NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 2426

PAULETTE D. VARNADO

VERSUS

PROGRESSIVE SECURITY INSURANCE COMPANY; NELSON J. LEWIS; GEMINI INSURANCE COMPANY; CHARIOTS OF FIRE; RONALD J. O'CONNER; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; KRISTY L. TONEY; BITUMINOUS CASUALTY CORPORATION; BAYOU AGGREGATE MATERIALS, INC. AND HENRY TAYLOR

C/W

NUMBER 2008 CA 2427

KRISTY TONEY

VERSUS

PROGRESSIVE SECURITY INSURANCE COMPANY; NELSON J. LEWIS; PAULETTE VARNADO; REPUBLIC FIRE AND CASUALTY INSURANCE COMPANY; GEMINI INSURANCE COMPANY; CHARIOTS OF FIRE; RONALD J. O'CONNER; BITUMINOUS CASUALTY CORPORATION; BAYOU AGGREGATE MATERIALS, INC. AND HENRY TAYLOR

Judgment Rendered: June 12, 2009

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 528,391 c/w 536,599
The Honorable Kay Bates, Judge Presiding

* * * * * * * * *

Downing, J. concurs

James T. Guglielmo **Opelousas, LA**	**Counsel for Cross Claim Defendants/Appellants, Bayou Aggregate Materials, Inc., Bituminous Casualty Corporation, and Henry Taylor**
John C. Jacobs **William C. Helm** **Baton Rouge, LA**	**Counsel for Cross Claim Defendant/Appellee, Gemini Insurance Company**

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

This matter is before us on appeal by Bayou Aggregate Materials, Inc., Henry Taylor, and Bituminous Casualty Corporation, defendants and cross-claimants in this matter, from a judgment of the trial court granting summary judgment and dismissing their claims against Gemini Insurance Company. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

This case arises from a series of automobile accidents that occurred on or about October 28, 2004, at approximately 7:30 a.m., on Louisiana Hwy. 327, commonly referred to as River Road, in East Baton Rouge Parish. On this foggy morning, Ronald O'Connor, an employee of Chariots of Fire, was operating a dump truck in connection with dirt work Bayou Aggregate Materials, Inc. ("Bayou Aggragate"), a dirt, sand, and gravel corporation, had contracted with Chariots of Fire to perform. Henry Taylor, an employee of Bayou Aggregate, was the flagman on the scene that morning.

The first accident occurred when Kristy Lynn Toney, who was traveling north on River Road, saw O'Connor's dump truck positioned across her lane of travel to unload a load of dirt, applied her brakes, and skidded into O'Connor's dump truck. Paulette Duhon Varnado, who was also traveling north on River Road, came upon the scene of Toney's accident in her vehicle. Varnado was able to come to a complete stop on the roadway without colliding into Toney's vehicle. Two to three minutes after Varnado stopped, however, Varnado's vehicle was rear-ended by a pick-up truck driven by Nelson Lewis, which jolted Varnado's vehicle, causing it to strike Toney and O'Connor, who had exited their respective vehicles after the first accident.

As a result of these accidents, lawsuits were filed by Varnado, Toney, and O'Connor.[1] All claims arising from these suits were settled except for a cross-claim filed on April 9, 2007, by defendants, Bayou Aggregate and Henry Taylor, against Gemini Insurance Company, the liability carrier for Chariots of Fire. In their cross-claim, Bayou Aggregate and Taylor, the flagman, specifically denied liability for any acts of O'Connor under a theory of *respondeat superior* and/or the "borrowed servant" doctrine. Alternatively, they assert that to the extent they may be held liable to Toney, they were covered as "omnibus insureds" under the Gemini policy issued to Chariots of Fire, which was in effect at the time of the accident and provided coverage for O'Connor's negligent acts. Specifically, Bayou Aggregate and Taylor contended that to the extent they would be responsible for the actions of O'Connor, they qualify as additional insureds under the Gemini policy. Bayou Aggregate and Taylor further contended that Gemini would ultimately owe them indemnity for any judgment and settlement together with the costs of defense of the principal action by Toney, including the costs of seeking said defense, including attorneys fees and court costs. On June 15, 2007, Bayou Aggregate and Taylor filed a supplemental and amended cross-claim adding Bituminous Casualty Corporation ("Bituminous"), Bayou Aggregate's insurer, as a cross-claimant subrogated to the rights of Bayou Aggregate herein.

On January 3, 2008, Gemini filed a motion for summary judgment, contending that Bayou Aggregate, Taylor, and Bituminous (hereinafter "cross-claimants") were not additional insureds under its policy and, thus, were not entitled to reimbursement of monies paid in settlement or incurred in defense of the claims filed against them. At the conclusion of a hearing on March 24, 2008, the trial court granted Gemini's motion for summary judgment, finding that the

[1]The suits filed by Varnado and Toney were consolidated in the district court. (R. 33-34)

cross-claimants were not additional insureds under the terms of the Gemini policy, and dismissed their cross-claim. (R. 241, 186-190) A written judgment was signed by the trial court on May 21, 2008, dismissing the cross-claim with prejudice and dismissing the case in its entirety since all other claims had been resolved. (R. 177)

The cross-claimants then filed the instant appeal, contending the trial court erred: (1) in finding that cross-claimants are not additional insureds under the Gemini policy; (2) in finding that Gemini does not owe Bayou Aggregate and Taylor indemnity for any judgment or settlement or costs of defense of the principal actions in this matter, including the costs of seeking a defense, attorney fees and court costs; (3) in construing alleged ambiguities in the policy against coverage; and (4) in granting the motion for summary judgment where disputed material issues of fact remain for trial.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. It 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 of material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial, the movant's burden does not require him to negate all essential elements of the adverse party's claim. Rather, the movant need only show that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2); Asberry v. The American Citadel

Guard, Inc., 2004-0929 (La. App. 1st Cir. 5/6/05), 915 So. 2d 892, 894. If, however, the movant fails in his burden to show an absence of factual support for one or more of the elements of the adverse party's claim, the burden never shifts to the adverse party, and the movant is not entitled to summary judgment. Asberry v. The American Citadel Guard, Inc., 915 So. 2d at 894.

However, when a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B).

Appellate courts review summary judgment *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Granda v. State Farm Mutual Insurance Company, 2004-2012 (La. App. 1st Cir. 2/10/06), 935 So. 2d 698, 701. Material facts are those that potentially insure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Gomon v. Melancon, 2006-2444 (La. App. 1st Cir. 3/28/07), 960 So. 2d 982, 984, writ denied, 2007-1567 (La. 9/14/07), 963 So. 2d 1005.

The underlying dispute herein involves a determination of whether the cross-claimants are "insureds" under the Gemini policy. Interpretation of an insurance policy usually involves a legal question that can be properly resolved in the framework of a motion for summary judgment. Ridenour ex rel. Ridenour v. Reed, 2005-1849 (La. App. 1st Cir. 9/20/06), 944 So. 2d 584, 586. An insurance policy is a contract between the parties and is construed using the general rules of

interpretation of contracts set forth in the Louisiana Civil Code. LeBlanc v. Aysenne, 2005-0297 (La. 1/19/06), 921 So. 2d 85, 89.

The Civil Code provides that interpretation of a contract is the determination of the common intent of the parties and when the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. LSA-C.C. art. 2045 and 2046. Thus, in interpreting the subject insurance policy, the words of the policy are given their generally prevailing meaning, and words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. See LSA-C.C. art. 2047 and 2048. Each provision of the policy must be interpreted in light of the other provisions so that each provision is given the meaning suggested by the contract as a whole, and must be interpreted to cover only those things it appears the parties intended to include. See LSA-C.C. arts. 2050 and 2051.

The first step in interpreting any insurance contract is to examine the policy language. If the language is clear and explicit, no further interpretation may be made in search of the parties' intent. Andrews v. Columbia Casualty Insurance Company, 2006-0896 (La. App. 1st Cir. 3/23/07), 960 So. 2d 134, 139. The pertinent policy language upon which cross-claimants rely as affording them liability coverage for the acts of O'Connor, provides as follows: (R. 153-154)

> II. Liability Coverage
>
> 1. WHO IS AN INSURED
>
> The following are "insureds"[:]
>
> * * *
>
> (c) Anyone liable for the conduct of an "insured"[2] described above but only to the extent of that liability.

[2]The parties do not dispute that O'Connor is an "insured" under the policy.

We first observe that we find no ambiguities in the above policy language. Giving the words in the policy their generally prevailing meaning, the policy clearly provides that an insured includes "[a]nyone liable for the conduct of an 'insured.'" These words are clear and explicit; thus, no further interpretation in search of the parties' intent is necessary. Accordingly, we find no merit to the cross-claimants' argument that the policy language is ambiguous.

Our query now turns to whether Gemini has shown that no genuine issue of material fact exists, i.e., that the cross-claimants are not "insureds" under the policy, such that Gemini is entitled to judgment in its favor as a matter of law. Stated differently, the issue before us is whether the cross-claimants countered Gemini's showing that the cross-claimants are not insureds by producing factual support sufficient to establish the cross-claimants will be able to satisfy their evidentiary burden of proof at trial.

In support of its motion for summary judgment, Gemini presented the cross-claim, Gemini's answer to the cross-claim, and a certified copy of the Gemini policy. Gemini contended that application of this policy provision requires a finding of negligence on behalf of O'Connor, and an additional finding that the cross-claimants are vicariously negligent for O'Connor's purported negligent acts. Gemini further contended that this issue was mooted by Gemini's unqualified admission in its answer that the "Cross-Claimants are not liable for any acts of Ronald O'Conner [sic] under a theory of Respondeat Superior and/or the 'borrowed servant' doctrine [... and] due to the settlement of the referenced lawsuits, Cross-Claimants cannot be held liable to Kristy Toney under the theory of Repondeat Superior and/or the 'borrowed servant' doctrine." Gemini maintained that based on its admission that the cross-claimants are not liable for any of O'Connor's acts, no disputed facts remain as to whether the cross-

claimants can be vicariously liable for O'Connor's actions and thus, be considered insureds under its policy.

In response to this showing, the cross-claimants filed a memorandum in opposition to Gemini's motion for summary judgment, wherein they point to (1) allegations in Toney's petition for damages as to the nature of O'Connor's employment, which they contend are "disputed issues of fact" and (2) contentions in the pre-trial order that Bayou Aggregate is responsible for the actions of O'Connor, which they contend presents an issue for trial. The cross-claimants also filed a document entitled, "Statement of Material Facts Creating a Genuine Issue for Trial."

In a reply memorandum, as further support for its motion for summary judgment, Gemini additionally presented Toney and Varnado's petitions for damages, as well as deposition excerpts from the deposition testimony of Thomas Eric Johnson (owner of Bayou Aggregates), Toney, Varnado, and Lewis. Gemini further maintained therein that the petitions filed by Varnado and Toney did not allege that the cross-claimants were vicariously liable for the alleged negligence of O'Connor. Instead the petitions contained only independent allegations of negligence against Bayou Aggregate and Taylor, which Gemini contended were supported by the deposition testimony.

Nonetheless, the cross-claimants argue on appeal that pursuant to the above policy language, they should be considered insureds under the policy to the extent that they are or could have been found liable for O'Connor's conduct. Despite Gemini's admission in its answer to the cross-claim that the cross-claimants are not liable for any acts of O'Connor, the cross-claimants contend that material issues of fact remain as to this determination and point to Toney's allegation in her petition for damages that Bayou Aggregate had a duty to instruct O'Connor and was responsible in general for the actions of O'Connor. The cross-claimants

further point to Gemini and O'Connor's contentions in the pre-trial order of May 11, 2007, wherein they contended that:

> At all material times herein, Ronald O'Connor was acting under the supervision, direction and control of Bayou Aggregate Materials, Inc. Bayou Aggregate told Mr. O'Conner [sic] where to be on the morning of the accident, Bayou Aggregate loaded Mr. O'Conner's [sic] truck with dirt and told Mr. O'Conner [sic] where and how to dump the dirt. Bayou Aggregate Materials, Inc. exercised total control over everything that Ronald O'Conner [sic] and the other dump-truck drivers did prior to the accident.
>
> Gemini Insurance Company and Ronald O'Conner [sic] deny that Ronald O'Conner [sic] was negligent on the date of the accident and also deny that he caused or contributed to the accident. However, if it is determined that Ronald O'Conner [sic] caused or contributed to the accident, then these defendants contend that Bayou Aggregate Materials, Inc. is vicariously liable for his negligence.

The cross-claimants further cite "Contested Issues of Fact" Number 11 in the May 11, 2007 pre-trial order, "Whether Bayou Aggregate Materials, Inc. is vicariously liable for the negligence of Ronald O'Connor, if any," as support for their contention that material issues of fact remain as to whether they are vicariously liable for O'Connor's negligent acts.

In granting Gemini's motion for summary judgment, the trial court found that the policy language at issue "requires a finding of negligence on the part of Ronald O'Connor, and an additional finding that the cross-claim plaintiffs are vicariously liable for Mr. O'Connor's negligence." The trial court determined that Gemini sufficiently negated the necessary elements of the cross-claim when Gemini admitted that the cross-claimants were not answerable for any negligence by O'Connor, and that when the burden accordingly shifted to the cross-claimants, they failed to produce factual support sufficient to show that they could satisfy their evidentiary burden of proof at trial. Specifically, the trial court further determined that in order for the cross-claimants to be entitled to indemnification from Gemini, the cross-claimants had to show they were (or were

found to be) vicariously liable for the actions of O'Connor. The trial court found that the cross-claimants' contentions that they still had potential liability, despite Gemini's admissions in response that they were not liable for any acts of O'Connor, were not sufficient evidence to support a finding that genuine issues of material fact remain in this case. We agree.

In response to Gemini's showing that the cross-claimants were not liable for the actions of O'Connor, the cross-claimants failed to come forward with any evidence (by affidavits, discovery responses, or otherwise), showing how they would meet their burden of proving at trial that they were vicariously liable for the actions of O'Connor. Instead, the cross-claimants rested on mere allegations set forth in the pleadings and failed to produce any factual support to establish their vicarious liability. Moreover, with reference to the cross-claimants' contentions that they "have potential liability in this matter," such speculation falls far short of the factual support required to establish that the cross-claimants will be able to satisfy their evidentiary burden of proof at trial. See Babin v. Winn-Dixie Louisiana, Inc., 2000-0078 (La. 6/30/00), 764 So. 2d 37, 40.

Because the cross-claimants failed to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial, i.e., that they were (or had been found to be) "liable for the conduct of" O'Connor, so as to be considered insureds under the policy, and therefore entitled to indemnification, or that they were otherwise entitled to indemnification under the theory of *respondeat superior* or the "borrowed employee" doctrine, no genuine issue of material fact remained and the trial court correctly granted summary judgment. Accordingly, we find no merit to the cross-claimants' remaining assignments of error.

CONCLUSION

Based on the above and foregoing reasons, the May 21, 2008 judgment of the trial court is affirmed. Costs of this appeal are assessed against the cross-claimants/appellants, Bayou Aggregate Materials, Inc., Henry Taylor, and Bituminous Casualty Corporation.

AFFIRMED.