NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0451

LISSETTE SAVOY MENENDEZ AS THE APPOINTED
NATURAL TUTRIX OF VANESSA SAVOY

VERSUS

MICHAEL B. O'NIELL, FRIENDS ENTERPRISES, LLC,
AND PROGRESSIVE SECURITY INSURANCE COMPANY

Judgment Rendered: December 28, 2006

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 519,357
Honorable Kay Bates, Judge

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

This is an appeal by the plaintiff, Lissette Savoy Menedez, as the appointed natural tutrix of Vanessa Savoy, of a summary judgment granted in favor of the defendant insurer, Progressive Security Insurance Company (Progressive), dismissing it from this lawsuit on the basis that its policy provided no coverage for the automobile involved in the accident for which plaintiff seeks damages. After a thorough review of the record and the applicable law, we find the summary judgment was properly granted and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 22, 2004, Michael O'Niell (Michael) was driving a 1997 Chevy pickup and was involved in a one-vehicle accident on Louisiana Highway 30 (Nicholson Drive). Vanessa Savoy, a passenger, was thrown from the vehicle and suffered severe head injuries and crippling, permanent disabilities. The plaintiff filed suit alleging that the accident was caused by the sole negligence of Michael in driving while intoxicated, speeding, reckless driving, and failure to maintain control of his vehicle. The plaintiff named as a defendant, among others, Progressive, alleging it insured the Chevy truck driven by Michael and provided coverage for the damages sustained by her and her daughter.

The truck was owned by Friends Enterprises, LLC (Friends). Michael O'Niell's father, John O'Niell (Mr. O'Niell), was the managing partner and part-owner of the company. Mr. O'Niell testified by deposition that he gave Michael the Chevy pickup for his personal use in 1999 or 2000, under the mistaken belief that he (Mr. O'Niell) was the titled owner of the vehicle. On the date of the accident, February 22, 2004, the Chevy truck was titled in the name of Friends, which had a commercial automobile policy with Progressive in effect for the

policy period of 07/07/03 to 07/07/04.[1]

Plaintiff's original petition alleges that Progressive insured the vehicle involved in the accident and provides coverage under the aforementioned policy for the losses she suffered. Progressive filed a motion for summary judgment asserting there are no genuine issues of material fact and that at the time of the accident, it did not provide insurance coverage to the Chevy truck being driven by Michael O'Niell. The trial court granted the summary judgment in favor of Progressive, and the plaintiff appeals.

SUMMARY JUDGMENT LAW

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Craig v. Bantek West, Inc.**, 2004-0229 (La. App. 1st Cir. 9/17/04), 885 So.2d 1241, 1244; **Western Sizzlin Steakhouse v. McDuffie**, 2002-0935 (La. App. 1st Cir. 3/28/03), 844 So.2d 355, 357, writ denied, 2003-1147 (La. 6/20/03), 847 So.2d 1236. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2). A summary judgment may be rendered on the issue of insurance coverage alone, even where there is a genuine issue as to liability or damages. **Simmons v. Weiymann,** 2005-1128 (La. App. 1st Cir. 8/23/06), ___ So.2d ___. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). Summary judgment declaring a lack of coverage under an insurance

[1] Mr. O'Niell testified that sometime in 1999 or 2000, he purchased a Dodge truck for his son, Michael. Approximately two months later, he purchased the 1997 Chevy pickup at issue herein for his maintenance man at Friends to use in the business. However, Michael decided that he liked the Chevy truck better than the Dodge, so Mr. O'Niell agreed to let Michael have the Chevy truck, and the Dodge truck would be returned by Michael to Friends for the maintenance man to use. According to Mr. O'Niell, his secretary was supposed to transfer the title of the vehicles after the swap was made. However, after the accident at issue in this case, it was discovered that the titles were never transferred and that the title to the Chevy truck being used solely by Michael was still in Friends' name.

policy may not be rendered unless 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 (La. 4/11/94), 634 So.2d 1180, 1183.

On a motion for summary judgment, the burden of proof is on the mover. When the issue before the court on the motion for summary judgment is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. La. C.C.P. art. 966(C)(2); **Buck's Run Enterprises, Inc. v. Mapp Constr., Inc.**, 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. An insurer seeking to avoid coverage through summary judgment bears the burden of proving some exclusion applies to preclude coverage. **Simmons,** *supra,* at p.1.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, 230; **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 2002-1072 (La. 4/9/03), 842 So.2d 373, 377. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482 (La. App. 1st Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Foreman v. Danos and Curole Marine Contractors, Inc.**, 97-2038 (La. App. 1st Cir. 9/25/98), 722 So.2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So.2d 637.

ARGUMENT

Progressive maintains that its policy with Friends does not provide coverage on the vehicle driven by Michael on the date of the accident. In support of its Motion for Summary Judgment, Progressive introduced the policy itself as well as the deposition testimony of Mr. O'Niell. Progressive cites Paragraph 9(b)(2) of the policy and asserts the clear language therein unequivocably excludes coverage on the Chevy truck, which according to the testimony of Mr. O'Niell, was purchased prior to the policy period. Plaintiff on the other hand argues the trial court erred in granting summary judgment because the policy language relied on by Progressive is ambiguous and creates a genuine issue of material fact concerning whether the vehicle driven by Michael is covered by the policy.[2]

THE POLICY

Under the terms of Part 1 of the policy, entitled "Liability to Others," coverage extends only to liabilities that arise from the use of an "insured auto." Paragraph 9(b) on page 5 of the policy under the heading, "General Definitions" defines "insured auto" in pertinent part as follows:

> b. Any additional **auto** *of which* ***you*** *acquire ownership during the Policy period* provided that: 1) if the **auto** is used in **your** business, **we** must insure all other **autos you** own and that have been used in **your** business [3] and 2) if the **auto** is not used in **your** business, **we** must insure all other **autos you** own.

(Emphasis added).

Progressive argues that the deposition testimony of Mr. O'Niell, that he purchased the 1998 Chevy truck sometime in 1999 or 2000, establishes that the truck was not purchased "during the policy period" as required by the policy in order for coverage to apply under Paragraph 9(b)(2). Thus, according to

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2 It is undisputed that the Chevy truck at issue is not listed on the declarations page of the policy and also that it is not a "replacement vehicle" pursuant to Paragraph 9(a) of the policy.

3 It is undisputed that the Chevy truck driven by Michael was not used in the business of Friends.

Progressive, Paragraph 9(b) of the policy affording coverage to automobiles acquired during the policy period is simply inapplicable on that basis. Mr. O'Niell also testified that all of the other vehicles owned by Friends, as listed on the declarations page of the policy, were insured by Progressive. Progressive maintains that this evidence leaves no genuine issues of material fact and entitles it to judgment as a matter of law, finding no coverage under its policy with Friends for the Chevy truck involved in the accident at issue.

Plaintiff opposed the motion for summary judgment on several bases. First, she argues that there exists a genuine issue of material fact regarding whether Progressive insured all other autos owned by Friends, as required by Paragraph 9(b)(2), in order for coverage to attach to an automobile acquired during the policy period which is not used in the insured's business. Also, the plaintiff argues that the vehicle, purchased in 1999 or 2000, was purchased "at some point during the policy period." Plaintiff asserts that such policies were renewed annually, "and one such policy was active at the time of the purchase" of the Chevy truck. Accordingly, plaintiff argues that coverage attached to the Chevy truck at the time of purchase and remained that way until the time of the accident. Plaintiff further asserts that at the very least, the policy language creates ambiguity as to coverage, resulting in genuine issues of material fact precluding summary judgment.

CONTRACT INTERPRETATION

An insurance policy is a contract between the parties and governed by the general rules of interpretation of contract set forth in the Louisiana Civil Code and reiterated by our supreme court in **Cadwallader v. Allstate Ins. Co.,** 2002-1637 (La. 6/27/03), 848 So.2d 577, 580:

> The judiciary's role in interpreting insurance contracts is to ascertain the common intent of the parties to the contract. *See* La. Civ. Code art. 2045.
>
> Words and phrases used in an insurance policy are to be

> construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. *See* La. Civ. Code art. 2047. An insurance contract, however, should not be interpreted in an unreasonable or strained manner under the guise of contractual interpretation to enlarge or to restrict its provisions beyond what is reasonably contemplated by unambiguous terms or achieve an absurd conclusion. The rules of construction do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clearness the parties' intent.

(Citations omitted.)

We have reviewed the policy in its entirety. Applying the foregoing legal principles of contractual interpretation, we conclude that the language is clear and unambiguous and that the phrase "during the policy period" means just what it says. The policy itself very clearly provides: "POLICY PERIOD: 07/07/03 to 07/07/04." No other interpretation of this phrase is reasonable based on the evidence presented. Therefore, Progressive has met its burden of proof and summary judgment was warranted.

Plaintiff argues in brief that the language "during the policy period" is ambiguous and should be interpreted as meaning "during *a* policy" including a prior policy which has simply been renewed. Assuming for the sake of argument alone that the policy language might be construed as asserted by the plaintiff, plaintiff has failed to prove any facts to support such application in this case. There is complete absence of proof on the part of the plaintiff that the policy introduced into evidence is one that was "simply renewed annually;" and therefore, all other vehicles owned or acquired by Friends at any time are covered by all successive policies. No other policy between Progressive and Friends was introduced into evidence. Therefore, even accepting for the sake of argument that the policy language is ambiguous, and even applying the interpretation asserted by the plaintiff, the plaintiff has not borne its burden of providing evidence to support such an interpretation.

Accordingly, for all of the foregoing reasons, we find summary judgment in favor of Progressive and dismissing plaintiff's claims against it was properly granted and it is affirmed. Costs of this appeal are assessed to the plaintiff.

AFFIRMED.