STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0063

JAMIE MYERS AND ERICKA MYERS, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR DECEASED CHILD, TYLER MYERS, AND PEYTON MYERS (THEIR MINOR SON)

VERSUS

BRAD M. WELCH, VALENTINE & LEBLANC, LLC; SECURITY NATIONAL INSURANCE COMPANY AND SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY

TMH

aMP

Judgment Rendered: OCT 25 2017

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. C619732, Sec. 24

The Honorable R. Michael Caldwell, Judge Presiding

* * * * * * *

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

AH Holdridge J., concurs.

PENZATO, J.

Plaintiffs, Jamie and Ericka Myers, individually and on behalf of their son Peyton Myers, and the estate of their minor deceased child, Tyler Myers ("The Myers Family"), appeal a summary judgment in favor of the defendant, AIG Specialty Insurance Company ("ASIC"), dismissing all claims and causes of action against ASIC with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 24, 2012, as Brad Welch was turning into the driveway of his house, he struck six-year-old Tyler Myers, resulting in Tyler's death. Tyler's parents, Jamie and Ericka Myers, filed a petition for damages, individually, and on behalf of their twelve-year-old son Peyton and their deceased child Tyler, seeking wrongful death, survival, and bystander damages, as well as punitive damages. Named as defendants were Brad Welch ("Welch") and his employer, Valentine & Leblanc, LLC ("Valentine & Leblanc"). Security National Insurance Company ("Security National") was also named as a defendant because the vehicle driven by Welch was expressly identified and listed as a "covered auto" under a policy issued by Security National to Valentine & Leblanc.[1]

Valentine & Leblanc and Security National filed a motion for summary judgment asserting that Valentine & Leblanc had no liability because at the time of the accident, Welch was not acting in the course and scope of his employment, and that the Security National policy did not cover Welch because at the time of the accident, Welch was not an insured person under the policy. While the motion for summary judgment was pending, the parties participated in a successful mediation.

[1] The petition alleged that Welch and Valentine & Leblanc were underinsured, and also named Southern Farm Bureau Casualty Insurance Company as a defendant pursuant to a policy of uninsured/underinsured motorist coverage issued to Jamie and Ericka Myers. The record does not reflect that Southern Farm Bureau was served with the petition, and it is not involved in this appeal.

The Myers Family then added Chartis Specialty Insurance Company, which later became known as AIG Specialty Insurance Company ("ASIC"), as a defendant pursuant to a commercial umbrella liability policy issued to Valentine & Leblanc. The Myers Family's claims against Welch, Valentine & Leblanc and Security National were dismissed with prejudice, with Welch and Valentine & Leblanc remaining as nominal defendants only for purposes of pursuing the reserved and assigned rights of The Myers Family against ASIC.

Motions for Summary Judgment – Action of the Trial Court

On November 19, 2014, ASIC filed a motion for summary judgment alleging that the ASIC policy of insurance issued to Valentine & Leblanc did not provide coverage. ASIC argued that Welch was not acting in the scope of his employment at the time of the accident, and that he was not included as an additional insured under the Security National policy, and therefore was not provided coverage by the ASIC umbrella policy. The trial court granted the motion for summary judgment in favor of ASIC, finding that while Welch may have qualified as an omnibus insured under the Security National policy, that did not mean that he was an "additional insured" under the ASIC policy. A judgment granting the motion for summary judgment and dismissing with prejudice all of The Myers Family's claims against ASIC was signed December 7, 2015.

The Myers Family filed a motion for new trial on the summary judgment, asserting that Welch was an "additional insured" under the Security National policy by operation of the omnibus clause, and therefore was an insured under the ASIC policy. The motion for new trial came for hearing on Feb 29, 2016. At that time, the trial court indicated that it had some "misgivings" following its previous ruling, and concluded that if Welch did qualify as an omnibus insured under the Security National policy, "he would be in the general understanding of the term an 'additional insured'." The trial court granted the motion for new trial and denied

the motion for summary judgment previously rendered in favor of ASIC. A judgment reflecting same was signed on March 17, 2016.

Thereafter, The Myers Family filed a motion for summary judgment on coverage, asserting that Welch was an additional insured under the Security National policy, and as such qualified as an insured under the ASIC policy. Central to The Myers Family's argument was that Welch was driving a vehicle identified in the policy as being owned by Valentine & Leblanc.

ASIC also filed a motion for summary judgment as to coverage, asserting that Welch did not qualify as an insured under the Security National policy for his personal use of a vehicle that he owned, and was thus not afforded coverage by the ASIC policy. In support of its motion, ASIC introduced several exhibits, including Welch's admissions that at the time of the accident he was not within the scope of his employment with Valentine & Leblanc and that he was driving a vehicle that he personally owned; and the affidavit of John Valentine, the president and owner of Valentine & Leblanc, stating that at the time of the accident Valentine & Leblanc did not own or pay for the vehicle that Welch was driving. Valentine further attested that the vehicle was listed as a covered vehicle on Valentine & Leblanc's automobile insurance policy because the vehicle was used in part for work.

The Myers Family objected to the introduction into evidence of the exhibits, arguing that the inclusion of Welch's vehicle on the Security National policy's "Schedule of Covered Autos You Own" precluded further inquiry into ownership of the vehicle. The Myers Family argued that the terms of the Security National policy unequivocally established that, for purposes of the policy, Valentine & LeBlanc owned the vehicle involved in the accident and that the Louisiana Civil Code prohibited the use of extrinsic evidence to reform the policy's declaration of ownership.

The motions for summary judgment were heard in open court on August 1, 2016. The trial court allowed into evidence the Welch admissions and the Valentine affidavit, and considering such evidence, found that at the time of the accident, Welch was driving a vehicle that he and his wife owned, and under that factual situation the exception in the Security National policy for an employee driving his own auto applied. Additionally, the trial court held that since Welch was not an insured pursuant to the exception in the Security National policy, he was not an additional insured under the ASIC policy. In a judgment signed September 8, 2016, the trial court denied The Myers Family's motion for partial summary judgment, granted ASIC's motion for summary judgment, and dismissed all claims and causes of action against ASIC. The Myers Family appealed.

ASSIGNMENT OF ERRORS

The Myers Family asserts the following assignments of error:

1. The trial court erred by denying The Myers Family's motion for summary judgment;
2. The trial court erred by admitting extrinsic evidence concerning ownership of the accident vehicle;
3. The trial court erred by overruling The Myers Family's objections; and
4. The trial court erred by granting ASIC's motion for summary judgment.

LAW AND DISCUSSION

On appeal, summary judgments are reviewed *de novo,* using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Rider v. Ambeau*, 2011-0532 (La. App. 1 Cir. 2/1/12), 100 So. 3d 849, 854. A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to

material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. Pro. art. 966 A(3).

A summary judgment may be rendered on the issue of insurance coverage alone, although there is a genuine issue as to liability or damages. *See* La. Code Civ. Pro. art. 966 E; *Rider*, 100 So. 3d at 854. Summary judgment declaring a lack of coverage under an insurance 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. 1994), 634 So. 2d 1180, 1183.

Relevant Provisions Under Umbrella and Automobile Policies

The ASIC Umbrella Policy

ASIC issued a commercial umbrella liability policy to Valentine & Leblanc, in effect at the time of the accident, that provided the following coverage:

> We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, Property Damage or Personal Injury and Advertising Injury to which this insurance applies or because of Bodily Injury or Property Damage to which this insurance applies assumed by the Insured under an Insured Contract.

The policy defines "Insured", in pertinent part, as:

> 1. the Named Insured;
>
> [...]
>
> 3. your employees other than your executive officers..., but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business;
>
> [...]

7. Any person or organization, other than the Named Insured, included as an additional insured in the policies listed in Scheduled Underlying Insurance however:

a. coverage will not be broader than is available to such person or organization under such Scheduled Underlying Insurance....[2]

The Security National auto liability policy was included on the ASIC policy's "Schedule of Underlying Insurance".

The Security National Policy

The Security National policy of commercial automobile insurance issued to Valentine & Leblanc, which was in effect at the time of the accident, provided the following coverage:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

The policy further provided, in pertinent part:

> 1. Who Is An Insured
>
> The following are "insureds":
>
> a. You for any covered "auto".
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> (1) The owner or anyone else from whom you hire or borrow a covered "auto".
>
> [...]
>
> (2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.

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[2] We note that in its motion for summary judgment and in its brief to this court, ASIC used the following version of paragraph 7, which was deleted in its entirety and replaced with the above quoted language pursuant to Endorsement No. 8 of the policy, effective August 31, 2012:

> 7. any person or organization, other than the Named Insured, included as an additional insured under Scheduled Underlying Insurance, but not for broader coverage than would be afforded by such Scheduled Underlying Insurance.
> Notwithstanding any of the above:
> [...]
> b. no person or organization is an Insured under this policy who is not an Insured under applicable Scheduled Underlying Insurance.

We use the language in effect at the time of the accident, and note that the change to this paragraph is stylistic only and does not change the substance of the definition of "Insured."

The policy also contained an endorsement entitled "Employees as Insureds" that added the following to the "Who is an Insured" provision:

> Any "employee" of yours is an "insured" while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs.

Finally, the policy contained a "Schedule of Covered Autos You Own", which listed 35 specific "units" including, as Unit #19, the 2006 Dodge Pickup that Welch was driving at the time of the accident.

Use of Extrinsic Evidence

We first consider The Myers Family's second and third assignments of errors regarding the admission of evidence concerning ownership of the vehicle.[3] In the instant case we are called upon to determine whether the inclusion of the vehicle in question on the "Schedule of Covered Autos You Own" precludes any further inquiry into the ownership of the vehicle for any other purpose under the policy, more specifically to determine the status of Welch as an "insured" at the time of the accident. The trial court found that the law did not prohibit the introduction of extrinsic evidence concerning ownership of the vehicle, as the evidence went to the facts to prove coverage. As noted above, The Myers Family argues that the inclusion of the vehicle driven by Welch at the time of the accident on the Security National policy's "Schedule of Covered Autos You Own" unequivocally establishes that, for purposes of the policy, Valentine & LeBlanc owned the vehicle involved in the accident and that the Louisiana Civil Code prohibits the use of extrinsic evidence to reform the policy's declaration of ownership.

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[3] In addition to The Welch Admissions and the Valentine affidavit, The Myers Family objected to the admission of memoranda filed by the parties in connection with other motions. We have not considered these exhibits in our review, and therefore do not address their admission. With regard to the Valentine affidavit, The Myers Family objected to the last two sentences of paragraph five as speculation and the third sentence of paragraph eleven as hearsay. Likewise, as we do not consider those portions of the affidavit, we do not address their admission.

An insurance policy is a contract between the parties and should be construed employing the general rules of interpretation of contracts set forth in the Louisiana Civil Code. *Reynolds*, 634 So.2d at 1183. Words and phrases used in a policy are to be construed using their generally prevailing meaning, unless the words have acquired a technical meaning. *See* La. Civ. Code art. 2047. An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. Where the language in the policy is clear, unambiguous, and expressive of the intent of the parties, the agreement must be enforced as written. *Reynolds*, 634 So.2d at 1183.

The purpose of liability insurance is to afford the insured protection from damage claims; therefore, policies should be construed to effect, not to deny, coverage. Thus, a provision which seeks to narrow the insurer's obligation is strictly construed against the insurer, and, if the language of the exclusion is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied. *Id.* It is equally well settled, however, that subject to the above rules of interpretation, insurance companies have the right to limit coverage in any manner they desire, so long as the limitations do not conflict with statutory provisions or public policy. *Id.*

Parol evidence cannot be introduced when the provisions of an insurance contract are clear and explicit, and lead to no absurd consequences; courts must enforce the contract as written. *See* La. Civ. Code art. 2046. Furthermore, courts are prohibited from taking parol evidence to explain or contradict the insurance contract's clear meaning. The meaning and intent of the parties must be sought within the four corners of the insurance contract. La. Civ. Code art. 1848[4];

[4] Louisiana Civil Code article 1848 provides: "Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature."

Peterson v. Schimek, 98-1712 (La. 3/2/99), 729 So. 2d 1024, 1028.

Our initial inquiry is whether the language of the policy is ambiguous. We find no ambiguity within the four corners of the document. There is, however, no dispute that absent its inclusion on the schedule of owned autos, Valentine & LeBlanc had no ownership, credit, or leasehold interest in Welch's vehicle. Further, there is no evidence Valentine & LeBlanc purchased the vehicle for Welch's use. Therefore, while "owned" is not defined by the policy, this fact in and of itself does not create an ambiguity. However, our analysis does not end with this determination. The evidence herein is not offered to vary the terms of the contract, i.e. to remove or delete the vehicle in question as a covered auto, but is offered and is appropriate for consideration where a party raises a factual issue as to the applicability of a contract provision. *See Rolston v. United Servs. Auto. Ass'n*, 2006-0978 (La. App. 4 Cir. 12/13/06), 948 So. 2d 1113, 1119.

Although parol evidence may not be introduced to vary the actual terms or provisions of a policy, evidence may be introduced to determine whether a policy is in force. *Isaac v. Patterson Ins. Co.*, 97-608 (La. App. 3 Cir. 10/8/97), 702 So. 2d 918, 922, *writ denied,* 97-2806 (La. 1/30/98), 709 So. 2d 709. In *Sieferman v. State Farm Mut. Auto. Ins. Co.*, 2000-71 (La. App. 3 Cir. 5/3/00), 760 So. 2d 549, according to the State Farm policy's declaration's page, the policy provided benefits for the accidental death of the plaintiff's former husband, Mr. Parris Decuir. State Farm opposed summary judgment with affidavits indicating that the plaintiff had cancelled the coverage prior to the accident. The court concluded that the consideration of the affidavits would not be inapposite to the reasoning of *Peterson,* 729 So. 2d 1024, since they were not offered to assist in the interpretation of certain terms and conditions of the insurance policy but related to whether or not the death provision of the policy was in force as to Mr. Decuir at the time of his death. The court concluded that the trial court erred in failing to

consider the affidavits in its ruling on the motion for summary judgment. *Sieferman,* 760 So. 2d at 553.

Similarly, in this case, we find that Welch's admissions and the relevant portions of John Valentine's affidavit were not offered to alter the terms and conditions of the insurance contract, but were offered to present evidence as to the applicability of a contract provision determining whether coverage for Welch was in effect at the time of the accident. Thus, the evidence was properly admitted and considered by the trial court.

Coverage under the Policies

Finding that it is appropriate to consider the Welch admissions and the Valentine affidavit regarding ownership of the vehicle, we now address The Myers Family's assignments of error one and four and look to coverage under the relevant policies.

We first examine the ASIC policy, which, as noted above, defines "Insured", in pertinent part, as:

> 1. the Named Insured;
>
> [...]
>
> 3. your employees ..., but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business;
>
> [...]
>
> 7. Any person or organization, other than the Named Insured, included as an additional insured in the policies listed in Scheduled Underlying Insurance however:
>
> a. coverage will not be broader than is available to such person or organization under such Scheduled Underlying Insurance.....

There is no dispute that Welch was not a named insured, and while an employee of Valentine & Leblanc, was not acting within the scope of his employment or performing duties related to the business of Valentine & Leblanc at the time of the accident. Therefore, coverage is available under the ASIC policy **only** if Welch was included as an additional insured under the underlying Security

National policy.

We next examine the section entitled "Who Is An Insured" under the Security National policy, including the endorsement thereto:

> The following are "insureds":
>
> a. You for any covered "auto".
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> (1) The owner or anyone else from whom you hire or borrow a covered "auto".
>
> (2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.
>
> Any "employee" of yours is an "insured" while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs.

Again, there is no dispute that Welch was not a named insured, and was not engaged in Valentine & Leblanc's business, nor was there an assertion that Welch was engaged in Valentine & Leblanc's personal affairs. Therefore, in order for Welch to have been insured under the Security National policy, he must qualify as a "permissive user" under subsection (b). The Myers Family focuses on the language contained in subsection (b), and asserts that Welch was using with Valentine & Leblanc's permission an auto owned by Valentine & Leblanc by virtue of its inclusion on the policy's "Schedule of Covered Autos You Own", thereby making Welch an insured under the Security National policy.

However, the provision relied upon by The Myers Family contains an exclusion, as reflected in subsection (b)(2), namely that a permissive user is an insured **unless that person is an "employee" and the covered "auto" is owned by that employee** or a member of his or her household. As discussed earlier, The Myers Family argues that the exclusion is inapplicable, because the vehicle's inclusion on the policy's "Schedule of Covered Autos You Own" unequivocally

established that for purposes of the policy Valentine & Leblanc, not Welch, owned the vehicle.

We find that coverage under the underlying Security National policy is not extended to Welch because he falls within the "owner exception" contained in the definition of insured. The owner exception set forth in subsection 1(b)(2) of the Security National policy taken in its plain, ordinary sense is easily understood to mean that no coverage exists for an employee using a covered auto if that employee is also the owner of the auto. Welch admitted in responses to discovery that at the time of the accident he was driving a vehicle that he personally owned. In addition, John Valentine testified by affidavit that at the time of the accident Valentine & Leblanc did not own or pay for the vehicle that Welch was driving.

The Myers Family's contention that Valentine & Leblanc owned the vehicle for purposes of coverage based solely on its inclusion on the policy's "Schedule of Covered Autos You Own" leads to a strained interpretation of the policy and achieves an absurd conclusion. The absurd conclusion in this case is that the insurer could be liable for damages caused by a Valentine & Leblanc employee driving his personal vehicle outside the course and scope of his employment, a situation in which Valentine & Leblanc would not be liable. Further, as the trial court noted, the vehicle could have been sold but the policy not changed, and under The Myers Family's interpretation there would still be coverage. Moreover, since Valentine & Leblanc did not actually own the vehicle, it had no capacity to give Welch permission to use the vehicle that Welch himself owned.

The Myers Family additionally contends that the owner exception set forth in subsection 1(b)(2) of the policy is unenforceable because it is not one of the legislature's enumerated exceptions to La. R.S. 32:900, citing *Sensebe v. Canal Indem. Co.*, 2010-0703 (La. 1/28/11), 58 So. 3d 441, 451. However, the ASIC policy is an umbrella policy, a voluntary "automobile liability policy," and, as such,

omnibus insured coverage is not required under the mandate of La. R.S. 32:900. *Allen v. Allstate Ins. Co.*, 2008-1451 (La. App. 3 Cir. 5/6/09), 10 So. 3d 374, 380, *writ denied,* 2009-1264 (La. 9/18/09), 17 So. 3d 977. To the contrary, the insurer in an umbrella policy is not providing compulsory coverage and has the right to express the limits of its liability. *Id.* (citing *Walker v. State Farm Mut. Auto. Ins.,* 37,063, p. 11 (La. App. 2 Cir. 6/25/03), 850 So.2d 882, 889, *writs denied,* 2003-2019, 2003-2117 (La. 12/19/03), 861 So.2d 574, 575). Moreover, such a provision has been upheld by the Louisiana Supreme Court. *See, e.g., Carrier v. Reliance Ins. Co.*, 1999-2573 (La. 4/11/00), 759 So. 2d 37, 45.

Thus we find no error in the trial court's finding that as there was no coverage for Welch under the underlying Security National policy issued to Valentine & Leblanc, there was no coverage under the ASIC policy.

CONCLUSION

For the above reasons, we affirm the September 8, 2016 judgment of the trial court denying The Myers Family's motion for partial summary judgment, granting ASIC's motion for summary judgment, and dismissing all claims and causes of action against ASIC. All costs of this appeal are assessed to the plaintiffs/appellants.

AFFIRMED.