NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1220

RAEGAN A. HEBERT

VERSUS

CHARLES BARDWELL AND
STATE FARM INSURANCE COMPANY

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 587,553, Section 27
Honorable Todd W. Hernandez, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered February 10, 2012

PARRO, J.

Plaintiff, Raegan A. Hebert, has appealed a summary judgment in favor of State Farm Fire and Casualty Company (State Farm), dismissing her claims against State Farm and further declaring that State Farm did not have an obligation to defend its insured in this matter. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ms. Hebert and Charles Bardwell engaged in a consensual sexual relationship, during which Ms. Hebert became symptomatic and sought medical attention. Ms. Hebert was eventually diagnosed with Herpes Simplex Virus II (HSV II). Thereafter, Ms. Hebert filed a petition against Mr. Bardwell, alleging that he had negligently infected her with HSV II, which caused her to suffer mental and physical injuries, as well as other damages.

Ms. Hebert also named Mr. Bardwell's homeowner's insurer, State Farm, as a defendant in her petition. State Farm responded by filing a motion for summary judgment, seeking a dismissal of all claims against it, as well as a declaration that it did not owe a duty to defend or indemnify Mr. Bardwell in this matter. Specifically, State Farm contended that the insuring clause of the policy did not provide coverage for the transmission of, or exposure to, any communicable virus.

After a hearing on the motion, the trial court took the matter under advisement. Subsequently, the trial court issued written reasons for judgment, granting State Farm's motion for summary judgment. On October 28, 2010, a judgment in accordance with these reasons was signed. This appeal by Ms. Hebert followed.

APPLICABLE LAW

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover 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 the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

An appellate court's review of a summary judgment is a *de novo* review based on the evidence presented to the trial court, using the same criteria used by the trial court in deciding whether a summary judgment should be granted. Buck's Run Enterprises, Inc. v. Mapp Const., Inc., 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable or material fact. All doubts should be resolved in the non-moving party's favor. Hines v. Garrett, 04-0806 (La. 6/25/04), 876 So.2d 764, 765.

On a motion for summary judgment, the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the moving party's burden on the motion is 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, and the moving party is entitled to judgment as a matter of law. See LSA-C.C.P. art. 966(C)(2).

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 v. Select Properties, Ltd., 93-1480 (La. 4/11/94), 634 So.2d 1180, 1183. Words and phrases used in a policy are to be construed using their plain, ordinary, and generally prevailing meaning, unless the words have acquired a technical meaning. See LSA-C.C. 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.

Reynolds, 634 So.2d at 1183. Where the language in the policy is clear, unambiguous, and expressive of the intent of the parties, the agreement must be enforced as written. See LSA-C.C. art. 2046; Lewis v. Jabbar, 08-1051 (La. App. 1st Cir. 1/12/09), 5 So.3d 250, 255.

The purpose of liability insurance is to afford the insured protection for damage claims. Policies, therefore, should be construed to effect, and not to deny, coverage. Thus, a provision that 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 that favors coverage must be applied. Reynolds, 634 So.2d at 1183. Nevertheless, 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. The rule of strict construction does not authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists. Nor does it authorize courts to alter the terms of policies under the guise of contractual interpretation when the policy provisions are couched in unambiguous language. Doiron v. Louisiana Farm Bureau Mut. Ins. Co., 98-2818 (La. App. 1st Cir. 2/18/00), 753 So.2d 357, 363.

DISCUSSION

The insuring clause of the liability coverages section of the State Farm policy at issue provides, in pertinent part:

> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:
>
> 1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice.

(Emphasis in original).

The definitions at the beginning of the policy define "**bodily injury**" as follows:

"**bodily injury**" means physical injury, sickness, or disease to a person.

This includes required care, loss of services and death resulting therefrom.

Bodily injury does not include:

a. any of the following which are communicable: disease, bacteria, parasite, virus, or other organism, any of which are transmitted by any **insured** to any other person;

b. the exposure to any such disease, bacteria, parasite, virus, or other organism by any **insured** to any other person; or

c. emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury unless it arises out of actual physical injury to some person.

(Emphasis in original).

It is undisputed that HSV II is a virus that is communicable and transmitted from one person to another. It is also clear from Ms. Hebert's pleadings that her claims against Mr. Bardwell and State Farm are based solely on the fact that Mr. Bardwell allegedly transmitted HSV II to her during their consensual sexual relationship. Nevertheless, Ms. Hebert contends that the language in the State Farm policy is not clear and unambiguous because, although the definition of bodily injury does clearly and unambiguously exclude the transmission of, or exposure to, a virus by any insured to any other person, that policy language does not clearly and unambiguously exclude the bodily injury that results from the exposure to a virus or other communicable disease. Specifically, Ms. Hebert contends that the language of the State Farm policy only clearly and unambiguously applies to a situation where the plaintiff has been infected with a virus that results in no physical manifestations. However, in situations where the plaintiff suffers from the physical manifestations of the virus or communicable disease, as is allegedly the case in this matter, Ms. Hebert asserts that the language of the policy does not clearly and unambiguously preclude coverage for such damages.

In support of this claim, Ms. Hebert has relied on the language in an Allstate homeowner's insurance policy, in which the definition of "bodily injury" specifically excludes certain diseases and viruses, including herpes, "or any resulting symptom,

effect, condition, disease or illness related" to the listed diseases and viruses. According to Ms. Hebert, if State Farm had used this language, there would be no dispute as to the extent of the coverage of the policy in this matter. Ms. Hebert appears to assert that because State Farm did not include this language, its policy is vague and ambiguous with regard to coverage for any physical manifestations that actually result from the transmission of, or exposure to, a communicable disease or virus like HSV II. We find no merit in this argument.

As a preliminary matter, we note that the language of the Allstate policy is irrelevant to the interpretation of the State Farm policy. Ms. Hebert has cited no authority for the proposition that insurance policies must be uniform, and this court is unaware of any such authority. Furthermore, as noted previously, 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. Accordingly, this court will construe only the insurance policy actually at issue between the parties, rather than considering extraneous policies not relevant to that endeavor.

As noted above, the State Farm policy excluded the transmission of, or exposure to, communicable diseases or viruses from the definition of "**bodily injury.**" In considering this language, the trial court stated, in its written reasons in support of its granting of State Farm's motion for summary judgment, the following:

> Although plaintiff attempts to convince the court that the State Farm policy does not go far enough to preclude coverage for herpes and herpes related symptoms, the court is of the opinion that the language is sufficient to include all effects of a communicable disease. The court does not think that it is necessary for a policy to state that the resulting injuries or problems which occur as a result of the contraction of any such disease would also be excluded. The policy explicitly excludes from the definition of bodily injury the transmission of a virus or the exposure to a virus. It does not need to be further detailed in the policy that such virus causes pain and suffering, both mental and physical.

We agree with the trial court's conclusion.

We are mindful that, in interpreting an insurance policy, the words of the policy are to be given their plain and ordinary meaning, and the 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. See LSA-C.C. art. 2047; see also Reynolds, 634 So.2d at 1183. The language of the policy clearly excludes from coverage the transmission of a virus and the exposure to a virus from the definition of "**bodily injury**." The only reasonable interpretation of this language must include both asymptomatic and symptomatic transmissions and exposures of the virus. To interpret the policy as Ms. Hebert proposes requires an unreasonably strained reading of the language in the policy; therefore, such an interpretation cannot stand. Accordingly, we find that summary judgment was properly granted in favor of State Farm.[1]

DECREE

For the foregoing reasons, the judgment of the trial court granting the motion for summary judgment filed by State Farm Fire and Casualty Company is affirmed. All costs of this appeal are assessed to the plaintiff, Raegan A. Hebert.

AFFIRMED.

[1] Because the motion for summary judgment was granted, finding that the insuring clause of the policy was not triggered, it was also determined that State Farm had no duty to defend Mr. Bardwell in this matter.