NOT DESIGNATED FOR PUBLICATION

IN RE: MCDERMOTT INCORPORATED C/W MCDERMOTT INCORPORATED VS. RECORDS STORAGE, ET AL. C/W JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, LLP VS. RECORDS STORAGE, ET AL. C/W LOWE, STEIN, ETC. VS. RECORDS STORAGE, ET AL.	* * * * * * * * * * * * * * *	**NO. 2003-C-0467** **COURT OF APPEAL** **FOURTH CIRCUIT** **STATE OF LOUISIANA**

SUPERVISORY WRIT DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-5763, DIVISION "B-15"
Honorable Rosemary Ledet, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris Sr., and Judge Michael E. Kirby)

JOHN H. MUSSER, V
PETER B. SLOSS
EMILY STEVENS HARDIN
MURPHY, ROGERS & SLOSS
SUITE 400, ONE SHELL SQUARE
701 POYDDRAS STREET
NEW ORLEANS, LA 70139
COUNSEL FOR JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, L.L.P.

JAY M. LONERO
JOHN I. GOODWIN, III
LARZELERE, PICOU & WELLS, L.L.C.
3850 NORTH CAUSEWAY BOULEVARD
TWO LAKEWAY CENTER-SUITE 1100

METAIRIE, LA 70002
COUNSEL FOR REPUBLIC-VANGUARD INS. CO.

ROBERT J. BURVANT
STACIE N. FONTANA
KING, LEBLANC & BLAND, LLP
201 ST. CHARLES AVENUE
3800 BANK ONE CENTER
NEW ORLEANS, LA 70170
COUNSEL FOR MCDERMOTT INCORPORATED

WRIT GRANTED; JUDGMENT OF THE TRIAL COURT REVERSED

In these three consolidated actions for breach of contract and negligence related to water damage sustained to plaintiffs' business records while in storage with original defendants and cross-claim plaintiffs Records Storage & Services, Inc. ("RSS") and William R. Lasseigne Jr., original and cross-claim defendant Republic-Vanguard Insurance Company ("Republic-Vanguard") seeks supervisory review of the denial of its motion for summary judgment and the grant of the contrary motion for summary judgment filed by RSS and Lasseigne on the issue of insurance coverage/duty to defend. For the following reasons, we reverse the trial court judgment, which (1) denied Republic-Vanguard's motion for summary judgment; and (2) granted RSS and William R. Lasseigne Jr.'s motion for

summary judgment.

FACTS AND PROCEDURAL HISTORY

Plaintiffs McDermott Incorporated ("McDermott"), Jones, Walker, Waechter, Poitevant, Carrère & Denègre, L.L.P. ("Jones Walker"), Lowe, Stein, Hoffman, Allweiss & Hauver, L.L.P. ("Lowe, Stein") filed virtually identical actions in May 2002, naming as defendants RSS and its owner—Lasseigne, and their insurers, Republic-Vanguard and Underwriters at Lloyd's London ("Lloyd's"), seeking recompense for losses sustained from damage to plaintiffs' respective business records while being stored by RSS.

Republic-Vanguard moved for summary judgment against all plaintiffs and defendant/cross-claim plaintiff RSS, asserting that a policy provision excluded coverage for damage to the records because they were in the physical possession, custody and control of RSS when damaged. RSS and Lasseigne also moved for summary judgment against Republic-Vanguard on the issue of coverage and duty to defend.

Following a hearing, the trial court, on February 7, 2003, signed a written judgment denying Republic-Vanguard's motion and granting the motion by RSS and Lasseigne.

The plaintiffs' allege that their business records were damaged by water while stored by RSS and/or Lasseigne at a facility owned and operated

by RSS and/or Lasseigne at 900 Atlantic Street in New Orleans.

It is not disputed that at the time RSS and Lasseigne were covered by a commercial general liability policy of insurance issued by Republic-Vanguard. The policy provided in pertinent part:

SECTION I – COVERAGES
COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of … "property damage" to which this insurance applies.

* * *

2. Exclusions

This insurance does not apply to:

j. Damage to Property

"Property damage" to:

* * *

(4) Personal property in the care, custody or control of the insured;

* * *

SECTION V – DEFINITIONS

* * *

15. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of the use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Twenty or so total pages of Lasseigne's deposition are included in Republic-Vanguard's writ application as parts of three exhibits: (1) Republic-Vanguard's trial memorandum in support of its motion for summary judgment; (2) McDermott's trial court memorandum in opposition; and (3) RSS and Lasseigne's trial court memorandum in support of their motion for summary judgment and in opposition to Republic-Vanguard's motion.

Lasseigne said that, with few exceptions, RSS would pick up the records at the plaintiffs' respective offices. McDermott sometimes shipped records directly to RSS from outside the city, and annual reports would be shipped directly to RSS from the printer. He also confirmed that ninety-nine percent of the time, with the exception of McDermott's drafting department, RSS would deliver records to the plaintiffs if the stored records were needed. He said once and a while a plaintiff might send a runner to RSS to pick up a folder. As for the McDermott drafting department, they would come to the RSS facility to retrieve the records. However, Lasseigne confirmed that, because of liability concerns, none of plaintiffs' employees ever went into the RSS warehouse to retrieve their own records. RSS employees went into the warehouse and physically retrieved those records.

Lasseigne also confirmed that sometimes RSS employees would move

records around the warehouse. He gave as an example the case of a customer desiring to destroy some of the records, whereupon RSS would pull those records and destroy them. RSS employees might then shift around other stored records to fill shelf space formerly occupied by those records that were destroyed. Lasseigne also said that any new storage that came in had to be cataloged, inventoried, labeled and put on shelves. He said it was a "constant thing," that they were always moving around records. Anything that had been picked up and returned had to be re-filed and put back up, although he noted that RSS was a commercial archives and was mainly intended for inactive or semi-active records, not active records. There was a large volume of records, but they were not often referred to. There were no restrictions on RSS moving the plaintiffs' records around; RSS could move them for any reason it thought was appropriate, without consulting with the respective plaintiffs. Lasseigne confirmed that RSS "pretty much" had physical possession, custody and control of those records while they were in the RSS warehouse. He said most of the records were kept at 900 Atlantic Street, but that some were kept at a commercial self-storage facility.

DISCUSSION

At the outset, we note that there is no indication that the trial court

certified the grant of RSS and Lasseigne's motion for summary judgment as a final appealable judgment. Therefore, Republic-Vanguard's remedy as to the grant of that motion is the same remedy it has as to the denial of its motion for summary judgment—an application for supervisory review.

Appellate courts review the grant or denial of a motion for summary judgment de novo. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, p. 7 (La. 2/29/00), 755 So. 2d 226, 230. A summary judgment shall be rendered forthwith 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). A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. Smith v. Our Lady of the Lake Hosp., Inc., 93-2512, p. 27 (La. 7/5/94), 639 So. 2d 730, 751. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. Id.

La. C.C.P. art. 966(C)(2) provides that where the party moving for

summary judgment will not bear the burden of proof at trial, his burden does not require him to negate all essential elements of the adverse party's claim, 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. Thereafter, if the adverse party fails to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law. Id.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by La. C.C.P. art. 969. La. C.C.P. art. 966(A)(2). Summary judgments are favored, and the summary judgment procedure shall be construed to accomplish those ends. Id. Nevertheless, despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion and all doubt must be resolved in the opponent's favor. Willis v. Medders, 2000-2507, p. 2 (La. 12/08/00), 775 So.2d 1049, 1050. A court cannot make credibility determinations on a motion for summary judgment, and must assume that all of the affiants are credible. See Independent Fire Insurance Co. v. Sunbeam Corp., 99-2181, p. 16, 755

So.2d at 236.

Summary judgment declaring lack of coverage under an insurance policy may be rendered if there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. Reynolds v. Select Properties, Ltd., 93-1480, p. 2 (La. 4/11/94), 634 So. 2d 1180, 1183. An insurer bears the burden of proving the applicability of an exclusionary clause within a policy. Blackburn v. National Union Fire Ins. Co. of Pittsburgh, 2000-2668, p. 6 (La. 4/3/01), 784 So. 2d 637, 641.

The trial court denied Republic-Vanguard's motion and granted the contrary motion by RSS and Lasseigne based on Reynolds, supra, involving a policy exclusion essentially identical to the one in the instant case.

In Reynolds, the plaintiff leased a self-storage unit for the storage of personal property. Some of the property was stolen. Plaintiff filed suit against the owner and management company, alleging that they were liable for his loss. These defendants filed third-party demands against Transcontinental Insurance Co., alleging that it provided coverage for the plaintiff's loss under a commercial general liability policy. The Transcontinental policy contained essentially the identical clause at issue in the instant case, excluding coverage for property damage to "personal

property in your care, custody or control…."

The court in Reynolds cited jurisprudence interpreting the type of exclusion at issue as recognizing "two distinct circumstances under which the insured is held to have 'care, custody or control' of property such that the exclusion will be applicable to defeat coverage." 93-1480, p. 4, 634 So. 2d at 1184. The court explained:

> The first, and most common, circumstance usually occurs where the insured is either a contractor or subcontractor who has been sued by the owner of the property upon which work was being performed, or is a party with whom property had been placed for use or repair. The suits brought by the property owners are normally for alleged negligence in the performance of the work or in the use of the property which led to damage to the property. In these cases, the insured's actual physical possession of or control over the property determined whether the exclusion applied. The purpose of the exclusion under these circumstances is to prevent a general liability insurer from becoming a guarantor of the insured's workmanship in his ordinary operations.
>
> The second circumstance under which the insured will be held to have "care, custody or control" of the property occurs where the insured has a proprietary interest in or derives monetary benefit from the property. The exclusion is applied in this type of situation because there might be some advantage to the insured in falsifying or exaggerating a loss, a moral hazard not contemplated or contracted for in a commercial general liability insurance agreement. (citations omitted).

93-1480, pp. 4-5, 634 So. 2d at 1184.

We find that the trial court in the instant case erred both in analyzing Reynolds and as to the facts at issue. The trial court said in its reasons for

judgment:

> In the instant case, the foregoing law and alleged facts suggest that RSSI and Lassigne [sic] did not have care, custody or control of the plaintiffs' business records. There are no allegations that RSSI and/or Lassigne performed any work on the records; and they did not derive a monetary benefit from or have a proprietary interest in the records. RSSI and Lassigne merely leased storage space to the plaintiffs, which, according to *Reynolds*, does not rise to the level of care, custody or control of personal property. Thus, the policy exclusion at issue does not apply to this case.
>
> Republic argues that in the deposition of Lasseigne, he testified that RSSI had physical possession, control and custody of the records. The facts of this case do not suggest that RSSI or Lasseigne had authority to use the plaintiffs' actual business records for monetary benefit or to perform any work on the business records. As such, Republic's reliance upon this testimony is ineffectual and does not persuade this Court to rule in its favor.

It is clear from the reasons given that the trial court interpreted Reynolds as holding that "care, custody or control" as used in these exclusions is found only where (1) the insured was performing work on the property in question or was a party with whom the property had been placed for repair; or (2) where the insured had a proprietary interest in or derived monetary benefit from the property. The trial court's confusion is understandable, considering the way Reynolds is written. In the instant case, the second "circumstance" clearly is not applicable and is not at issue. The confusion arises when considering the first "circumstance." The applicability of the exclusion as to the first circumstance is not, as the trial

court obviously believed, limited to a situation where RSS and Lasseigne were performing work on the property in question or where the plaintiffs had left the property with RSS and Lasseigne for repair. That there is no such limitation is evidenced by reference to the cases cited by the Reynolds court with regard to the first circumstance.

In the first case cited by the Reynolds court with regard to the first circumstance, Borden, Inc. v. Howard Trucking Co., Inc., 454 So. 2d 1081 (La. 1983), Howard Trucking agreed to transport a Borden compressor to a facility for routine maintenance. The Howard Trucking transport truck was involved in an accident and overturned, damaging the Borden compressor. Borden sued Howard Trucking and its insurer, Northwest, which provided a policy containing three basic types of coverage, including comprehensive general liability insurance. The comprehensive general liability terms excluded coverage for property damage to "property in the care, custody or control of the Insured or as to which the Insured is for any purpose exercising physical control." 454 So. 2d at 1084. As to this exclusion, the court noted that actual physical damage to Borden's compressor was "clearly excluded under the Northwest policy for it was incurred … "while the compressor was under the 'care, custody or control' of Howard." 454 So. 2d at 1085. The compressor was not under the care, custody or control of

Howard Trucking because Howard was performing work on it or was a party with whom it had been placed for repair, or because Howard had a proprietary interest in or derived monetary benefit from it, but simply because it was in fact under Howard's care, custody or control, as those terms are commonly used. Analogizing the Borden case to the instant one, actual physical damage to plaintiffs' business records was clearly excluded under Republic-Vanguard's policy for it was incurred while the business records were in the care, custody or control of RSS and Lasseigne.

Thus, the very first case cited by the Louisiana Supreme Court in Reynolds as to the applicability of the "care, custody or control" exclusion supports Republic-Vanguard's position in the instant case.

Another case cited by the Louisiana Supreme Court in Reynolds as authority for the first circumstance is this Court's decision in Duchmann v. Orleans Maritime Brokerage, Inc., 603 So. 2d 818 (La. App. 4 Cir. 8/11/92). Duchmann, the purchaser of a vessel, sued Orleans Maritime Brokerage, Inc. ("OMBI"), who had brokered the sale and whose agent was to deliver the vessel to Duchmann in New Orleans after having its engine evaluated. The morning after the vessel arrived in New Orleans, before delivery to Duchmann, it was found listing due to an accumulation of water inside. Duchmann filed suit against OMBI and its insurer, Hartford. Hartford

moved for summary judgment under a policy provision excluding coverage for property damage to "personal property in your care, custody or control," the identical language used in the Republic-Vanguard property damage exclusion in the instant case. As in the instant case, the policy did not define the term "personal property." The trial court denied Hartford's motion for summary judgment. This Court reversed, stating:

> Both Louisiana decisional and statutory authority support Hartford's claim that, if an item is in the insured's possession or under its control at the time of the property damage, the exclusionary provision of the policy which relates to property damaged in the care, custody and control of the insured, is given effect. Therefore, as OMBI had not delivered the vessel to Duchmann prior to the time it was damaged and as the vessel was under the physical control of OMBI (through its agent) at the time it sustained property damage, exclusion 2(j)(4) of the Hartford-OMBI policy applies and bars coverage. (citations omitted).

603 So. 2d at 820.

Again, as in the Borden case, this Court in Duchmann did not find that the insured had "care, custody or control" of the vessel because it was performing work on it or was a party with whom it had been placed for repair, or because the insured had a proprietary interest in or derived monetary benefit from the vessel. Rather, this Court found that the insured, OMBI, had "care, custody or control" simply because OMBI had possession of the vessel.

It is clear from a reading of these two cases cited in Reynolds that the applicability of the "care, custody or control" exclusion in Republic-Vanguard's policy is not dependent upon a finding, as to the first "circumstance" listed in Reynolds, that the insured RSS and/or Lasseigne performed any work on plaintiffs' business records or that RSS and/or Lasseigne were parties with whom the plaintiffs' business records had been placed for repair.

Disposition of this case rests upon a simple interpretation of the policy provision at issue, applying well-settled principles of law set out by the court in Reynolds as follows:

> An insurance policy is a contract between the parties and should be construed employing the general rules of interpretation of contracts set forth in the Louisiana Civil Code. Smith v. Matthews, 611 So.2d 1377, 1379 (La.1993). The parties' intent, as reflected by the words of the policy, determine the extent of coverage. La.Civ.Code art. 2045; Louisiana Ins. Guar. Ass'n v. Interstate Fire & Casualty Co., 93-0911, p. 5, 630 So.2d 759, 763 (La.1994). Words and phrases used in a policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. Interstate, 630 So.2d at 763; La.Civ.Code art. 2047. An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. Interstate, 630 So.2d at 763. Where the language in the policy is clear, unambiguous, and expressive of the intent of the parties, the agreement must be enforced as written. Central La. Elec. Co. v. Westinghouse Elec. Corp., 579 So.2d 981, 985 (La.1991). However, if after applying the other rules of construction an ambiguity remains, the ambiguous provision is to be construed

against the drafter and in favor of the insured. Interstate, 630 So.2d at 763-64.

The purpose of liability insurance is to afford the insured protection from damage claims. Policies therefore should be construed to effect, and not to deny, coverage. Thus, a provision which seeks to narrow the insurer's obligation is strictly construed against the insurer, and, if the language of the exclusion is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied. Garcia v. St. Bernard School Bd., 576 So.2d 975, 976 (La.1991); Breland v. Schilling, 550 So.2d 609, 610 (La.1989).

It is equally well settled, however, that subject to the above rules of interpretation, insurance companies have the right to limit coverage in any manner they desire, so long as the limitations do not conflict with statutory provisions or public policy. Oceanonics, Inc. v. Petroleum Distrib. Co., 292 So.2d 190 (La.1974). As this court stated in Commercial Union Insurance Co. v. Advance Coating Co., 351 So.2d 1183, 1185 (La.1977), quoting Muse v. Metropolitan Life Insurance Co., 193 La. 605, 192 So. 72 (1939):

> The rule of strict construction does not authorize a perversion of language, or the exercise of inventive powers for the purpose of creating an ambiguity where none exists, nor does it authorize the court to make a new contract for the parties or disregard the evidence as expressed, or to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties....

(footnotes omitted).

93-1480, pp. 3-4, 634 So. 2d at 1183.

In the instant case the plaintiffs utilized the services of RSS whereby RSS employees would pick up the records from plaintiffs or receive them in shipment and store them in the RSS facility. If plaintiffs wished to consult their stored business records, they contacted RSS, who would retrieve the

records from its warehouse or other storage space and deliver them to the plaintiffs. RSS and Lasseigne did not, as the trial court found, merely lease storage space to the plaintiffs. Applying the plain, ordinary and generally prevailing meaning of the terms care, custody or control, the facts clearly establish that plaintiffs turned over the care, custody or control of their business records to RSS and Lasseigne, and that RSS and Lasseigne had the care, custody or control of those records at the time they were damaged. Therefore, the Republic-Vanguard policy clearly excludes coverage as to RSS and Lasseigne for the damages to plaintiffs' business records, including, by the terms of the policy, "all resulting loss of use" of those business records.

Plaintiff McDermott, and by adoption, plaintiff Lowe, Stein, argued in their trial court memorandums that the interpretation of the exclusion provision according to Republic-Vanguard's arguments would eliminate virtually any liability coverage under the policy. They note that Lasseigne stated in his deposition that, as a "layman," he believed they were covered and that was why they purchased the coverage. However, attached to Republic-Vanguard's trial court reply memorandum is the deposition excerpt of Dwight Andrus. Andrus stated that he specifically told Lasseigne that the liability policy would not cover damage to any contents, and that

Lasseigne declined to purchase coverage for that event. Andrus said that if someone wanted to cover records stored in a warehouse, that one would need to purchase a separate policy called "warehouseman's legal liability policy." There is no merit to this argument by McDermott and Lowe, Stein. The Republic-Vanguard policy exclusion is clear, and the policy obviously was never intended to cover damage to business records stored by RSS and Lasseigne.

Plaintiff McDermott, and by reference plaintiff Lowe, Stein, submitted in their trial court memorandums that, even assuming the policy provision excludes coverage for RSS, it does not for Lasseigne, for he did not have the care, custody or control of their records. There is no merit to this argument. Lasseigne is the sole owner of RSS. If RSS had the care, custody or control of plaintiffs' records, Lasseigne also did. Lasseigne is alleged to be strictly liable under La. C.C. art. 2322 as owner of the building where the records were stored and sustained damage; however, coverage for damage to plaintiffs' records and the loss of use thereof would still be excluded under the Republic-Vanguard policy.

For the foregoing reasons, we grant the writ application, and we reverse the judgment of the trial court, which (1) denied Republic-Vanguard's motion for summary judgment; and (2) granted RSS and

William R. Lasseigne Jr.’s motion for summary judgment.

WRIT GRANTED; JUDGMENT OF THE TRIAL COURT REVERSED