NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 1358

VGW

JUAN MENDEZ

VERSUS

EVAN VINCENT, C.B., LLC, D/B/A REGGIE'S AND ABC INSURANCE COMPANY

Judgment Rendered: APR 18 2017

Appealed from the
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana
Docket Number 604481

Honorable William A. Morvant, Judge Presiding

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BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.

McClendon, J. I concur in the result reached by the majority.

WHIPPLE, C.J.

Plaintiff, Juan Mendez, appeals a judgment of the trial court granting summary judgment in favor of Century Surety Company ("Century") and dismissing with prejudice plaintiff's claims against Century. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On or about August 22, 2010, plaintiff was involved in an altercation with Evan Vincent at Reggie's, a bar located in Baton Rouge, Louisina. At the time of the altercation, plaintiff was a patron at the bar and Vincent was working as a bouncer employed by Reggie's. The altercation began when Vincent escorted plaintiff out of the bar after plaintiff allegedly threw a drink in Vincent's face. After removing plaintiff from the bar, Vincent picked plaintiff up in the parking lot and forced him to the ground, injuring plaintiff. Police and medical first responders arrived and charges were filed against Vincent; however, Vincent was never prosecuted for the charges.

On August 22, 2011, plaintiff filed the instant civil suit for damages against Vincent; C.B., LLC, d/b/a, Reggie's; and Century Surety Company, which had issued a commercial general liability (CGL) policy to Reggie's.

In response to plaintiff's petition, Century filed an answer and a motion for summary judgment. In its motion for summary judgment, Century contended that the altercation that occurred between plaintiff and Vincent was excluded from coverage under the assault-and-battery endorsement exclusion in the policy that Century had issued to Reggie's. In support, Century filed a certified copy of the CGL policy, the transcript of Vincent's deposition, a copy of the police report pertaining to the August 22, 2010 incident, and a copy of plaintiff's petition for damages and second amended and supplemental petition for damages.

Following a hearing on May 16, 2016, the trial court granted summary judgment in favor of Century, finding that the policy's assault-and-battery exclusion precluded coverage for any damages arising from this incident. On June 13, 2016, a judgment was signed by the trial court, granting summary judgment in favor of Century and dismissing plaintiff's claims against Century with prejudice. Plaintiff now appeals from the trial court's judgment.[1]

On appeal, plaintiff argues that insurance coverage is, or may be, available under Century's policy because the policy definition of "assault and battery" does not include assaults and batteries resulting from "the use of reasonable force to protect persons or property" and therefore, coverage may be available under another policy provision, which provides coverage for expected or intended bodily injuries resulting from "the use of reasonable force to protect persons or property." Accordingly, plaintiff contends that the trial court erred in granting summary judgment and dismissing plaintiff's claims against Century because genuine issues of material fact exist regarding whether Vincent used reasonable force for the purpose of protecting the bar and its patrons.

DISCUSSION

This court reviews summary judgments *de novo*, considering the same criteria applied by the trial court in deciding whether summary judgment is appropriate. Estes v. St. Tammany Parish School Bd., 2012-1750 (La. App. 1st Cir. 6/7/13), 118 So. 3d 1264, 1266, writ denied, 2013-1946 (La. 11/8/2013), 125 So. 3d 457. A motion for summary judgment shall be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with

[1]We note that the trial court designated the judgment as final pursuant to LSA-C.C.P. art. 1915(B)(1). However, the trial court's designation of the judgment as final for appeal was unnecessary, as the judgment dismissed one party, Century, and resolved all issues between plaintiff and Century. Accordingly, the judgment constitutes a final judgment, immediately appealable under LSA-C.C.P. art. 1915(A)(1) and (A)(3).

the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2).[2]

Summary judgment is appropriate for determining issues relating to insurance coverage. Miller v. Superior Shipyard and Fabrication, Inc., 2001-2683 (La. App. 1st Cir. 11/8/02), 836 So. 2d 200, 203. An insurer seeking to avoid coverage through summary judgment must prove that some exclusion applies to preclude coverage. However, when determining whether a policy affords coverage for an incident, the insured bears the burden of proving the incident falls within the policy's terms. Miller, 836 So. 2d at 203.

An insurance policy is an agreement between the parties and should be construed according to general rules of contract interpretation as set forth in the Louisiana Civil Code. Edwards v. Daugherty, 2003-2103, 2003-2104 (La. 10/1/04), 883 So. 2d 932, 940. The judiciary's role in interpreting insurance contracts is to determine the common intent of the parties. See LSA-C.C. art. 2045; Edwards, 883 So. 2d at 940.

An insurance company may limit coverage in any manner, as long as the limitations do not conflict with statutory provisions or public policy. Edwards, 883 So. 2d at 947. The exclusionary provisions of an insurance contract are strictly construed against the insurer, and any ambiguity in the exclusion is construed in favor of the insured. See LSA-C.C. art. 2056; Ledbetter v. Concord General Corporation, 95-0809 (La. 1/6/96), 665 So. 2d 1166, 1169. The rules of construction, however, do not authorize a perversion of the words or the exercise

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[2] Louisiana Code of Civil Procedure article 966 was amended and reenacted by Acts 2015, No. 422, § 1, with an effective date of January 1, 2016. The amended version of article 966 does not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act. The summary judgment at issue in this appeal was filed on December 20, 2015. Therefore, we refer to the former version of the article as applicable in this case. See Acts 2015, No. 422, §§ 2 and 3.

of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clarity the parties' intent. Edwards, 883 So. 2d at 941. Using these principles, we now address the pertinent policy language.

The assault-and-battery exclusion, which is part of an endorsement to the Century CGL policy, provides, in pertinent part, as follows:

> This endorsement modifies insurance provided under the following:
>
> ******
>
> **1.** This insurance does not apply to "bodily injury", "property damage", or "personal and advertising injury" arising out of or resulting from:
>
> **(a)** any actual, threatened or alleged assault or battery;
>
> **(b)** the failure of any insured or anyone else for whom any insured is or could be held legally liable to prevent or suppress any assault or battery;
>
> **(c)** the failure of any insured or anyone else for whom any insured is or could be held legally liable to render or secure medical treatment necessitated by any assault or battery;
>
> **(d)** the rendering of medical treatment by any insured or anyone else for whom any insured is or could be held legally liable that was necessitated by any assault or battery;
>
> **(e)** the negligent:
>
> **(i)** employment;
> **(ii)** investigation;
> **(iii)** supervision
> **(iv)** training;
> **(v)** retention;
>
> of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by **1. (a), (b), (c) or (d)** above.

Plaintiff contends that the above exclusion is ambiguous in that the exclusion does not specify that an assault or battery is excluded from coverage when it results from "the reasonable use of force to protect persons or property." Accordingly, plaintiff contends that there is coverage, or an issue of fact as to

whether coverage exists, under page 2 of 16 of the general liability coverage form in the Century policy, which states:

> **1. Exclusions**
>
> This insurance does not apply to:
>
> **a. Expected or Intend Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion **does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.**
> [Emphasis added].

At the outset, we note that other courts in this state have found this exact assault-and-battery exclusion to be clear and unambiguous. See Espinoza v. Accor North America, Inc., 2014-0001 (La. App. 4th Cir. 9/24/14), 148 So. 3d 244, 249-253, writs denied, 2014-2446, 2014-2453 (La. 2/13/15), 159 So. 3d 466-467; Proshee v. Shree, Inc., 2004-1145 (La. App. 3rd Cir. 2/2/05), 893 So. 2d 939, 941-943. Albeit, in those cases, the party seeking coverage did not make the same argument urged by plaintiff in the instant case.

However, in Mattingly v. Sportsline, Inc., 98-230 (La. App. 5th Cir. 10/28/98), 720 So.2d 1227, writ denied, 98-2938 (La. 1/29/99), 736 So. 2d 830, the plaintiff made an argument in favor of insurance coverage identical to the argument made by plaintiff herein, which the court rejected (and the Louisiana Supreme Court denied writs). Mattingly is factually similar to the instant case, as the plaintiff in Mattingly was also a bar patron who filed suit to recover damages for injuries allegedly sustained when a bouncer at the bar "apprehended" him. The bar's CGL insurer contended that coverage was excluded under the assault-and-battery exclusion endorsement to the policy. The plaintiff contended that the assault-and-battery exclusion was ambiguous. Moreover, similar to the instant matter, the plaintiff also contended that despite the assault-and-battery exclusion, there was coverage for the incident under the "intended harm exclusion" found in

the body of the policy, which is identical to the "expected or intended injury" provision that plaintiff in the instant case relies on. Following a remand for briefing and opinion from the Louisiana Supreme Court, the court in Mattingly found that the plaintiff's claims were excluded under the assault-and-battery exclusion. Moreover, the court found that coverage was not available under the intended harm exclusion found in the body of the policy. In pertinent part, the court stated:

> If an endorsement is attached to the insurance policy and the policy and endorsement are parts of the same contract, the endorsement becomes part of the contract, and the two must be construed together. If there is a conflict between the endorsement and the policy, the endorsement must prevail. Thus, we find no merit to this argument.

Mattingly, 720 So. 2d at 1230, citing Smith v. Western Preferred Cas. Co., 424 So. 2d 375 (La. App. 2nd Cir. 1982), writ denied, 427 So. 2d 1212 (La. 1983).

As in Mattingly, the assault-and-battery exclusion in the instant case is an endorsement to the policy. The endorsement clearly states that it "modifies insurance" provided under the policy. Accordingly, like the court in Mattingly, we find that if there is a conflict, the endorsement must prevail.

In sum, we find no merit to plaintiff's arguments that coverage may exist if a trier of fact finds that Vincent was using reasonable force to protect the bar and its patrons when plaintiff was injured. Applying plaintiff's interpretation of the policy, and specifically the assault-and-battery exclusion, would allow a perversion of the words of the policy so as to create ambiguity where none exists. See Solieman v. Spears, 2009-0941, p. 4 (La. App. 1st Cir. 12/23/09) (unpublished). Thus, we find that the trial court correctly determined, as a matter of law, that the assault-and-battery exclusion in the Century policy precluded coverage herein.

CONCLUSION

For the above and foregoing reasons, the June 13, 2016 judgment of the trial court, granting summary judgment in favor of Century Surety Company and dismissing with prejudice plaintiff's claims against Century Surety Company, is hereby affirmed. Costs of this appeal are assessed against plaintiff, Juan Mendez.

AFFIRMED.