

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2007 CA 1854**

**HOUSING AUTHORITY OF THE  
CITY OF DONALDSONVILLE, LOUISIANA**

**VERSUS**

**COREGIS INSURANCE COMPANY AND  
WESTCHESTER INSURANCE COMPANY**

**Judgment rendered: MAR 26 2008**

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**On Appeal from the 23<sup>rd</sup> Judicial District Court  
Parish of Ascension, State of Louisiana  
Case #79319; Division E  
The Honorable Alvin Turner, Judge Presiding**

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Group Self Insurance Risk  
Management Agency**

**BEFORE: PARRO, KUHN AND DOWNING, JJ.**

*Handwritten initials: PARRO, KUHN, DOWNING*

**DOWNING, J.**

The Housing Authority of the City of Donaldsonville, Louisiana (“Housing Authority”), appeals a summary judgment granted in favor of Coregis Insurance Company<sup>1</sup> and the Louisiana Housing Council, Inc., Group Self Insurance Risk Management Agency (collectively, “the Fund”). We affirm the judgment.

**PERTINENT FACTS AND PROCEDURAL HISTORY**

In April 2003 a wind and hail storm caused damage to the roofs of two housing projects owned by the Housing Authority. The Housing Authority filed a claim with the Fund. When the Housing Authority and the Fund could not agree on the amount of the loss, the Housing Authority filed suit claiming damages under its Certificate of Coverage. After suit was filed and answered, both parties invoked the binding appraisal process provided in the Certificate of Coverage. This provision provides as follows in pertinent part:

b. Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. **A decision agreed to by any two will be binding.**

\* \* \*

If there is an appraisal, we still still retain our right to deny the claim. (Emphasis added.)

After the umpire and one of the appraisers agreed, the Fund tendered the actual cash value of the loss, less a deductible. The fund subsequently tendered the replacement cost difference. After the Housing Authority declined to dismiss the lawsuit, the Fund filed a motion for summary judgment. The Fund asserted that no

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<sup>1</sup> Coregis argues separate grounds on which it contends the summary judgment should have been granted. We do not consider these grounds based on our disposition herein.

questions of fact remained and that it was entitled to judgment as a matter of law because after the full payments, no claims or causes of action continued to exist in favor of the Housing Authority.

After a hearing, the trial court granted summary judgment in favor of the Fund, dismissing all of the Housing Authority's claims and causes of action, at the Housing Authority's costs. The trial court denied the Housing Authority's motion for new trial.<sup>2</sup>

The Housing Authority now appeals, asserting two assignments of error, summarized as follows:

1. The Certificate of Coverage violated La. C.C. art. 2004;
2. The trial court erred in granting the motion for summary judgment "in lieu (sic) of evidence presented."

## DISCUSSION

### *Standard of Review*

"Summary judgments are reviewed on appeal *de novo*. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law." **Hall v. Our Lady of the Lake R.M.C.**, 06-1425, p. 9 (La.App. 1 Cir. 6/20/07), 968 So.2d 179, 185. On a motion for summary judgment, the burden of proof is on the movant. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the movant must point out to

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<sup>2</sup> We address the trial court's denial of the Housing Authority's motion for new trial because it is argued in the briefs. The Housing Authority did not appeal the denial of the new trial. Nor did it raise the issue in an assignment of error. Even so, the denial of a motion for new trial is an interlocutory, non-appealable judgment. See La. C.C.P. art. 2083. The Louisiana Supreme Court, however, has instructed appellate courts to consider an appeal from the denial of a motion for new trial as an appeal of the judgment on the merits when it is clear from appellant's brief that the appeal was intended to be an appeal of the final judgment on the merits. **Shultz v. Shultz**, 02-2534, p. 3 (La.App. 1 Cir. 11/7/03), 867 So.2d 745, 746-47 (quoting **Carpenter v. Hannan**, 01-467 (La.App. 1 Cir. 3/28/02), 818 So.2d 226, 228-29.) We have considered the judgment on the merits.

the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he or she will be able to satisfy his or her evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966C; **Id.**

*The Fund's Claim for Summary Judgment*

Here, the Fund presented evidence in support of its motion for summary judgment showing that after the Housing Authority filed suit against it, the Housing Authority invoked a binding appraisal process provided in the Certificate of Coverage. Pursuant to the appraisal process, the Fund paid all sums due. It therefore asserts that it has no further liability to the Housing Authority and that its action against the Fund should be dismissed with prejudice.

*Louisiana Civil Code art. 2004*

The Housing Authority presented no admissible evidence to contradict the Fund's assertions of fact. Rather, it principally argues issues of law. First it argues that the appraisal procedure outlined in the Certificate of Coverage is null because it limits the Housing Authority's future recovery of damages in violation La. C.C. art. 2004, which provides as follows:

Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.

Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.

The Housing Authority, however, fails to explain how the appraisal clause set out above limits the Fund's liability, either for intentional or gross fault that causes damage or for causing future physical injury. Wind and hail damage do not seem to fit the types of fault and injury described in Art. 2004. And such assertion

seems contrary to the terms of the appraisal clause. The appraisal clause provides a method for determining damages, but it in no way appears to limit the Fund's liability, within the terms of the policy. The Housing Authority's first assignment of error is without merit.

#### *Right to Deny Claim*

Even though the appraisal clause states that the determination of value shall be binding on the parties, the Housing Authority claims that the appraisal clause is ambiguous, therefore unenforceable, because the Fund retains the right to deny the claim. This strained interpretation is not supported by the plain language of the appraisal clause. The Fund is bound by the agreement on value between two of three of the appraisers and umpire. The Fund retains its right to deny the claim if payment is not due for other reasons.

The court's responsibility in interpreting insurance contracts is to determine the parties' common intent. **Halphen v. Borja**, 06-1465, p. 3 (La.App. 1 Cir. 5/4/07), 961 So.2d 1201, 1204, *writ denied*, 07-1198 (La. 9/21/07), 964 So.2d 338. *See also* La. C.C. art. 2045. If the language in an insurance contract is clear and explicit and leads to no absurd consequences, no further interpretation may be made in search of the parties' intent. **Id.**, 06-1465 at p. 3, 964 So.2d at 1204-05. *See also* La. C.C. art. 2046. "The court should not strain to find ambiguity where none exists. The determination of whether a contract is clear or ambiguous is a question of law." (Citations omitted.) **Id.**, 06-1465 at p. 3, 964 So.2d at 1205. Here, we conclude as a matter of law that no ambiguity exists in the plain language of the appraisal clause at issue.

#### *Admissibility of Documents*

The Housing Authority attached three documents to its opposition to the Fund's motion for summary judgment. The Housing Authority urged that these documents raised some question regarding whether the umpire had the appropriate

information upon which to make an informed decision. The trial court refused to consider these documents because they were not in any form allowed by La. C.C.P. art. 967. The trial court ruled that the evidence “alone without the proper supporting documents was insufficient to raise a factual issue to defeat summary judgment against the Fund.”

Even so, the Housing Authority argues, without any citation to authority, that these items are admissible. The Housing Authority is incorrect in its understanding. La. C.C.P. arts. 966 and 967 do not permit a party to utilize unsworn and unverified documents as summary judgment evidence. “A document that is not an affidavit or sworn to in any way, or which is not certified or attached to an affidavit, is not of sufficient evidentiary quality to be given weight in determining whether there are remaining genuine issues of material fact.” **Sanders v. J. Ray McDermott, Inc.**, 03-0064, p. 6 (La.App. 1 Cir. 11/7/03), 867 So.2d 771, 775. Accordingly, the trial court did not err in declining to consider the Housing Authority’s documents attached to its opposition.

#### **DECREE**

We conclude that the trial court did not err in granting summary judgment in favor of the Fund. We affirm the judgment of the trial court. Costs of this appeal are assessed against the Housing Authority of the City of Donaldsonville, Louisiana, in the amount of two thousand five hundred ninety and 77/100 dollars (\$2,590.77).

**AFFIRMED**