NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1297

LAFOURCHE REALTY COMPANY, INC. AND THE ALLAN COMPANY

VERSUS

ENTERGY LOUISIANA, INC., ENTERGY LOUISIANA HOLDINGS, INC., ENTERGY SERVICES, INC., ENTERGY TEXAS, IRBY CONSTRUCTION COMPANY, IRBY CONSTRUCTION COMPANY OF MISSISSIPPI, HIGHLINES CONSTRUCTION COMPANY, INC., AND FROGCO, INC.

Judgment Rendered: APR 2 7 2010

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APPEALED FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LAFOURCHE
DOCKET NUMBER 104,457, DIVISION "A"
STATE OF LOUISIANA

THE HONORABLE JOHN E. LEBLANC, JUDGE

* * * * * * *

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Defendant/Appellee
ALEA London, Ltd.

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Kuhn, J. concurs. (by JMM)
Parro, J. concurs. (by JMM)

McDONALD, J.

Lafourche Realty Company, Inc. owned property in Lafourche Parish, East of Golden Meadow, with a 100-foot wide servitude in favor of Entergy Louisiana, Inc. The Allan Company, Elizabeth Culver Jahncke, Jeannie Culver Dragon, and John A. Culver owned property in the same area, which also had a 100-foot wide servitude in favor of Entergy Louisiana, Inc. These servitudes gave Entergy Louisiana, Inc. the right to construct, operate, and maintain upon the servitude properties pole-supported wire lines for the transmission of electric energy.

Between September 7 and September 18, 2005, Entergy Louisiana, Inc. and its subcontractors entered the two properties at issue in order to repair power lines damaged by Hurricane Katrina. Entergy Louisiana, Inc. used tracked excavators, air boats, and other equipment to repair or replace pole structures and repair the power lines on the properties.

Thereafter, Lafourche Realty Company, Inc., The Allan Company, Elizabeth Culver Jahncke, Jeannie Culver Dragon, and John A. Culver (the plaintiffs) filed suit against Entergy Louisiana, Inc., Entergy Louisiana Holdings, Inc., Entergy Services, Inc., Entergy Gulf States, Inc., and Entergy Louisiana, L.L.C. (collectively referred to as Entergy); Entergy's subcontractors, Irby Construction Company, Irby Construction Company of Mississippi, and Highlines Construction Company, Inc.; and Frogco Rentals, L.L.C. and Frogco Amphibious Equipment, Inc. (collectively referred to as Frogco), asserting that the defendants caused severe and extensive damage to their properties as a result of the repair work. The plaintiffs asserted that Entergy and its subcontractors were liable to them for property damage caused intentionally and negligently in the use of the servitudes, and also for trespassing onto the properties from the servitudes during the work. Plaintiffs prayed that Entergy and its subcontractors be required to pay compensation to restore the property and to monitor and maintain the restoration,

along with litigation costs, court costs, expert witness fees, attorney fees, and interest.

Entergy answered the suit, asserting that, given the circumstances following Hurricane Katrina, Entergy acted in a manner that was reasonable and prudent and that any damages arose from actions taken out of necessity. Further, Entergy denied damaging the property, asserting that any property damages were the result of the fault of persons for whom Entergy was not responsible, that the plaintiffs had failed to mitigate their damages, and that any damages were the result of the plaintiffs' own fault. Entergy asked that the suit be dismissed.

Frogco filed an answer, generally denying the allegations. Frogco also filed peremptory exceptions raising the objections of no cause of action and no right of action, asserting that the plaintiffs' claims were barred by operation of Act 402 of the 2005 Regular Session of the Louisiana Legislature, which enacted La. R.S. 9:2800.17, and asking that the plaintiffs' claims be dismissed.

Frogco also filed a third-party petition for declaratory judgment and for damages against ALEA London, Ltd. (ALEA), asserting that as Frogco's general liability insurer, ALEA had a duty to defend Frogco, that Frogco had contacted ALEA and advised it of the claim and requested a defense, and that ALEA had denied coverage and protection for the lawsuit and refused to provide a defense. Frogco asserted it was entitled to indemnity for damages, that ALEA had the right and the duty to defend it against the suit, that ALEA's failure to do so was arbitrary and capricious and violated Louisiana law, and that ALEA breached its duty of good faith and fair dealing, its affirmative duty to adjust its claims fairly and promptly, and its affirmative duty to make reasonable efforts to settle the claim. Frogco prayed for judgment finding coverage under the ALEA policy, finding that ALEA had a duty to defend Frogco, and further, for damages, penalties, costs, attorney fees, and other relief.

ALEA filed an answer, generally denying the allegations. Further, ALEA filed peremptory exceptions raising the objections that the third-party petition failed to state a right of action and failed to state a cause of action; filed declinatory exceptions raising the objections of insufficiency of service of process, lack of jurisdiction, and improper venue; and filed a peremptory exception raising the objection of prescription. ALEA asserted there was no coverage under the policy, because it only provided coverage for "an occurrence" and excluded "expected or intended injury" and "your work." ALEA asserted that any injuries and damages sustained by plaintiffs were caused by the negligence and fault of third persons for whom ALEA was not responsible, and alternatively, asserted plaintiffs' contributory and comparative negligence and failure to mitigate damages. ALEA asked for dismissal of Frogco's third-party demands.

Thereafter, Frogco filed a motion for summary judgment, asserting that there were no genuine issues of material fact, that it was entitled to judgment as a matter of law, and that based upon the allegations in the plaintiffs' lawsuit and the coverage afforded under the policy, ALEA was obligated to furnish a defense to Frogco. Further, Frogco asserted that ALEA was arbitrary and capricious in denying coverage and a defense and prayed for general and special damages, penalties, interest, costs, attorney fees, and other just and equitable relief.

ALEA filed a motion for summary judgment, asserting that there was no genuine issue of material fact in dispute and that, based on its policy, it did not owe Frogco a defense in the matter. ALEA asked for judgment in its favor, dismissing Frogco's claims.

After a hearing on the motion for summary judgment, the district court ruled, finding there were no factual allegations in the original petition indicating that the marsh equipment was used in any manner which negligently caused property damage; thus Frogco's motion for summary judgment that ALEA owed a

duty to defend and provide coverage under the negligence claim in the original petition was denied. Further, the district court found that Frogco was operating its marsh equipment in its usual course of business to repair power lines and that no event took place without its foresight or expectation; thus, the actions of Frogco did not constitute an "occurrence" within the policy definition. Therefore, ALEA's motion for summary judgment on the issue of no "occurrence" under the policy was granted.

ALEA's motion for summary judgment on the issue of its policy exclusion for "expected or intended injury" was denied, as the trial court noted that Frogco's representative stated in his affidavit that he had never been told the marsh buggies were prohibited on the property or that the use of such marsh buggies would damage the property. The court further stated that the allegations in the original petition that defendants collectively knew that the plaintiffs objected to tracked machines and that they caused damage to the property were insufficient to oppose Frogco's affidavit and other evidence on that issue. Nevertheless, all claims by Frogco against ALEA were dismissed on the basis of the previously discussed lack of an "occurrence."

Frogco is appealing that judgment and asserts that the district court erred in granting ALEA's motion for summary judgment, in denying Frogco's motion for summary judgment, and in dismissing Frogco's claims.

THE GRANTING OF ALEA'S MOTION FOR SUMMARY JUDGMENT

Our review of a grant of a motion for summary judgment is *de novo*. **Independent Fire Insurance Co. v. Sunbeam Corp.**, 99-2181, p. 7 (La. 2/29/00), 755 So.2d 226, 230. Interpretation of an insurance policy usually involves a legal question which can be resolved properly in the framework of a motion for

summary judgment. **Henry v. South Louisiana Sugars Co-op, Inc.**, 06-2764, p. 4 (La. 5/22/07), 957 So.2d 1275, 1277.

The judgment sought on a motion for summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B. The burden of proof remains with the movant. However, if the movant 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 him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to 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, 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. La. C.C.P. art. 966C(2).

The ALEA policy issued to Frogco states:

> a. 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. . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> 1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory". . ..

The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy does not define the term "accident."

Black's law dictionary defines an "accident" as "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course

of events or that could not be reasonably anticipated." Black's Law Dictionary (8th ed. 2004).

The petition alleges that the plaintiffs told representatives of Entergy and other defendants that they did not allow tracked vehicles on the property, and that Entergy representatives stated they knew the tracked machines would cause damage to the property, but they would pay for repairs. However, the affidavit of Frogco's owner, Garrett Naquin, states that he was never informed that marsh buggies were not allowed on the property or that the use of marsh buggies would damage the property. Mr. Naquin also said that, had he known marsh buggies were not allowed on the property, he would not have taken the job, as there was no other way to do the work. Thus, the damage to the property was an "unintended and unforeseen injurious occurrence" on the part of Frogco, based on Mr. Naquin's affidavit. **See Reichart v. Hindes**, 04-1382 (La. App. 3rd Cir. 3/2/05), 896 So.2d 1228, writ denied, 05-0844 (La. 5/13/05), 902 So.2d 1028.

After a *de novo* review, we find that there is a genuine issue of material fact as to whether there was an "occurrence" within the definition of the ALEA liability policy to trigger a duty to defend and provide coverage to Frogco for the damages caused by the use of tracked vehicles on the subject property. Thus, the district court's grant of summary judgment in favor of ALEA and against Frogco is reversed.

THE DENIAL OF FROGCO'S MOTION FOR SUMMARY JUDGMENT

Frogco's motion for summary judgment asserted that there were no genuine issues of material fact, that it was entitled to judgment as a matter of law, and that based upon the allegations in the plaintiffs' lawsuit and the coverage afforded under the policy, ALEA was obligated to furnish a defense to Frogco.

The denial of a motion for summary judgment is an interlocutory judgment. The proper procedural vehicle to contest the denial of a motion for summary

judgment is an application for a supervisory writ. **Ellender v. Goldking Production Co.**, 99-0069 (La. App. 1st Cir. 6/23/00), 775 So.2d 11. However, when a judgment is rendered in the case, and it is appealable, the reviewing court can then consider the correctness of the prior interlocutory judgment. **Bunge v. Board and Department of Economic Development**, 07-1746, p. 9 (La. App. 1st Cir. 5/2/08), 991 So.2d 511, 518 n.4, writ denied, 08-1594 (La. 11/21/08), 996 So.2d 1106. Thus, we convert Frogco's appeal from the denial of its motion for summary judgment to an application for a supervisory writ, and, based upon the same reasoning used in the analysis of ALEA's motion for summary judgment, we find that Frogco's motion for summary judgment on the duty to defend issue should have been granted.

Thus, for the foregoing reasons, we reverse the district court's judgment granting ALEA's motion for summary judgment, we reverse the district court's judgment denying Frogco's motion for summary judgment on the issue of a duty to defend, we grant Frogco's motion for summary judgment on the duty to defend, and we remand the case for further proceedings. Costs are assessed against ALEA. This judgment is issued in accordance with the Louisiana Uniform Rules, Courts of Appeal, Rule 2-16.1.B.

REVERSED AND REMANDED.