CORY WICKRAMASEKRA	*	**NO. 2002-CA-2474**
VERSUS	*	**COURT OF APPEAL**
ASSOCIATED INTERNATIONAL INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-3893, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *
(Court composed of Judge Dennis R. Bagneris Sr., Judge Edwin A. Lombard, and Judge Leon A. Cannizzaro, Jr.)

CANNIZZARO, J. DISSENTS WITH REASONS

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INTERNATIONAL INSUANCE COMPANY

AFFIRMED

This case involves an appeal by the plaintiff from a summary judgment granted by the trial court in favor of the defendant. For the reasons set forth below, this Court affirms the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

On March 20, 1999, the plaintiff, Cory Wickramasekra, was visiting an employee of The Palm's, Inc. (the "Palm's") at the Palm's place of business. At the time of the visit, the employee was moving palm trees using a forklift, and he requested Mr. Wickramasekra's assistance. After approximately ten palm trees had been moved, the forklift injured Mr. Wickramasekra's foot. In an affidavit submitted by Mr. Wickramasekra to the trial court in connection with his motion for summary judgment, he stated "we had loaded/unloaded approximately 10 palm trees on and off the forklift for the purpose of moving the trees."

On March 13, 2000, Mr. Wickramasekra sued the Palm's, which is no longer in business, and its insurer, Associated International Insurance Company ("Associated"), for damages resulting from the Palm's negligence

in connection with the injury to Mr. Wickramasekra's foot. Associated had issued a commercial general liability insurance policy (the "Policy") to the Palm's for the policy period beginning August 7, 1998, and ending August 7, 1999.

On June 5, 2000, Associated filed an answer to the petition. In its answer Associated asserted several affirmative defenses, one of which was an exclusion from coverage under a "classification limitation" endorsement to the Policy.

On December 10, 2001, Associated filed a motion for summary judgment on the grounds that the classification limitation endorsement to the Policy precluded coverage for Mr. Wickramasekra's claim. The classification limitation endorsement provided, in relevant part, that the Policy's coverage did not apply to bodily injury or medical payments arising out of operations that were not included on the declarations page of the Policy or on any endorsement or supplement to the declarations page. The declarations page of the Policy lists "loading and unloading of equipment" as the operation that is covered by the Policy.

On January 17, 2002, Mr. Wickramasekra filed a motion for summary judgment on the issue of insurance coverage. He sought a summary judgment holding that the Policy afforded coverage for his injuries.

On May 31, 2002, both the motion for summary judgment by Associated and the motion for summary judgment by Mr. Wickramasekra were heard. In a Judgment dated July 15, 2002, Associated's motion was granted, Mr. Wickramasekra's motion was denied, and all of his claims against Associated

were dismissed with prejudice. Although the trial court did not issue written reasons for his judgment, the transcript of the hearing on the motions for summary judgment indicated that the trial court found that the palm trees being moved by the forklift were not "equipment" as that term was used in the phrase "loading and unloading of equipment" in the Policy.

Mr. Wickramasekra is now appealing the summary judgment that the trial court granted in favor of Associated. He contends that the court erred in finding that palm trees were not equipment and in not finding that the forklift that was being loaded and unloaded with the palm trees was, in fact, equipment.

STANDARD OF REVIEW

The Louisiana Supreme Court discussed the standard of review of a summary judgment as follows in *Independent Fire Insurance Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226:

> Our review of a grant or denial of a motion for

> summary judgment is de novo. *Schroeder v. Board of Sup'rs of Louisiana State University*, 591 So.2d 342 (La. 1991). A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B).

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at the trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La.C.C. P. art.966 C (2).

An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La.C.C.P. art. 967; *Townley v. City* of Iowa, 97-493 (La. App. 3 Cir. 10/29/97), 702 So.2d

323, 326.

The amended article 966 substantially changed the law of summary judgment. Under the prior jurisprudence, summary judgment was not favored and was to be used only cautiously and sparingly. The pleadings and supporting documents of the mover were to be strictly scrutinized by the court, while the documents submitted by the party in opposition were to be treated indulgently. Any doubt was to be resolved against granting the summary judgment, and in favor of trial on the merits. This jurisprudential presumption against granting the summary judgment was legislatively overruled by La.C.C.P. art. 966 as amended. The amendment levels the playing field between the parties, with the supporting documentation submitted by the parties to be scrutinized equally and the removal of the overriding presumption in favor of trial. Under the amended statute, the initial burden of proof remains with the mover to show that no genuine issue of material fact exists. However, under La.C.C.P. art. 966(C), once mover has made a prima facie showing that the motion should be granted, the burden shifts to the non-moving party to present evidence demonstrating that material factual issues remain. Once mover has properly supported the motion for summary judgment, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the

motion. The amendment to La.C.C.P. art. 966 brings Louisiana's standard for summary judgment closely in line with the federal standard under Fed. Rule Civ.Proc. 56(c). *Hayes v. Autin*, 96-287 (La.App.3 Cir. 12/26/96); 685 So.2d 691, 694, *writ denied*, 97-0281 (La.3/14/97), 690 So.2d 41. The summary judgment law was amended by La.Acts No. 483 of 1997 to incorporate the *Hayes* analysis.

Under Fed. Rule Civ.Proc. 56, when the nonmoving party bears the burden of proof at trial, there is no genuine issue of material fact if the nonmoving party cannot come forward at the summary judgment stage with evidence of sufficient quantity and quality for a reasonable juror to find that the party can satisfy his substantive evidentiary burden. In construing the federal summary judgment rule, the United States Supreme Court held that summary judgment shall be granted where the evidence is such that it would require a directed verdict for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If a defendant in an ordinary civil case moves for summary judgment or a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the non-moving party on the evidence presented. *Id*. The Anderson court further held that

the mere existence of a scintilla of evidence on the non-moving party's position would be insufficient; there must be evidence on which the jury could reasonably find for that party. *In Lujan v. National Wildlife,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the court held that Fed. Rule Civ.Proc. 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof. *Berzas v. OXY USA, Inc.,* 29,835 (La. App. 2 Cir. 9/24/97), 699 So.2d 1149, 1152-53;*Martello v. State Farm Fire and Cas. Co.,* 96-2375 (La.App. 1 Cir. 11/7/97), 702 So.2d 1179, 1183-84, *writ denied* 98-0184 (La.3/20/98), 715 So.2d 1215.

A fact is material if it is essential to a plaintiff's cause of action under the applicable theory of recovery and without which plaintiff could not prevail. Generally, material facts are those that potentially insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute. *Prado v. Sloman Neptun Schiffahrts,* A.G., 611 So.2d 691, 699 (La. App. 4 Cir.1992), *writ not considered* 613 So.2d 986 (La.1993).

Based on the foregoing, this Court must conduct a *de novo* review in the instant case to determine whether the trial court committed error in

granting summary judgment in favor of Associated. Both Associated and Mr. Wickramasekra agree on the underlying factual issues in this case.

DISCUSSION

On appeal, Wickramasekra contends the trial court erred by failing to recognize the ambiguity in the Classification Limitation Exclusion and by failing to construe the ambiguity against the insurer and in favor of coverage. Wickramasekra argues that that the Classification Limitation Exclusion in the policy is ambiguous and that the trial court erred in concluding that coverage is excluded because the palms trees are not equipment.

An insurance policy is a contract and, as with all other contracts, it constitutes the law between the parties. *Carney v. American Fire & Indemnity Co*., 371 So.2d 815 (La.1979). If the policy wording at issue is clear and expresses the intent of the parties, the agreement must be enforced as written. *Albritton v. Fireman's Fund Ins. Co.*, 224 La. 522, 70 So.2d 111 (La.1953).

An insurance contract is to be construed as a whole, and one portion thereof should not be construed separately at the expense of disregarding another. *Benton Casing Service, Inc., v. Avemco Ins.*, 379 So.2d 225 (La.1979). If there is an ambiguity in a policy, then that ambiguity should

be construed in favor of the insured and against the insurer. *Albritton,* 70 So.2d at 111. However, courts have no authority to alter the terms of policies under the guise of contractual *interpretation when the policy provisions are couched in unambiguous language. Monteleone v. American Emp. Ins. Co.,* 239 La. 773, 120 So.2d 70 (La.1960); *Edwards v. Life & Cas. Ins. Co. of Tenn*., 210 La. 1024, 29 So.2d 50 (La.1946); *Pareti v. Sentry Indem. Co.,* 36 So.2d 417, (La. 1988).

An insurance policy is an agreement between the parties and should be interpreted by using ordinary contract principles. *Smith v. Matthews,* 611 So.2d 1377, 1379 (La.1993). The parties' intent, as reflected by the words of the policy, determines the extent of coverage. Such intent is to be determined in accordance with the general, ordinary, plain and popular meaning of the words used in the policy, unless the words have acquired a technical meaning. La.Civ.Code art. 2047; Lou*isiana Insurance Guaranty Association v. Interstate Fire & Casualty Co.,* 93-0911 (La. 1/14/94); 630 So.2d 759, 763. If the policy wording at issue is clear and expresses the intent of the parties, the agreement must be enforced as written. *Pareti v. Sentry Indemnity Co., supra.* at 417, 420.

In the instant case, the policy's declaration page lists in the business description the following;

Business Description:

LOADING AND UPLOADING OF EQUIPMENT

UNLOADING

(HANDWRITING)

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Also, contained in the policy was the following;

CLASSIFICATION LIMITATION

This endorsement modifies insurance under the following:

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COMMERCIAL GENERAL LIABILITY COVERAGE PART PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

> This insurance does not apply to “ bodily injury”, property damage”, personal injury”, advertising injury” or medical payment arising out of those operations or premises which are not classified or shown on the Commercial General Liability Coverage part Declaration, its endorsements or supplements

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The ambiguity in the insurance policy which plaintiff seeks to create is illusory. Wickramasekra injured his foot when he was assisting in moving

of palm trees using a forklift. Considering, the ordinary, general, plain or popular meaning of the word palm tree, we are unable to characterize or define a palm tree as equipment as defined by any dictionary. Based on this reasoning we find that the wording "**LOADING AND UPLOADING OF EQUIPMENT"** is unambiguous and clear. Thus, there is no genuine issue of material fact for trial. Wickramasekra's contention is without merit.

Accordingly, we affirm the judgment of the trial court.

AFFIRMED