RICHARD PERNICIARO & ROBERT CLEVELAND	*	**NO. 2018-CA-0113**
INDIVIDUALLY AND ON BEHALF OF PARATECH, LLC	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
GUY MCINNIS, RAY LAUGA, JR., CASEY W. HUNNICUTT, RICHARD LEWIS & ST. BERNARD PARISH GOVERNMENT, ET AL	* * * * * * *	

LEDET, CONCURRING WITH REASONS

On appeal, the St. Bernard Parish Government (the "SBPG") and four members of the St. Bernard Parish Council: Guy McInnis, Ray Lauga, Casey Hunnicutt, and Richard Lewis (the "Council Members") (collectively, the "Parish") contends that the trial court erred in two respects: (i) denying the Council Members' motion to compel discovery and request to depose RSUI Indemnity Company's ("RSUI"), and granting RSUI's motion to quash and protective order (the "Discovery Issue"); and (ii) granting RSUI's motion for summary judgment and dismissing all of the Plaintiffs' direct action claims against RSUI with prejudice (the "Coverage Issue").[1]

As to the Discovery Issue, I agree with the majority's finding that the trial court did not abuse its discretion.[2] No further discovery was necessary to resolve the insurance coverage issue in this case, which is a purely legal one. As to the Coverage Issue, I agree with the majority's findings that certain policy exclusions apply to relieve RSUI of its obligation to defend and to indemnity the Parish for

[1] The plaintiffs are ParaTech and its individual owners and members, Richard Perniciaro and Robert Cleveland (collective "the Plaintiffs").

[2] As the majority observes, the trial court's interlocutory ruling on the Discovery Issue is properly before us on appeal. *See Favrot v. Favrot*, 10-0986, p. 2 (La. App. 4 Cir. 2/9/11), 68 So.3d 1099, 1102, n. 1 (observing that "[i]t is well-settled that although an interlocutory judgment may not itself be immediately appealable, it is nevertheless subject to review by an appellate court when a judgment is rendered in the case which is appealable").

the Plaintiffs' claims; however, I write separately to articulate my analysis of the this issue.

To place the Coverage Issue in context, it is necessary to outline briefly the factual and procedural background of the case. Factually, RSUI issued two claims-made-and-reported officer and directors liability policies to the SBPG—one having a policy period of February 1, 2014, to February 1, 2015; the other, February 1, 2015, to February 1, 2016. Although the policy periods differ, the pertinent policy terms are the same. The instant suit, which falls within the 2015 to 2016 policy, is the Plaintiffs' third suit arising out of the same factual scenario—the termination of the contract for information technology ("IT") services between the SBPG and ParaTech, LLC ("ParaTech") (the "IT Contract"). The three suits are as follows:

- **Suit One**—filed: November 7, 2014; venue: 34th Judicial District Court, Parish of St. Bernard; plaintiff: ParaTech; and defendants: the SBPG and RSUI.

- **Suit Two**—filed: October 27, 2015; venue: 24th Judicial District Court, Parish of Jefferson; plaintiffs: ParaTech and its individual owners and members Richard Perniciaro, and Robert Cleveland; and defendants: the SBPG; RSUI; the Council Members; and the media defendants.[3]

- **Suit Three** (the instant suit)—filed: August 5, 2016; venue: 34th Judicial District Court, Parish of St. Bernard; plaintiffs: ParaTech, Mr. Perniciaro, and Mr. Cleveland; and defendants: the SBPG; RSUI; the Council Members; and the media defendants.[4]

Suit One and Suit Two are relevant to the instant suit only insofar as those suits form the basis of the timeliness issue raised by RSUI regarding the Parish's presentation of its insurance claim to RSUI, so as to trigger coverage under the 2015 to 2016 policy.[5] The majority pretermits the timeliness issue based on its

[3] The media defendants are the Times Picayune, LLC ("the Times Picayune"); and Benjamin Alexander-Bloch, a reporter for the Times Picayune.

[4] The media defendants are not parties to this appeal.

[5] Suit One is still pending; Suit Two was dismissed on a declinatory exception of improper venue. The judgment dismissing Suit Two was affirmed on appeal. *Perniciaro v. McInnis*, 16-740 (La. App. 5 Cir. 5/31/17), 222 So.3d 987.

finding that three policy exclusions, raised by RSUI in support of its motion for summary judgment, apply here. I agree and, thus, focus solely on the exclusions.

The three pertinent policy exclusions are as follows: (i) the defamation exclusion; (ii) the mental anguish or emotional distress exclusion; and (iii) the "breach-of-contract" exclusion. The application of the defamation and the mental anguish or emotional distress exclusions is straightforward. As the trial court noted in its oral reasons for judgment, "[t]he claim, for defamation, I think, is plain and simple. Everything that is a defamation claim, I think, is certainly excluded by the defamation exclusion. And all of the other claims of mental anguish are certainly excluded by the mental anguish, emotional distress exclusion." Because the correctness of the trial court's reasoning is not disputed, those two exclusions require no further analysis. The application of the "breach-of-contract" exclusion, on the other hand, is the crux of the instant appeal. Indeed, it subsumes all of the Parish's arguments.

The trial court, in its oral reasons for judgment, construed the "breach-of-contract" exclusion as "all encompassing," reasoning as follows: "[a]ll the claims made by the plaintiff[s] . . . had to do with the efforts of St. Bernard Parish Government to disassociate itself, terminate the contract, get away from, kick out of the building Mr. Perniciaro, his companies. It all has to do with that." On appeal, the Parish contends that the trial court erred in finding the "breach-of-contract" exclusion dispositive. The Parish's argument can be divided into the following three categories: (i) claims involving non-parties to the IT Contract; (ii) claims that are non-contractual in nature; and (iii) the "catch-all" claim in the Plaintiffs' petition. I separately address each category.

Claims Involving Non-Parties

As the majority points out, "[t]he Parish argues, in its reply brief, that the breach of contract exclusion does not apply to the Council Members, and Messrs.

Perniciaro and Cleveland because they were not a party to the [IT] [C]ontract—just the SBPG and ParaTech." The majority pretermits this issue given that it was not raised in the trial court. I would address this issue.

This issue is resolved by the plain language of RSUI's policy setting forth the "breach-of-contract" exclusion; particularly, the policy provides that an insured loss excludes claims:

> Alleging, arising out of, based upon or attributable to, in whole or in part, any liability under or pursuant to any contract or agreement, whether oral, written, express or implied, including the liability of others assumed by an Insured, unless such Insured would have been liable in the absence of such contract or agreement; provided, this EXCLUSION shall not apply to Defense Expenses in connection with an Employment Practices Claim[.]

Construing the same policy language, the federal district court in *RSUI Indemnity Co. v. McDonough County Hospital d/b/a McDonough County Hospital District, and Women's Health Center of Macomb, S.C.*, Labor & Empl. L. ¶ 221585 (C.C.H.) (U.S. District Court, C.D. Ill., September 28, 2017) (*unpub*.), 2017 WL 9884199, rejected an insured's argument that the exclusion was only intended to apply to liability-producing contracts to which the insured, McDonough, was a party. In reaching this result, the district court reasoned that "the contract [exclusion], by its terms, applies to any claim based upon liability under any contract." *Id.* The district court further reasoned that "by the exclusion's terms, it does not matter who the parties to the contract are, and thus, whether or not the insured is a party to the liability-producing contract is not dispositive of whether the exclusion applies. The claim just has to be based on or attributable to a contract." *Id.*

Moreover, the district court in *McDonough* observed, as RSUI's counsel pointed out at oral argument before this court, that RSUI's policy exclusion, by its express terms, is actually a "contract" exclusion, not a "breach-of-contract" exclusion. Given the language of RSUI's contract exclusion does not restrict its

scope to the parties to the liability-producing contract, the Parish's argument that the exclusion does not extend to non-parties to the IT Contract is unpersuasive.

Claims That Are Non-Contractual in Nature

The Parish's next argument is that the contract exclusion does not extend to non-contractual claims. The Parish cites the well-settled jurisprudential principle that the same act can give rise to both contractual and tort claims. *See Borden, Inc. v. Howard Trucking Co.*, , 454 So.2d 1081, 1096 (La. 1983) (observing that "a party can incur liability in tort, notwithstanding a contractual relationship between parties, . . . where the act causing the damage constitutes both a breach of contract and legal fault"). The Parish contends that the trial court erred in failing to recognize that this principle applies here. Nonetheless, the Parish acknowledges that the "but for" test, which the majority discusses in detail, determines the applicability of the "breach-of-contract" exclusion. Under the "but for" test, "the injury is only considered to have arisen out of the contractual breach if the injury would not have occurred but for the breach of contract." *Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Cas. Co.*, 677 F.3d 250, 256 (5th Cir. 2012).

Applying the "but for" test to the present case, it is necessary to summarize the allegations of the Plaintiffs' petition. In *McInnis, supra*, the appellate court summarized the allegations of the Plaintiffs' petition in Suit Two—which, save a few words, are essentially verbatim to those in Suit Three—as follows:

> Plaintiffs' claims against defendants arose out of an IT professional services contract between ParaTech and the St. Bernard Parish Government that was terminated by an ordinance passed by the St. Bernard Parish Council. The suit alleged specific causes of action against each defendant regarding events surrounding the contract and its eventual termination. First, plaintiffs alleged that the Councilmen were liable for various acts of defamation and conspiracy perpetrated against plaintiffs by the Councilmen as members of the St. Bernard Parish Government and in their own personal and individual capacities. These actions included providing defamatory statements to the press about plaintiffs; conspiring with other parish officials to sign an "illegal contract" with another IT company, Todd's Technology; stating false and misleading "facts" about Mr. Perniciaro to Mr.

> Cleveland and attempting to persuade Mr. Cleveland to leave ParaTech; and for initiating and/or voting for four "illegal" ordinances terminating ParaTech's contract with St. Bernard Parish, preventing plaintiffs from entering any parish building, and refusing to pay money owed to plaintiffs. As to the St. Bernard Parish Government, plaintiffs alleged that, through its parish councilmembers, employees, directors, officers, and contractors, it defamed and injured plaintiffs though defamatory public statements to the press, as well as through the above-listed actions of the Councilmen. The petition also alleged that RSUI was liable because it provided a policy of liability insurance to the St. Bernard Parish Government.

16-740 at pp. 1-2, 222 So.3d at 988-89. The above synopsis of the Plaintiffs' allegations supports the trial court's finding that all of the Plaintiffs' claims would not have arisen but for the SBPG's termination of the IT Contract.

"Crucial to the ['but for'] analysis is that the act giving rise to liability, i.e., the ('operative act'), is determinative, not the theories of liability alleged." *In re Delta Fin. Corp*., 398 B.R. 382, 397 (Bankr. D. Del. 2008). Here, the operative act is the SBPG's termination of the IT Contract. All of the Plaintiffs' claims, no matter how labeled, flow from that operative act.

In its oral reasons for judgment, the trial court stated that "it's all one story. The story is St. Bernard Parish Government, in the beginning, identified as that and then, later, by individual councilmen was interested and made a sincere effort and succeeded in terminating the relationship between Parish Government and ParaTech and Mr. Perniciaro." I agree. Given that none of the Plaintiffs' claims flow from a duty owed to them stemming from any source other than SBPG's termination of the IT Contract, none of the Plaintiffs' claims would have arisen but for this story—this operative act. For these reasons, the Parish's argument regarding non-contractual claims is unpersuasive.

The "Catch-All" Claim

The Parish's final argument is that the trial court erred in ignoring the "catch-all" claim in the Plaintiffs' petition, which alleges that "[a]ny and all other negligent and/or intentional acts . . . which will be proven or identified through

discovery." RSUI counters that the "catch-all" claim is insufficient to impose liability because, under Louisiana's fact-pleading system, a petition must allege with specificity the facts supporting each cause of action.

Under Louisiana's fact-pleading system, a petition must set forth the material facts upon which a cause of action is based. *Batson v. Cherokee Beach & Campgrounds, Inc*., 428 So.2d 991, 993 (La. App. 1st Cir. 1983) (citing La. C.C.P. art. 891(A)). "Mere allegations of negligence are not allegations of fact which must be accepted as true, but are conclusions of law." *Batson*, *supra*. Mere allegations of negligence "cannot form the basis of a cause of action, which under our system of fact pleading must be based on facts from which such conclusions may be drawn." *Id*.

Consistent with the fact-pleading requirement, the jurisprudence has recognized that a "catch-all" claim is insufficient to preclude summary judgment. *See Ebarb v. Boswell*, 51,445, p. 7 (La. App. 2 Cir. 7/19/17), 224 So.3d 523, 528 (observing that "[i]nsurance coverage in this matter is not salvaged by Ebarb pleading that Bowell is liable for '[o]ther improper/negligent acts as may be proven at trial'");. *Chalmers v. Burnet & Co., Inc*., 15-249, p. 7 (La. App. 3 Cir. 10/7/15), 175 So.3d 1100, 1104 (rejecting the argument that an "other relief" allegation precluded a finding that coverage was not unambiguously excluded). Simply stated, a "catch-all" claim is insufficient because it alleges "[n]o new facts." *Chambers*, *supra*. Only those claims that a plaintiff has asserted and supported with specific factual averments are sufficient to defeat summary judgment. The Parish's reliance on the "catch-all" claim in the Plaintiffs' petition thus is misplaced.

For all the above reasons, I respectfully concur.