of the primary Bituminous policy. We amend the December 16, 2015 judgment and render. We order, adjudge, and decree that Great American Alliance Insurance Company and Great American Insurance Company, as excess insurer of MAPP Construction, LLC, is liable to Southgate Residential Towers, LLC and Southgate Penthouses, LLC in the sum of $1,441,000, with interest from date of demand. We further amend the judgment to reflect the jury verdict finding that Southgate failed to mitigate its damages during GA-MAPP's 4/1/2004 – 4/1/2005 policy period. The judgment is affirmed in all other respects. Each party is to bear its own costs.

AMENDED IN PART; AFFIRMED AS AMENDED

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0186

M&R DRYWALL, INC.

VERSUS

MAPP CONSTRUCTION, LLC, SOUTHGATE TOWERS, LLC, AND R. W. DAY AND ASSOCIATES, INC.

CONSOLIDATED WITH

NO. 2017 CA 0187

MAPP CONSTRUCTION, LLC

VERSUS

SOUTHGATE PENTHOUSE, LLC, R. W. DAY DEVELOPMENT, LLC, ROBERT W. DAY, JANICE E. DAY, AND LIONSAY, LLC

CONSOLIDATED WITH

NO. 2017 CA 0188

SOUTHGATE RESIDENTIAL TOWERS, LLC, SOUTHGATE PENTHOUSE, LLC

VERSUS

MAPP CONSTRUCTION, INC., ET AL

****

MCCLENDON, J., concurring in part and dissenting in part.

The majority relies on LSA-C.E. art. 804B.(6) to conclude that the Arbitration Award was properly admitted. However, I find that art. 804B.(6), which specifically states that it applies when a declarant is unavailable, is inapplicable.[1] I also note, as recognized by the majority, this exception is intended to apply only in extraordinary circumstances.

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[1] Arguably, the Arbitration Award may be admissible under the business records exception to the hearsay rule, LSA-C.E. 803(6). See **Graef v. Chemical Leaman Corp.**, 106 F.3d 112 (5th Cir. 1997). However, this would require a custodian to authenticate the document, which was not done here.

Furthermore, the admission of the Arbitration Award was a clear violation of LSA-C.E. art. 413 which provides, "Any amount paid in settlement or by tender ***shall not*** be admitted into evidence unless the failure to make a settlement or tender is an issue in the case." [Emphasis added].

In light of these axioms, I find the trial court clearly abused its discretion in admitting the Arbitration Award into evidence. Nevertheless, our analysis does not end here. As the majority points out, Southgate had the burden of showing that this erroneous evidentiary ruling had a substantial effect on the outcome of the case to its detriment. **Schexnayder v. Bridges**, 15-0786, 15-0787 (La.App. 1 Cir. 2/26/16), 190 So.3d 764, 771. Southgate failed to satisfy this burden. Therefore, I am constrained to concur with the result reached by the majority regarding the admission of the Arbitration Award.

Further, I dissent from the majority's holding that this court lacks jurisdiction to review the denial of GA-MAPP's motion for summary judgment regarding the professional services exclusion. In **Hopkins v. American Cyanamid Company**, 95–1088 (La. 1/16/96), 666 So.2d 615, 617, the Louisiana Supreme Court instructed:

> [O]nce a case is fully tried, the affidavits and other limited evidence presented with a motion for summary judgment – later denied by the district court – are of little or no value. Appellate courts should not rule on appeal after a full merits trial on the strength alone of affidavits in support of a motion for summary judgment that was not sustained in the district court. In such cases, appellate courts should review the entire record.

This court has interpreted **Hopkins** to mean that review of the denial of a motion for summary judgment is permitted in an appeal from a final judgment following a trial on the merits; however, our review is not limited to the evidence filed in support of or in opposition to the motion. Instead, per **Hopkins**, our review of the merits of the motion must include the entire record. See **Rosenberg-Kennett v. City of Bogalusa**, 14-1555 (La.App. 1 Cir. 4/24/15) 2015 WL 1882746, *2 (unpublished); **Browne v. State of Louisiana, Dept. of Transp. and Development**, 15-0667 (La.App. 1 Cir. 2/4/16), 2016 WL 455938, *3 (unpublished); **Moore v. Talbot**, 08-1370 (La.App. 1 Cir. 2/13/09), 2009 WL 368619, *3, n. 4 (unpublished). Additionally, it is

well-established that, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings, in addition to review of the final judgment. See **Cajun Constructors, Inc. v. Ecoproduct Solutions, LP**, 15-0049 (La.App. 1 Cir. 9/18/15), 182 So.3d 149, 155; **Fonseca, Sr., v. City Air of Louisiana, LLC,** 15-1848 (La.App. 1 Cir. 6/3/16), 196 So.3d 82, n. 3, citing **Gilchrist Const. Co, LLC v. State Dept. of Transp. and Development**, 13-2101 (La.App. 1 Cir. 3/9/15), 166 So.3d 1045, "Generally, an appeal may not be taken from the trial court's denial of a motion for summary judgment. *See* La. C.C.P. art. 968. However, it may be reviewed on an appeal of a final judgment in the suit."

Consequently, I would consider this assignment of error raised by GA-MAPP and conduct a *de novo* review of the entire record to determine whether the trial court properly denied GA-MAPP's motion for summary judgment.