NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1067

ROBIN BUELLE AND KENNETH S. SMITH

VERSUS

THOMAS PERIOU, M.D. AND FIREMAN'S FUND INSURANCE COMPANY

Judgment Rendered: MAY - 2 2012

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2004-12954

Honorable Richard A. Swartz, Presiding

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Irvy E. Cosse, III Irvy E. Cosse, Jr. New Orleans, LA	Counsel for Plaintiffs/Appellees Robin Buelle and Kenneth S. Smith
Sidney W. Degan, III James A. Rowell Travis L. Bourgeois Jennifer S. Kilpatrick Keith A. Kornman New Orleans, LA	Counsel for Defendant/Appellant Fireman's Fund Insurance Company
Michael P. Bienvenu Baton Rouge, LA and Jacques F. Bezou J.A. Kott Covington, LA	Counsel for Defendant/Appellant Thomas Periou, M.D.
Normand E. Pizza Thomas S. Schneidau Covington, LA	Counsel for Defendant/Appellee Louisiana Medical Mutual Insurance Company

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KUHN, J DISSENTS + ASSIGNS REASONS

BEFORE: WHIPPLE, KUHN, GUIDRY, WELCH, AND HIGGINBOTHAM, JJ.

Whipple, J. concurs for reasons assigned.
Higginbotham, J. concurs without reasons.
Welch J. concurs without reasons.

GUIDRY, J.

Defendants, Fireman's Fund Insurance Company (Fireman's Fund) and Thomas Periou, M.D., appeal from a judgment of the trial court granting summary judgment in favor of defendant, Louisiana Medical Mutual Insurance Company (LAMMICO), and dismissing all claims against LAMMICO with prejudice. For the reasons that follow, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On October 5, 2003, Robin Buelle was working as a registered nurse at Slidell Memorial Hospital. While outside on a smoke break, Dr. Periou, an anesthesiologist, approached Ms. Buelle and attempted to manipulate her sacroiliac (SI) joint. Thereafter, on June 17, 2004, Ms. Buelle and her husband, Kenneth Smith, filed a petition for damages, naming Dr. Periou and his homeowner's insurer, Fireman's Fund, as defendants and alleging that as a result of manipulation of the joint, Dr. Periou caused severe and disabling injuries to Ms. Buelle's spine and the onset of an extra abdominal fibromatosis.

Fireman's Fund responded by filing an exception of prematurity, asserting that Dr. Periou is a qualified healthcare provider and the plaintiffs' claims have not been reviewed by a medical review panel as required by La. R.S. 40:1299.47 et. seq. The trial court subsequently denied Fireman's Fund's exception, and his court affirmed the trial court's judgment, finding that Fireman's Fund had failed to establish, based on the record then before us, that Ms. Buelle was a patient. See Buelle v. Periou, 04-2733 (La. App. 1st Cir. 12/22/05), 927 So. 2d 1126, writ denied, 06-0160 (La. 4/24/06), 926 So. 2d 542.

Dr. Periou filed a third party demand against LAMMICO, alleging that the plaintiffs' claims against him were covered by a physician's professional liability insurance policy issued by LAMMICO to Dr. Periou. Thereafter, LAMMICO filed a motion for summary judgment, arguing that the claims asserted by the plaintiffs were not covered by the LAMMICO policy, because they did not arise from an injury from a "medical incident resulting from a negligent act, error or omission in rendering or failure to render professional services." Fireman's Fund also filed a motion for summary judgment, asserting that coverage for the claims asserted by the plaintiffs is excluded under its personal liability policy, because the claims arise out of the rendering of or failure to render professional services.

Following a hearing on the two motions, the trial court signed a judgment granting LAMMICO's motion for summary judgment and dismissing all claims against it with prejudice and denying Fireman's Fund's motion for summary judgment. Fireman's Fund and Dr. Periou now appeal from this judgment, asserting that the trial court erred in granting summary judgment in favor of LAMMICO.[1]

DISCUSSION

An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Smith v. Our Lady of the Lake Hospital, Inc., 93-2512, p. 26 (La. 7/5/94), 639 So. 2d 730, 750. The motion should be granted only 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. La. C.C.P. art. 966(B). Whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can be resolved within the framework of a motion for summary judgment. North American Treatment Systems, Inc. v. Scottsdale Insurance Company, 05-0081 (La. App. 1st Cir. 8/23/06), 943 So. 2d 429, 443, writs

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[1] Fireman's Fund sought supervisory review of the denial of their motion for summary judgment, which review was denied by this Court and the Supreme Court. See Buelle v. Periou, 2001CW0161 (La. App. 1st Cir. 3/25/11) and Buelle v. Periou, 2001CC0775 (La. 5/27/11).

denied, 06-2803 (La. 2/16/07), 949 So. 2d 423, 424. However, summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. McDonald v. American Family Life Assurance Company of Columbus, 10-1873, p. 4 (La. App. 1st Cir. 7/27/11), 70 So. 3d 1086, 1089. An insurer seeking to avoid coverage through summary judgment bears the burden of proving that some provision or exclusion applies to preclude coverage. Henley v. Philips Abita Lumber Co., 06-1856, p. 4 (La. App. 1st Cir. 10/3/07), 971 So. 2d 1104, 1108; see also Russell v. Eye Associates of Northeast Louisiana, 46,525, p. (La. App. 2nd Cir. 9/21/11), 74 So. 3d 230, 234.

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. Hoagboon v. Cannon, 10-0909, p. 3 (La. App. 1st Cir. 12/29/10), 54 So. 3d 802, 805. Interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. The parties' intent, as reflected by the words of the policy, determines the extent of coverage. McDonald, 10-1873 at p. 5, 70 So. 3d at 1090.

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. La. C.C. art. 2046. Such intent is to be determined in accordance with the general, ordinary, plain, and popular meaning of the words used in the policy, unless the words have acquired a technical meaning. Love v. AAA Temporaries, Inc., 06-1679, p. 5 (La. App. 1st Cir. 5/4/07), 961 So. 2d 480, 483. If the policy wording at issue is clear and expresses the intent of the parties, the agreement must be enforced as written. Love, 06-1679 at p. 5, 961 So. 2d at 484. An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or restrict its provisions beyond what is reasonably contemplated by its terms or to achieve an absurd conclusion. Love, 06-1679 at p. 5, 961 So. 2d at 484. Absent a conflict with statutory provisions or public policy, insurers are entitled to limit their liability and to impose and enforce reasonable conditions on the policy obligations they contractually assume. McDonald, 10-1873 at p. 6, 70 So. 3d at 1090.

The Physicians' and Surgeons' Professional Liability Insurance Policy issued by LAMMICO to Dr. Periou provides, in pertinent part:

> **I. COVERAGE AGREEMENTS**
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> The Company will pay on behalf of the **insured**:
>
> **A – Individual Professional Liability:**
>
> All sums which the **insured** shall become legally obligated to pay as damages because of injury, to which this insurance applies, from a **medical incident** resulting from a negligent act, error, or omission in the rendering of **professional services**, which occurs subsequent to the **retroactive date**, and for which claim is first made against the **insured** and reported to the Company during the policy period.
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> * * *
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> **VII. DEFINITIONS**
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> When used in this policy (including endorsements forming a part hereof):
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> * * *
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> **"medical incident"** means any act or omission in the furnishing of professional services to any person by the insured, any member, partner, officer, director, stockholder, or employee of the insured, or any person acting under the personal direction, control, or supervision of the insured. Any such act or omissions together with all related acts or omissions in the furnishing of such services to any one person shall be considered one medical incident;
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> **"professional services"** means the furnishing of professional healthcare services including the furnishing of food, beverages, medications or appliances in connection therewith, post mortem handling or examination of human bodies, services as a member of a formal accreditation or standards review board or committee including insured persons charged with executing the directives of such Board or Committee; however, this insurance does not apply to utilization review services performed for others[.]

Generally, where a policy of insurance contains a definition of any word or phrase, that definition is controlling. McDonald, 10-1873 at p. 6, 70 So. 3d at 1090. However, in the instant case, the policy definition of "professional services" does not truly define that term but rather, clarifies that the policy provides coverage for "professional *healthcare* services." Accordingly, in order to determine the meaning of "professional services" as that term is used in LAMMICO's policy we must look to the jurisprudence for guidance.

"Professional services," in its usual connotation, means services performed by one in the ordinary course of the practice of his profession, on behalf of another, pursuant to some agreement, express or implied, and for which it could reasonably be expected some compensation would be due. Aker v. Sabatier, 200 So. 2d 94, 97 (La. App. 1st Cir.), writs denied, 251 La. 48, 49, 202 So. 2d 657, 658 (La. 1967). In determining whether a particular act is professional in nature, a court should examine the character of the act itself, rather than the title or character of the party performing the act. American Casualty Company v. Hartford Insurance Company, 479 So. 2d 577, 579 (La. App. 1st Cir. 1985). Factors that should be considered are whether the act involved the exercise of professional judgment or required the exercise of a particular skill or discretion acquired by special training, or whether the act could have been done by an unskilled or untrained person. North American Treatment Systems, Inc. v. Scottsdale Insurance Company, 05-0081, p. 27 (La. App. 1st Cir. 8/23/06), 943 So. 2d 429, 447, writs denied, 06-2918, 06-2803 (La. 2/16/07), 949 So. 2d 423, 424.

In his deposition testimony, Dr. Periou stated that while on a smoke break outside Slidell Memorial Hospital, he and Ms. Buelle engaged in a conversation wherein Ms. Buelle indicated to him that she had been having pain in her lower back. According to Dr. Periou, he asked Ms. Buelle a series of questions that he generally asks of people when he thinks they may have SI joint dysfunction. Dr. Periou then demonstrated some exercises while seated next to Ms. Buelle on a bench. Dr. Periou stated that he asked Ms. Buelle to stand and turn around so he could perform the Fortin sign, which is a test where you press on the SI area to duplicate the pain. According to Dr. Periou, he put his left hand on her right shoulder and told Ms. Buelle that he was going to put his hand on her hip, and the he pressed on her SI joint.

Dr. Periou stated that he is an anesthesiologist, as well as a respiratory therapist and a registered nurse. While employed at Slidell Memorial he "put people to sleep" and performed epidurals for labor and delivery. However, while employed at LaPlace Hospital and St. Tammany Hospital, he did steroid epidurals and SI joint injections and was sent pain patients for evaluation. Additionally, when working in Mamou, Louisiana, Dr. Periou had a pain practice. He noticed that the steroid injections did not always work, and he was looking for something else that might help people rather than sticking them with needles and giving them drugs. Therefore, he started extensively reading articles and books on joint and bone manipulation, and he incorporated manipulations and exercises into his practice. According to Dr. Periou, the Fortin test that he performed on Ms. Buelle was part of his discipline and was self-taught, and he had performed the same test when indicated with other patients when they came in for epidural injections. Further, though Dr. Periou admitted that he did not charge nor did Ms. Buelle pay him for his service, this service was the same type of service he provided to other patients, whom he did bill.

Ms. Buelle's deposition describes a different course of events. According to Ms. Buelle, she did not tell Dr. Periou that she was experiencing back pain but rather, Dr. Periou just started talking about the SI joint and describing SI joint pain, and started demonstrating maneuvers while sitting next to her. Thereafter, Dr. Periou asked her to stand, and she complied, assuming that he was going to tell her what to do in a standing position. Dr. Periou then grabbed her shoulder and pressed on her back. According to Ms. Buelle, she had no idea that he was going to walk up behind her and do what he did.

From our review of the record, we find that Dr. Periou's testimony, when read in its entirety, indicates that he may not have formal training in SI joint manipulation, but that he did, in conjunction with his practice as an anesthesiologist, read extensively on joint and bone manipulation to find alternatives to treat patients who were experiencing back pain. Dr. Periou then applied this acquired knowledge to his practice, performing the Fortin test on patients when indicated when they came in for epidural injections. Further, though Dr. Periou did not expect Ms. Buelle to pay him for his service, his testimony indicates that this type of activity is one for which he could expect to be paid from anyone else, and indeed, had been paid or had billed patients for such activity in the past. Finally, the issue of whether Ms. Buelle and Dr. Periou agreed to the performance of the service is not, as the trial court states, uncontested. Rather, the deposition testimony contained in the record, and detailed above, indicates two opposing views as to whether Ms. Buelle agreed to allow Dr. Periou to perform the SI joint manipulation. A trial court cannot make credibility determinations or weigh conflicting evidence in deciding a motion for summary judgment. Russell v. Eye Associates of Northeast Louisiana, 46,525, p. 5 (La. App. 2nd Cir. 9/21/11), 74 So. 3d 230, 234. Accordingly, based on our *de novo* review, we find that the trial court erred in granting summary judgment in favor of LAMMICO.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court granting summary judgment in favor of LAMMICO and dismissing all claims against it with prejudice and remand this matter to the trial court for further proceedings. All costs of this appeal are assessed against LAMMICO.

REVERSED AND REMANDED.

ROBIN BUELLE AND KENNETH S. SMITH

VERSUS

THOMAS PERIOU, M.D. AND FIREMAN'S FUND INSURANCE COMPANY

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KUHN, J., dissenting.

I disagree with the majority's conclusion. In interpreting a policy, the courts are bound to take a logical approach. Without superimposing the "definitions" on the terms set forth in the coverage section of the policy, it is evident from the undisputed facts that the actions of Dr. Periou vis-à-vis Ms. Buelle did not constitute a "medical incident" as the manipulation was not done in the context of a doctor-patient relationship. Ms. Buelle does not claim to have paid Dr. Periou for the adjustment; and Dr. Periou's unequivocal testimony was that he had no professional training to perform the manipulation. Consistent with this court's conclusion that the actions of Dr. Periou are not covered by the Medical Malpractice Act, see ***Buelle v. Periou,*** 04-2733 (La. App. 12/22/05), 927 So.2d 1126, and mindful that Dr. Periou's homeowner's insurer, Fireman's Fund Insurance Company, remains a defendant who provides coverage in this matter, I believe that under the undisputed facts of this case and an unstrained interpretation of the plain language of LAMMICO's policy, which is after all entitled **Physicians' … Professional Liability** Insurance Policy (emphasis added), there is no coverage. Accordingly, I would affirm the trial court's dismissal of the claims of Ms. Buelle and her husband against LAMMICO.

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WHIPPLE, J., concurring.

Without regard to whether a sufficient showing was made to establish that a medical review panel was (or may be) required, **the LAMMICO policy at issue provides**, on behalf of the insured, coverage for "[a]ll sums which the **insured** shall become legally obligated to pay as damages because of injury . . . from a **medical incident** resulting from a negligent act, error, or omission in the rendering of **professional services**." Further, by its terms, the LAMMICO policy states that "'**medical incident**' means any act or omission in the furnishing of professional services to **any person** by the insured." Thus, given the information now before us in the record, and considering the broad language of the policy, I concur in the result reached by the majority.