NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0811

TOMMIE WAYNE COCHRAN, TAMSY SHIRAH COCHRAN AND MARVIN C. COCHRAN, ON BEHALF OF THE MINOR CHILD, MAGAN ROSE COCHRAN

VERSUS

SAFEWAY INSURANCE COMPANY OF LOUISIANA

Judgment Rendered: FEB 14 2007

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On Appeal from the 21st Judicial District Court
In and For the Parish of Tanigipahoa
Trial Court No. 2005-0002401, Division "A"

Honorable Wayne Ray Chutz, Judge Presiding

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Karen Crosby Fulda Ponchatoula, LA	Counsel for Plaintiffs/Appellants Tommie Wayne Cochran, Tamsy S. Cochran, and Marvin C. Cochran, On Behalf of the Minor Child, Magan Rose Cochran
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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from a summary judgment on an automobile insurance policy exclusion, which was granted in favor of the insurer, excluding coverage for the owner/policyholder of the vehicle. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In August of 2004, Patricia Rick was killed in an automobile accident while riding as a passenger in a vehicle owned and driven by Mark S. Crayton. Mr. Crayton was also killed in the accident.

Safeway Insurance Company of Louisiana (Safeway) had issued a policy of automobile insurance covering the vehicle in question; however, the policy excluded coverage for Mark S. Crayton as a driver of the vehicle. Plaintiffs made Safeway a defendant in the instant lawsuit, seeking damages resulting from the death of Ms. Rick.

In response, Safeway filed a motion for summary judgment urging the policy exclusion, which was granted by the trial court. A judgment dismissing plaintiffs' claims was signed by the trial court on January 26, 2006. Plaintiffs have appealed, asserting, essentially, that the trial court erred in granting summary judgment in favor of Safeway and in failing to find that: the policy exclusion as to Mark S. Crayton was improper, the policy provisions gave adequate "notice that an excluded driver can be the same individual as the named insured," and that the policy provisions were "ambiguous, unclear and confusing."

DISCUSSION

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 mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Allen v. State ex rel. Ernest N. Morial--New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Schroeder v. Board of Supervisors of Louisiana State University**, 591 So.2d 342, 345 (La. 1991). 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 fact. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Id.** at 765-6.

Pursuant to LSA-C.C.P. art. 966(C)(2), the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of

proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. Moreover, as consistently noted in LSA-C.C.P. art. 967, the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence that will establish that material facts are still at issue. **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. See **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592; **Cressionnie v. Intrepid, Inc.**, 2003-1714 at p. 3, 879 So.2d at 738-9.

Our review of this case reveals that there are no genuine issues of material fact in this case. At the time of the accident in question, Safeway had issued Mark Crayton a policy of automobile insurance covering his vehicle(s), but which excluded coverage of him as a driver. The named driver under the policy was Loretta Holcombe. The address listed on the policy for both Mr. Crayton and Ms. Holcombe was 39210 Arnold Road, Ponchatoula, Louisiana. Ms. Holcombe stated in an affidavit: that she signed documentation with Safeway designating her as the insured driver of Mr. Crayton's vehicle(s), that the Arnold Road property was owned exclusively by her, that Mr. Crayton never lived with her on Arnold Road,

and that Mr. Crayton lived on Verneuil Road.[1] Also, certified copies of Tangipahoa Parish conveyance records were filed into the record showing Ms. Holcombe to be the owner of the Arnold Road property, and showing Mr. Crayton to have owned immovable property elsewhere in the parish.

The endorsement page of the Safeway policy indicated the policy was issued to:

> MARK CRAYTON
>
> 39210 ARNOLD RD
> PONCHATOULA, LA 70454

"MARK CRAYTON" was listed under the heading "**Exclusions.**" "LORETTA HOLCOMBE" was listed under the heading "**Driver(s).**" A separate page, entitled "**EXCLUSION OF NAMED DRIVER(S),**" was signed by Mr. Crayton on August 2, 2004, and stated that the document was an endorsement forming a part of the policy issued to Mark Crayton, and specified the following:

> Pursuant to Louisiana Revised Statute 32:900(L) it is agreed that the insurance afforded by this policy shall not apply with respect to loss, damage, or injury to person(s) or property while the excluded driver(s),

Full Name	Date of Birth
[Mark Crayton	10-29-59[2]]

> who is a member of the same household as the named insured at the time that this exclusion is executed, is operating the automobile(s) described in the policy or any other motor vehicle(s) to which the terms and conditions of the policy apply. It is understood that this exclusion also applies to all renewal, reinstatement, substitute and amended policies issued

[1] A certified copy of the insurance policy was introduced into evidence, and the affidavit of Ms. Holcombe was filed into the record.

[2] In the original document, the name of Mr. Crayton and his date of birth were handwritten.

to the named insured. It is understood that for the purpose of this exclusion adding a vehicle(s), driver(s) and/or coverage to this policy shall be considered an amendment to this policy and does not constitute a new policy. It is further agreed that this exclusion applies to **all** coverages afforded by this policy unless otherwise prohibited by any applicable statute.

This exclusory endorsement was signed by Mr. Crayton.

The exclusion from coverage of a policy owner is authorized by LSA-R.S. 32:900, which provides in pertinent part:

> A. A "Motor Vehicle Liability Policy" as said term is used in this Chapter, shall mean an owner's or an operator's policy of liability insurance, certified as provided in R.S. 32:898 or 32:899 as proof of financial responsibility, and issued except as otherwise provided in R.S. 32:899, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.
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> B. Such owner's policy of liability insurance:
> (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and
> (2) Shall insure the person named therein and any other person, as insured, ...
>
> * * *
>
> L. (1) Notwithstanding the provisions of Paragraph (B)(2) of this Section, an insurer and an insured may by written agreement exclude from coverage the named insured and the spouse of the named insured. The insurer and an insured may also exclude from coverage any other named person who is a resident of the same household as the named insured at the time that the written agreement is entered into, and the exclusion shall be effective, regardless of whether the excluded person continues to remain a resident of the same household subsequent to the execution of the written agreement. It shall not be necessary for the person being excluded from coverage to execute or be a party to the written agreement. For the purposes of this Subsection, the term "named insured" means the applicant for the policy of insurance issued by the insurer.
> (2) The form signed by the insured or his legal representative which excludes a named person from coverage shall remain valid for the life of the policy and shall not require the completion of a new driver exclusion form when a renewal, reinstatement, substitute, or amended policy is issued to the same named insured by the same insurer or any of its affiliates. Any changes to an existing policy, including but not limited to the addition of vehicles or insured drivers to said policy, regardless of whether these changes create new coverage, do

not create a new policy and do not require the completion of a new agreement excluding a named person from coverage. For the purpose of this Subsection, a new policy shall mean an original contract of insurance which an insured enters into through the completion of an application on the form required by the insurer.

Plaintiffs/appellants contend in brief to this court that the policy exclusion of Mr. Crayton as a covered driver under the Safeway policy issued to him was invalid for several reasons: Mr. Crayton did not live at the address stated in the policy and was not a member of the same household as Ms. Holcombe; Ms. Holcombe, the only covered driver, did not sign the policy endorsement(s); and, the exclusion form was ambiguous and confusing in that it did not "properly give notice that an excluded driver can be the same individual as the named insured." Plaintiffs/appellants further contend that there must exist an actual person who is insured to operate the insured vehicle, asserting that if the exclusion of Mr. Crayton is found to be valid, then "there was no actual person who was insured" to operate the covered vehicle.

Evidently, plaintiffs/appellants interpret the Safeway policy as extending coverage to someone other than Mr. Crayton only if that person was a member of Mr. Crayton's household. The following pertinent policy provisions reflect that such is not the case:

> **Persons Insured**. The following are insureds under Part I:
> (a) With respect to the owned automobile,
> (1) the named insured,
> (2) any other person using such automobile to whom the named insured has given permission, provided the use is within the scope of such permission;
>
> * * *
>
> **Definitions**. Under Part I:
> "**named insured**" means the individual named in the declarations and also includes his spouse, while living with him;

Paragraph (a) contemplates that Mr. Crayton, as the insured named on the declarations page (though excluded as a covered driver by the policy endorsement attached to the policy), could authorize "any other person" to drive his vehicle(s) regardless of that person's residence. A residency requirement is applied by the policy provisions only to activate automatic coverage for a named insured's spouse "while living with him." Plaintiffs/appellants cite no specific policy provision, and we find none, which requires "any other person," authorized by Mr. Crayton to drive his car, to either be a member of his household or to sign his application for insurance coverage and/or any endorsements thereto.

Further, any misrepresentations made by Mr. Crayton to Safeway are governed by the following policy provisions:

CONDITIONS
(Unless otherwise noted, conditions apply to all Parts.)

* * *

> **15. Misrepresentation.** This policy shall be voidable, at our option, if the named insured or any other insured has, with an intent to deceive, concealed or misrepresented any material fact concerning any matter regarding completion of the application.

Thus, Safeway had an adequate remedy vis-à-vis its insured with respect to misrepresentation of material facts. Despite plaintiffs'/appellants' assertion that insurance companies should be obligated to more thoroughly check for accuracy in the factual information provided by its insureds, no affirmative statutory or jurisprudential authority to support this contention has been cited. The imposition of such a duty is a matter within the province of the legislature.

Nor can we find merit in plaintiffs'/appellants' assertion that the Safeway exclusion form was ambiguous and confusing for failing to "properly" give notice that an excluded driver can be the same individual as

the named insured. In conjunction with this argument, plaintiffs/appellants cite the language of the exclusory endorsement where "excluded driver(s)" are to be listed, followed by the language: "who is a member of the same household as the named insured..." (quoted in full hereinabove). Plaintiffs/appellants contend that listing the "named insured" as an "excluded driver" while stating, "who is a member of the same household as the named insured," constitutes wording that is ambiguous and confusing. We do not agree. The exclusory endorsement clearly states that the policy is issued to "Mark Crayton" and that "Mark Crayton" is excluded as a driver under the policy. We find this language to be clear and unambiguous. Moreover, such an agreement is authorized by LSA-R.S. 32:900(L).[3]

There are many foreseeable instances in which a person may need to purchase a vehicle for the use of others, but cannot for some reason of health or law obtain a driver's license or otherwise operate the vehicle. The person should not be required to pay premiums to cover his/her driving when he/she cannot drive, nor should the insurance company be forced to cover an illegal or incapable driver. It is unfortunate that in this case the owner of the vehicle and named insured allegedly violated the law by driving without insurance covering him and then became involved in an accident. However, his conduct should not be used to infringe on the rights of other responsible persons whose circumstances may require them to exclude themselves from insurance coverage, or the right of insurers to exclude illegal drivers. See **Smyre v. Progressive Security Insurance Company**, 98-518, p. 7 (La. App. 5 Cir. 12/16/98), 726 So.2d 984, 986-87, writ denied, 99-0139 (La. 6/4/99), 745 So.2d 14 (abrogated by **Williams v. U.S. Agencies Casualty**

[3] Plaintiffs/appellants have made no argument either before the trial court, which appears in the appellate record, or in brief to this court that the provisions of LSA-R.S. 32:900(L) are against public policy or otherwise invalid or unenforceable.

Insurance Company, 2000-1693 (La. 2/21/01), 779 So.2d 729, in turn superseded in statute by 2001 La. Acts, No. 368, § 1, amending LSA-R.S. 32:900(L),[4] as recognized by **Smith v. Williams**, 2003-0433 (La. App. 1 Cir. 5/14/04), 879 So.2d 233, and **State Farm Mutual Automobile Insurance Company v. Noyes**, 2002-1876 (La. App. 1 Cir. 2/23/04), 872 So.2d 1133. While we commiserate with plaintiffs/appellants in their exasperation that Mr. Crayton may have procured motor vehicle insurance by supplying Safeway with inaccurate and/or false information, Safeway's remedy for such actions is provided by policy provisions that authorize nullification of such a policy. Moreover, this State's legislature has enacted statutes to penalize those who drive without proper insurance for the sake of public safety. See LSA-R.S. 32:861 et seq.

Act 368, which amended LSA-R.S. 32:900(L) and explicitly authorized an automobile insurer and its insured to agree to exclude from coverage the named insured as a driver, became effective on August 15, 2001. Mr. Crayton and Safeway agreed to the exclusory endorsement at issue herein on August 2, 2004, after the effective date of the 2001 legislative amendment.

It is well-settled that an insurance policy is a contract and, as with all other contracts, it is the law between the parties. It is equally well-settled that in the absence of a conflict with law or public policy, insurers have the right to limit their liability and to impose whatever conditions they please upon their obligations. In these circumstances, unambiguous provisions limiting liability must be given effect. **Stamper v. Liberty Mutual**

[4] Section 2 of Act 368 stated, "It is the intent of this Act to legislatively overrule the decision in the case of **Williams v. US Agencies Casualty Insurance Company**, No. 00-C-1693 (La. February 21, 2001)."

Insurance Company, 2003-2764, p. 3 (La. App. 1 Cir. 10/29/04), 897 So.2d 142, 143.

Plaintiffs/appellants have presented this court with no persuasive argument in support of invalidating the contractual agreement entered into between Mr. Crayton and Safeway; therefore, we cannot say the trial court erred in granting summary judgment in favor of Safeway.

CONCLUSION

For the reasons assigned herein, the judgment of the trial court in favor of Safeway Insurance Company of Louisiana, dismissing plaintiffs' suit is affirmed; all costs of this appeal are to be borne by plaintiffs/appellants.

AFFIRMED.