

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0760

GRANTHAM EDUCATION CORPORATION
VERSUS

THE HARTFORD FIRE INSURANCE COMPANY,
THE HARTFORD INSURANCE GROUP OF HARTFORD, CONNECTICUT,
MARSH U.S.A., INC. D/B/A MARSH USA RISK SERVICES, AND GEORGE
W. LANE, III

AND

NUMBER 2010 CW 0914

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MARSH U.S.A., INC. D/B/A MARSH USA RISK SERVICES, AND
GEORGE W. LANE, III

Judgment Rendered: October 29, 2010

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 13,879

Honorable Richard A. Swartz, Judge

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* * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

Plaintiff, Grantham Education Corporation (Grantham) appeals a partial summary judgment rendered in favor of defendant, Hartford Fire Insurance Company (Hartford) on the issue of the limit of civil authority coverage as well as the denial of its motion for partial summary judgment on the same issue. Grantham also filed an application for supervisory writs seeking review of the denial of its motion for partial summary judgment. For the reasons that follow, we dismiss the appeal, deny the writ, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The facts forming the basis for this lawsuit are not disputed. Grantham is a university that offers its degree programs exclusively online and operated its offices in Slidell, Louisiana. On August 29, 2005, Hurricane Katrina hit Louisiana and caused widespread damage. On that date, Grantham was insured by Hartford, which issued a Special Multi-Flex Policy to Grantham covering its Slidell offices. The policy contained multiple types of property damage coverage and insured Grantham against business income losses. The policy extended business income coverage to numerous situations, including the loss of business income and reasonable extra expenses when access to the covered premises was specifically prohibited by an order of a civil authority (civil authority coverage).

Grantham submitted a sworn statement of proof of loss seeking to recover, pursuant to the policy's civil authority coverage, lost business income in the amount of \$5,748,725.14. Thereafter, on August 25, 2006, Grantham filed this lawsuit against Hartford, alleging that following Hurricane Katrina, and as a result of the actions and orders of civil authorities, Grantham's access to its premises was prohibited for a period of time in excess of thirty days causing it to suffer loss of business income and to incur expenses and extra expenses. It further alleged that as a result of Hurricane Katrina, it sustained damage and/or losses entitling it to

recover under the civil authority coverage of the policy as well as numerous other coverages contained in the policy, including: "Business Interruption, . . . Business Income, Tenant Improvements, Improvements and Betterments, Buildings and Business Personal Property, Expenses, Extra Expenses, Expediting Expenses, Debris Removal, Utility Services, Emergency Services, Windblown Debris, Brands and Labels, Building Glass Repair, Claim Expenses, Contract Penalties, Employee Personal Effects, Preservation of Property, Transition to Replacement Premises, Accounts Receivable, and all Tenant Lease Coverages (including but not limited to, building glass, lease assessment and leasehold improvements)."

Grantham alleged that although it provided Hartford with sufficient and satisfactory proof of loss for damages it incurred or sustained which are covered under the Hartford policy, including, business and personal property, improvements and betterments, expediting expenses, civil authority, and other losses, and despite amicable demand, Hartford rejected Grantham's claims. Grantham alleged that Hartford's failure to make the required payments within thirty days after receipt of satisfactory proof of loss subjected Grantham to penalties, damages, and attorney fees pursuant to La. R.S. 22:658(B)(1) and La. R.S. 22:1220.

In its petition, Grantham asserted that the policy provided unlimited civil authority coverage for a period of thirty days after the seventy-two-hour waiting period. While Hartford did not dispute the existence of civil authority coverage under the policy, it claimed that such coverage was limited to \$1,000,000.00. Grantham and Hartford filed cross-motions for partial summary judgment on the issue of the applicable limit of civil authority coverage.

In support of its motion, Hartford urged that the majority of Grantham's claim against Hartford is its claim for loss of business income under the policy's civil authority coverage. Hartford attached the policy issued to Grantham and

Grantham's sworn statement of proof of loss. Hartford urged that the policy expressly and unambiguously provides coverage for loss of business income caused by orders of civil authority for a thirty-day period (following a seventy-two-hour waiting period) and expressly limits coverage for such losses to \$1,000,000.00. Hartford asked the court to enforce the plain language of its policy and hold that coverage for Grantham's alleged business income losses under the civil authority provision is subject to the thirty-day period and the \$1,000,000.00 limit.

In its motion for partial summary judgment, Grantham urged that there were conflicting provisions in the policy pertaining to the limitation of civil authority coverage and asked the court to find the policy to be ambiguous. Grantham sought to have the court declare that civil authority coverage under the Hartford policy is unlimited for a period of thirty days.

The trial court denied both motions for partial summary judgment on the basis that there were genuine issues of material fact to be resolved. Hartford and Grantham filed applications for supervisory writs seeking to have this court review the ruling. Another panel of this court granted writs and vacated the ruling, finding that the limit of civil authority coverage provided by Hartford to Grantham presented a legal issue on which there were no genuine issues of material fact. Accordingly, this court remanded the matter to the trial court to determine the limit of insurance the contract provides for civil authority coverage. **Grantham Education Corporation v. The Hartford Fire Insurance Company**, 2009-0133 (La. App. 1st Cir. 5/28/09)(*unpublished writ action*).

Following remand, the trial court granted Hartford's motion for partial summary judgment and denied Grantham's motion for partial summary judgment, finding that the policy plainly and unambiguously limited civil authority coverage to a maximum of \$1,000,000.00. The trial court certified the judgment as

immediately appealable pursuant to La. C.C.P. art. 1915(B). The court specifically found that there was no just reason for delay because the issue resolved in the judgment is purely legal, the judgment may significantly affect the course of the litigation, the expenses incurred by the parties and the trial, and for reasons of judicial efficiency.

Grantham appealed, challenging the court's granting of Hartford's motion for partial summary judgment and the denial of its motion for partial summary judgment. Grantham also filed a writ application with this court challenging the denial of its motion for partial summary judgment. The writ application was referred to this panel to consider in connection with the instant appeal. **Grantham Education Corporation v. The Hartford Fire Insurance Company**, 2010-0914 (La. 1st Cir. 8/2/10)(*unpublished writ action*).

PROPRIETY OF THE APPEAL

Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. **Motorola, Inc. v. Associated Indemnity Corporation**, 2002-0716, p. 4 (La. App. 1st Cir. 4/30/03), 867 So.2d 715, 717. A partial summary judgment rendered pursuant to La. C.C.P. art. 966(E) may be immediately appealed during an ongoing litigation only if it has been properly designated as a final judgment by the trial court. La. C.C.P. art. 1915(B). Although the trial court designated the partial summary judgment determining the applicable limits of civil authority coverage to be a final one under La. C.C.P. art. 1915(B), that designation is not determinative of this court's jurisdiction. **Van ex rel White v. Davis**, 2000-0206, p. 2 (La. App. 1st Cir. 2/16/01), 808 So.2d 478, 480. We must ascertain whether this court has appellate jurisdiction to review the partial judgments appealed from.

At the outset, we find that the trial court clearly erred in certifying the judgment denying Grantham's motion for partial summary judgment as final and

immediately appealable. A judgment denying a motion for summary judgment is interlocutory in nature and cannot be certified immediately appealable under La. C.C.P. art. 1915(B). **Louisiana Workers' Compensation Corporation v. Louisiana Insurance Guaranty Association**, 2008-0885, p. 7 n.3 (La. App. 1st Cir. 5/13/09), 20 So.3d 1047, 1051 n.3, writ denied, 2009-1308 (La. 10/9/09), 18 So.3d 1282.

We next consider the propriety of the certification as it pertains to the judgment granting Hartford's motion for partial summary judgment. Because the trial court gave reasons for certifying the judgment as immediately appealable, we review the certification applying the abuse of discretion standard. **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664, p. 13 (La. 3/2/05), 894 So.2d 1113, 1122.

Historically, our courts have had a policy against multiple appeals and piecemeal litigation. Article 1915(B) attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties. Thus, in considering whether a judgment is properly designated as a final one pursuant to Article 1915(B), a trial court must take into account judicial administrative interests as well as the equities involved. **R.J. Messinger, Inc.**, 2004-1664 at p. 13, 894 So.2d at 1222; **Templet v. State of Louisiana, Department of Public Safety and Corrections**, 2005-1903, p. 6 (La. App. 1st Cir. 11/3/06), 951 So.2d 182, 185. Some factors a trial court should take into account in making the certification determination is the relationship between the adjudicated and unadjudicated claims, the possibility that the need for review might or might not be mooted by future developments in the trial court, the possibility that the reviewing court might be obliged to consider the same issue a second time, and miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. **R.J. Messinger, Inc.**, 2004-1664 at p. 14, 894 So.2d at

1122. However, the overriding inquiry for the trial court is whether there is no just reason for delay. **R.J. Messinger, Inc.**, 2004-1664 at p. 14, 894 So.2d at. 1122-1123.

In light of these considerations and based on the record before us, we find the trial court abused its discretion in designating the partial summary judgment final and immediately appealable. The issue adjudicated by the partial summary judgment is the applicable limit of a particular coverage provided for in a multi-layer insurance policy. The claimant, however, has also asserted claims under numerous provisions of the policy, leaving a host of unadjudicated claims to be resolved in the trial court before Hartford's ultimate liability can be determined. Moreover, in its motion for partial summary judgment and during oral argument before this court, Hartford acknowledged that it has taken the position that Grantham's losses falling under civil authority coverage are actually less than \$1,000,000.00. At trial, Grantham will be required to put on evidence of all of its business income losses for the purpose of civil authority coverage regardless of a ruling on the applicable limits of civil authority coverage by this court. Thus, a determination of the applicable limits of civil authority coverage will not shorten the length of time of the trial, narrow the scope of evidence to be adduced at trial, or decrease the costs of litigation. More importantly, if Grantham is unable to prove losses over \$1,000,000.00, the issue of the applicable limits would become moot, obviating the need for appellate review. There is nothing in the record to suggest that the appeal of the partial summary judgment at this stage of the proceedings best serves the needs of the parties or that other compelling or urgent circumstances exist that would make a delay in appellate review until final determination of Hartford's liability unjust. Under these circumstances, we can conclude that allowing an immediate appeal of a judgment determining the applicable limits of one type of insurance coverage only serves to encourage

multiple appeals and piecemeal litigation that would ultimately delay the resolution of this lawsuit and cause judicial inefficiency. Accordingly, we find that the trial court abused its discretion in certifying the judgment granting Hartford's motion for partial summary judgment as final and immediately appealable for the purpose of Article 1915(B), and we dismiss the appeal.

We next examine Grantham's application for supervisory writs. In the writ application, Grantham sought review of the trial court's denial of its motion for a partial summary judgment in the event this court determined that the judgment could not be certified as a final appealable judgment. In determining whether to exercise supervisory jurisdiction, this court looks to the criteria set forth by the Louisiana Supreme Court in **Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc.**, 396 So.2d 878 (La. 1981). In that case, the Supreme Court held that appellate courts should exercise supervisory jurisdiction when: (1) an appellate reversal will "terminate the litigation," (2) there is no dispute of fact to be resolved, and (3) the trial court decision is arguably incorrect.

A reversal by this court will not terminate the litigation, as the parties will continue to litigate the amount of Grantham's losses and Hartford's corresponding liability. Therefore, the criteria set forth in **Herlitz** are not met. Furthermore, Grantham clearly has an adequate remedy of review on appeal after a final judgment. For these reasons, we decline to exercise our supervisory jurisdiction to review either the denial of Grantham's motion for partial summary judgment or the granting of Hartford's motion for partial summary judgment.

CONCLUSION

Because the trial court improperly designated the partial summary judgments rendered herein as final judgments pursuant to La. C.C.P. art. 1915(B), we dismiss the appeal for lack of appellate jurisdiction. We decline to exercise our supervisory jurisdiction and deny the writ. The case is remanded for proceedings

consistent with this ruling. All costs of this appeal are assessed equally to the parties.

APPEAL DISMISSED; WRIT DENIED; REMANDED.