

**NOT DESIGNATED FOR PUBLICATION**

<b>WENDY THOMAS,</b>	*	<b>NO. 2006-CA-1098</b>
<b>INDIVIDUALLY AND ON</b>		
<b>BEHALF OF HER</b>	*	<b>COURT OF APPEAL</b>
<b>MINOR CHILDREN,</b>		
<b>CHELSEY SHE'A MARIE</b>	*	<b>FOURTH CIRCUIT</b>
<b>THOMAS AND TYLER</b>		
<b>PAUL THOMAS</b>	*	<b>STATE OF LOUISIANA</b>

**VERSUS** \* \* \* \* \*

**DIVCON, L.L.C., HORSESHOE  
GAMING HOLDING CORP.,  
HORSESHOE RIVERBOAT  
CASINO, HORSESHOE  
ENTERTAINMENT,  
HORSESHOE GP, INC. AND  
NEW GAMING CAPITAL  
PARTNERSHIP**

**CONSOLIDATED WITH:**

**NO. 2006-C-0960**

**APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2002-12759, DIVISION "E-7"  
Honorable Madeleine Landrieu, Judge**

\* \* \* \* \*

**Judge Patricia Rivet Murray**

\* \* \* \* \*

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,  
Judge Edwin A. Lombard)

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**AFFIRMED**

General Star Indemnity Company [“General Star”] appeals the granting of summary judgment dismissing its third party claim against Zurich American Insurance Company [“Zurich”]. For the reasons that follow, we affirm.

### **FACTS AND PROCEEDINGS BELOW**

The plaintiff, Wendy Thomas, individually and on behalf of her two minor children, filed the instant action on August 13, 2002, seeking compensation for the alleged wrongful death of her husband, Darrin Thomas, who had drowned while working as a diver cleaning out silt, sand and debris from beneath an elevator barge connected to the Horseshoe Casino on the Red River. Plaintiff sued the decedent’s employer, Divcon, L.L.C. [“Divcon”]; the owner/operator of the floating casino, Horseshoe Entertainment [“Horseshoe”]; and Divcon’s insurer, General Star. Horseshoe filed a cross claim against General Star asserting that Horseshoe was an additional insured under the General Star liability policy issued to Divcon. General Star then asserted a third party demand against Zurich, claiming Zurich also provided coverage to Horseshoe for the drowning incident. On April 10, 2006, Zurich moved for summary judgment dismissing the third party claim on the basis that the Zurich coverage was

excess to General Star's primary coverage, which had a limit of \$1,000,000 per occurrence. On May 11, 2006, General Star filed an opposing motion for summary judgment on the grounds that the two policies were co-primary, seeking a declaration that the two insurers would have to share the costs of defending Horseshoe and the payment of any liability assessed against Horseshoe.

The matter came for hearing on June 2, 2006. On June 21, 2006, the trial court signed a judgment granting Zurich's motion for summary judgment, dismissing with prejudice General Star's third-party demand for declaratory judgment, and denying General Star's motion for summary judgment, specifically finding the General Star policy primary and Zurich's policy excess for claims against Horseshoe.

General Star filed the instant appeal challenging the granting of summary judgment and the dismissal of its third party claim; it also filed a writ application seeking review of the denial of its motion for summary judgment. This court consolidated General Star's writ application with its appeal, as both concern the same substantive issue.

## **ISSUE**

The sole issue on appeal is whether the Zurich policy is co-primary or merely excess to the General Star coverage.

## **STANDARD OF REVIEW**

Appellate courts review summary judgments *de novo* using the same criteria that govern the district court's consideration of whether summary judgment is appropriate, i.e., whether there is a genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. *King v. Parish National Bank*, 2004-0337, p.7 (La. 10/19/04), 885 So.2d 540, 545. Favored in Louisiana, the summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, and should be construed to accomplish those ends. *Id.*; La. C.C.P. art. 966(A) (2).

## **DISCUSSION OF LAW AND FACTS**

In the instant case, there is no factual issue, as the parties agree as to what transpired, and the language of the pertinent policy provisions is not in dispute. The trial court's granting of summary judgment was based upon its legal interpretation of the policies involved, and our task on review is simply to determine whether the trial court's interpretation is correct. We find that it is.

The General Star policy covering Horseshoe contains both a standard "other insurance" clause and a "primary insurance" endorsement. The Zurich policy issued to Horseshoe also contains an "other insurance" clause.

Generally, each “other insurance” clause provides that if the insured has other valid and collectible insurance covering the same loss, which insurance is also primary, the insurers will share the loss according to the proportion that the limit of each bears to the total amount of primary coverage available under all policies.

On appeal, General Star argues that the trial court erred by failing to give effect to the “other insurance” clause present in both General Star’s policy and Zurich’s policy. We disagree. General Star’s argument ignores the fact that its own policy also contains Endorsement Number 001, entitled “Primary Insurance Endorsement,” which provides, in pertinent part:

It is hereby understood and agreed that, in the event of any loss covered by this insurance, this policy shall be primary to any other insurance carried by the party named above its affiliated, subsidiary and/or interrelated companies or any other additional insureds or their underwriters and that any insurance carried by such parties shall be considered excess and non-contributory.

The page containing the above-quoted endorsement clearly states: “This endorsement changes the commercial liability policy. Please read it carefully.”

We agree with the trial court that by its own terms, the primary insurance endorsement attached to the General Star policy overrides the policy’s “other insurance” clause. In the instant case, the endorsement

clearly renders the General Star policy primary and the Zurich policy excess. An insurer may change or amend coverage by means of an endorsement attached to the policy. *Balisco Blades & Casting, Inc. v. Fireman's Fund Ins. Co.*, 31,876, p.3 (La. App. 2 Cir. 5/5/99), 737 So. 2d 164, 166. It is a well settled that when a conflict arises between the endorsement and the main body of an insurance policy, the endorsement prevails. *Dekeyser v. Automotive Cas. Ins. Co.*, 97-1251, p.9 (La. App. 4 Cir. 2/4/98), 706 So.2d 676, 681, citing *Howell v. American Casualty Co. of Reading, Pennsylvania*, 96-0694 (La. App. 4 Cir. 3/19/97), 691 So. 2d 715, 724. See also: *Jefferson Downs v. American Gen. Ins. Co.*, 214 So.2d 244(La. App. 4th Cir. 1968); *Hicks v. Summers*, 577 So. 2d 299 (La. App. 4<sup>th</sup> Cir. 1991); *Seatrek, Inc. v. Sunderland Marine Mut. Ins. Co., Ltd.*, 99-893 (La. App. 5 Cir. 2/16/00); 757 So. 2d 805. Moreover, a Louisiana court has specifically held that an endorsement applying to additional insureds, addressing which policy is primary and which is excess should the additional insured carry its own coverage, supercedes the general "other insurance" clause contained in the policy. *Jessop v. City of Alexandria*, 03-1500, p.8 (La. App. 3 Cir. 3/31/04), 871 So. 2d 1140, 1146. The *Jessop* court reasoned that because the language of the endorsement was more specific, it prevailed over the "other insurance" provision found in the main policy. *Id.*

We find the General Star policy to be clear and unambiguous. We agree with the trial court that the inclusion of Endorsement 001 negates the main policy's "other insurance" clause and renders the Zurich policy excess in the instant situation. Our conclusion in this regard makes it unnecessary for us to address the alternative arguments set forth by Horseshoe and Zurich in defense of this appeal.

### **CONCLUSION**

Accordingly, we conclude that Zurich's motion for summary judgment was properly granted; General Star's motion for summary judgment was properly denied; and General Star's third party demand against Zurich was properly dismissed. We therefore affirm the judgment of the trial court.

**AFFIRMED**