Application For Writs

No. 15-C-676

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

OCTOBER 30, 2015

Mary E. Legnon

Deputy Clerk

JOHN MAESTRI, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, AIDEN SEBASTIAN MAESTRI AND ADDILYN SOPHIA MAESTRI
VERSUS
ENTERGY CORPORATION, ENTERGY LOUISIANA, LLC, RSC SERVICE CORPORATION, LIBERTY MUTUAL INSURANCE, GENIE INDUSTRIES, INC., A-1 GLASS SERVICES, INC., AND WALTON CONSTRUCTION, A CORE COMPANY, LLC

IN RE FIRST FINANCIAL INSURANCE COMPANY

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE DANYELLE M. TAYLOR, DIVISION "O", NUMBER 723-160

Attorneys for Relator:

Kristopher T. Wilson
Heather N. Sharp
Attorneys at Law
601 Poydras Street, Suite 2775
New Orleans, LA 70130
(504) 568-1990

Attorneys for Respondent:

David T. Butler, Jr.
Attorney at Law
1111 South Foster Drive
Suite G
Baton Rouge, LA 70806
(225) 924-1000

Daren Sarphie
Attorney at Law
3045 Ridgelake Drive
Suite 203
Metairie, LA 70002
(504) 838-8883

Thomas M. Ruli
Attorney at Law
3320 West Esplanade Avenue North
Metairie, LA 70002
(504) 831-7270

Scott F. Davis
Attorney at Law
3900 North Causeway Boulevard
Suite 1450, Lakeway One
Metairie, LA 70002
(504) 836-5200

Respondent Attorneys continued on next page.....

WRIT GRANTED

See attached.

Gretna, Louisiana, this 27th day of January, 2016.

S. C. Garcia, III
Attorney at Law
522 North New Hampshire Street
Suite 3
Covington, LA 70433
(985) 635-0055

William G. Burns
Attorney at Law
5821 Norland Avenue
New Orleans, LA 70131
(504) 606-6527

Sandra Diggs-Miller
Attorney at Law
639 Loyola Avenue
26th Floor
New Orleans, LA 70113
(504) 576-5334

Paul M. Lavelle
Attorney at Law
650 Poydras Street
Suite 2810
New Orleans, LA 70130
(504) 568-9393

Stephen W. Glusman
Attorney at Law
701 North Street
Baton Rouge, LA 70802
(225) 387-5551

Mark D. Latham
Attorney at Law
701 Poydras Street
Suite 5000, One Shell Square
New Orleans, LA 70139
(504) 581-7979

John M. Robin
Attorneys at Law
600 Covington Center
Covington, LA 70433
(985) 893-0370

George R. Blue, Jr.
Attorneys at Law
600 Covington Center
Covington, LA 70433
(985) 893-9930

JOHN MAESTRI, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, AIDEN SEBASTIAN MAESTRI AND ADDILYN SOPHIA MAESTRI

VERSUS

ENTERGY CORPORATION, ENTERGY LOUISIANA, LLC, RSC SERVICE CORPORATION, LIBERTY MUTUAL INSURANCE, GENIE INDUSTRIES, INC., A-1 GLASS SERVICES, INC., AND WALTON CONSTRUCTION, A CORE COMPANY, LLC

NO. 15-C-676

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

WRIT GRANTED

This insurance coverage dispute arises from a work-related accident in which the plaintiff, John Maestri, a commercial glazier, was electrocuted while riding a Genie Boom Lift in close proximity to a power line owned by Entergy Louisiana, LLC ("Entergy"). At the time of the accident, Mr. Maestri was installing glass panels and working as a direct employee of A-1 Glass Services, Inc. ("A-1 Glass"), a subcontractor on a construction project operating under Walton Construction-A Core Company, LLC ("Walton Construction"), the project's general contractor. A-1 Glass rented the Genie Boom Lift from RSC Equipment Rentals, Inc. ("RSC"), a company later purchased by United Rentals.

Mr. Maestri filed a suit in the 24th Judicial District Court against RSC (now United Rentals), its insurer, Liberty Mutual Insurance Company ("Liberty Mutual"), Genie Industries, Inc., the manufacturer of the lift, and Entergy, alleging these parties were at fault for his injuries.

Entergy filed a third party demand in this state court suit against Walton Construction and A-1 Glass claiming those companies violated the Louisiana Overhead Power Line Safety Act (the "Safety Act"), La. R.S. 45:141-146, by failing to notify Entergy at least 48 hours prior to performing work near the power line to make mutually satisfactory arrangements. Entergy avers that the Safety Act

requires that Walton Construction and A-1 Glass indemnify Entergy for all damages for which Entergy may become liable in Mr. Maestri's suit.

Relator for this writ, First Financial Insurance Corporation ("First Financial"), issued a commercial general liability policy to A-1 Glass which was in effect at the time of the alleged accident. Both Walton Construction and United Rentals filed third party claims against First Financial seeking defense and indemnity coverage as an additional insured under the policy issued to A-1 Glass. The issue before us is whether the language of the Cross Liability Exclusion clause of the First Financial policy effectively bars coverage for United Rentals. Walton Construction filed a declaratory judgment action in the United States District Court for the Eastern District of Louisiana against First Financial seeking additional insured status under the First Financial policy. In that case, Chief Judge Sarah Vance held that the cross liability exclusion clause does bar coverage for Walton's claims arising out of Mr. Maestri's suit and declared that First Financial has no duty to defend or indemnify Walton Construction as an additional insured.

On August 4, 2015, First Financial filed a motion for summary judgment in this case, seeking dismissal of United Rentals' claims for additional insured status. On October 1, 2015, the district court denied the motion for summary judgment, finding that the cross liability exclusion, when read in conjunction with the separation of insureds provision of the policy, was ambiguous as applied to United Rentals' claim. First Financial seeks supervisory review of this judgment, and avers that United Rentals' claim is the only claim that remains pending against First Financial.

The issue presented here, whether the cross liability exclusion bars coverage for United Rentals' claim, is a question of law which this Court reviews *de novo*.

In *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 93-0911 (La. 1/14/94), 630 So.2d 759, 763, the Louisiana Supreme Court outlined the elementary principles for construing insurance policies, stating:

> An insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code... An insurance policy should not be interpreted in an unreasonable or 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. Absent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and to enforce reasonable conditions upon the policy obligations they contractually assume... Ambiguity in an insurance policy must be resolved by construing the policy as a whole; one policy provision is not to be construed separately at the expense of disregarding other policy provisions... [I]f the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written. When the language of an insurance policy is clear, courts lack the authority to change or alter its terms under the guise of interpretation. The determination of whether a contract is clear or ambiguous is a question of law. (Internal citation omitted.)

We review the policy at hand with these principals of construction in mind. First Financial issued to A-1 Glass a commercial general liability policy (Policy No. HGL0028059) with a policy period of July 1, 2011 through July 1, 2012. The policy's insuring agreement provides in pertinent part:

> **Insuring Agreement**
>
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

Additionally, under the section "Who Is An Insured," the policy provides the following language:

> 2. Each of the following is also an insured:
>
> a. ... [Y]our "employees" ..., but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business."

The parties do not dispute that Mr. Maestri was an employee of A-1 Glass performing duties related to the conduct of A-1 Glass' business at the time of the accident; therefore, Mr. Maestri would be considered an 'insured' under the terms of the policy. These provisions of the policy do not obligate First Financial to pay for "bodily injury" suffered by Mr. Maestri; rather, First Financial would be obligated to pay for those "bodily injuries" which are caused by Mr. Maestri, an insured, and for which he becomes legally obligated to pay damages. Workers' compensation plans are intended to cover those bodily injuries suffered by employees while performing duties related to the conduct of their business. Commercial general liability policies, on the other hand, are designed to protect the insured against losses to third parties that arise out of the insured's business operations. *Roundtree v. New Orleans Aviation Bd.*, 04-0702 (La. App. 4 Cir. 02/04/05), 896 So.2d 1078, 1087.

The scope of protection afforded by the policy may be expanded beyond the named insureds in the policy to additional insureds. First Financial's policy for A-1 Glass includes an "Automatic Additional Insureds By Written Contract, Written Agreement, or Permit" endorsement by which United Rentals seeks coverage as an additional insured. The language of that endorsement provides:

> A. Section II - Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) with whom you agreed, because of a written contract, written agreement or permit, to provide insurance such as is afforded under this Coverage Part, but only:
>
> 1. With respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused by "your work" or maintenance, operation or use of facilities owned or used by you; and
> 2. When such written contract, written agreement or permit is fully executed prior to an "occurrence" in which coverage is sought under this policy.

The parties do not dispute that a written contract, the boom lift rental contract, existed between A-1 Glass and United Rentals' predecessor in interest, RSC. That contract required A-1 Glass to have insurance and to name RSC as an

additional insured on its policy as a precondition to renting the boom lift. Where an insurance policy allows for coverage of multiple parties, including named and additional insureds, the relationship between those parties under the insurance contract is established by a "separation of insureds" or "severability" clause. The "separation of insureds" provision of the First Financial policy states:

> **Separation of Insureds**
>
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
> b. Separately to each insured against whom claim is made or "suit" is brought.

Such severability provisions, in effect, require the policy to be construed as providing separate coverage for each insured as if each were separately insured with a distinct policy.

The First Financial policy contains approximately two dozen endorsements. Endorsements to the policy may expand the scope of coverage provided in the initial insuring agreement to include additional parties or additional kinds of accidents. The aforementioned "Automatic Additional Insureds By Written Contract" endorsement is an example of this. Endorsements to the policy may also limit the scope of coverage provided in the initial insuring agreement. For example, pollution, asbestos, and fungi exclusions particularly exclude coverage for damages or injuries resulting from those particular perils. Another endorsement made part of the First Financial policy is a cross liability exclusion, which provides:

> **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**
> **EXCLUSION – CROSS LIABILITY**
>
> This endorsement modified insurance provided under the following:
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
> This insurance does not apply to any actual or alleged "bodily injury"…to:

...

3. A present, former, future or prospective partner, officer, director, stockholder or *employee of any insured*;
4. *Any insured*; or
5. The spouse, child, parent or sibling of any of the above as a consequence of Paragraphs 1., 2., 3., or 4. above.

(Emphasis added.)

At the trial court and in its writ application, First Financial argues that a plain reading of this cross liability exclusion provision precludes coverage for United Rentals against claims for damages brought by Mr. Maestri because Mr. Maestri is both the employee of an insured, A-1 Glass, as well as an insured in his own right. We agree with this interpretation of the cross liability exclusion. It is consistent with the purpose of commercial general liability policies, which are designed to protect the insured against claims brought by third parties. As previously noted, insurers, like other individuals, are entitled to limit their liability and to impose and to enforce reasonable conditions upon the policy obligations they contractually assume.

United Rentals argues that the cross liability exclusion, when read with the separation of insureds clause of the policy, creates an ambiguity as to whether the exclusion applies to additional insureds as well as named insureds. According to United Rentals' interpretation of the contract, because it is an additional insured and because the severability clause of the contract requires that each insured be treated as if it were insured by a separate, distinct policy, United Rentals should be protected against claims for damages due to "bodily injury" under the terms of the policy's insuring agreement. We disagree with this interpretation of the policy, which would have the effect of disregarding the cross liability exclusion altogether.

It is well settled law that exclusionary provisions in insurance contracts are strictly construed against the insurer, and any ambiguity or doubt as to the meaning of a provision is construed in favor of the insured. *Garcia v. St. Bernard Parish School Board*, 576 So.2d 975, 976 (La. 1991). Louisiana courts, however, do not

take it upon themselves to interpret contracts which are not ambiguous. *Smith v. Mobil Corporation*, 719 F.2d 1313, 1317 (5th Cir. 1983). Absent ambiguity, the contract is to be read according to its plain intent, and contractual obligations are to be enforced as written and given legal effect according to the true intent of the parties. *See Bailey v. Franks Petroleum, Inc.*, 479 So.2d 563, 566 (La. App. 1st Cir. 1985). Except for words of art and technical terms, the words of a contract must be given their generally prevailing understood meaning. La. C.C. art. 2047.

In this instance, the plain language of the cross liability exclusion, which bars coverage for claims of "bodily injury" to "*any* insured," places a reasonable limitation on a general commercial liability contract designed to protect insureds against claims brought by third parties. The plain meaning of "*any* insured" is broad enough to include any party insured under the contract, be they named in the original insuring agreement or additional insureds by the terms of an endorsement.

Upon *de novo* review, we do not find any ambiguity in the policy issued by First Financial to A-1 Glass. Accordingly, we vacate the judgment of the trial court and grant relator's motion for summary judgment.

Gretna, Louisiana, this 27th day of January, 2016.

RAC

JUDGE ROBERT A. CHAISSON

FHW

JUDGE FREDERICKA HOMBERG WICKER

JJG

JUDGE JUDE G. GRAVOIS