**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0474

WILLIAM M. MAGEE, A PROFESSIONAL LAW CORPORATION,
d/b/a MAGEE & DEVEREUX

VERSUS

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD

Judgment Rendered: February 8, 2008

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2005-15439

Honorable Martin E. Coady, Judge

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

WELCH, J.

The appellant/plaintiff, William M. Magee, A Professional Corporation d/b/a Magee & Devereux ("Magee"), appeals the judgment of the district court denying its motion for partial summary judgment and the granting of the defendant's/appellee's, National Fire Insurance Company of Hartford ("National Fire"), cross-motion for summary judgment. We affirm.

**FACTS AND PROCEDURAL BACKGROUND**

The sole issue presented in this matter concerns the interpretation of the "Civil Authority" coverage provision in the parties' insurance contract. The following material facts are not in dispute. As a result of Hurricane Katrina making landfall in Louisiana, the St. Tammany Parish Government ordered evacuation of the parish by executive order (the "Evacuation Order") on August 29, 2005. The record contains a copy of the August 30, 2005 "St. Tammany Parish Emergency Operations Center Parish Status Update," including St. Tammany Parish President Kevin Davis's statement that "[a] 24/7 curfew is in place. Stay in your homes. It is not safe to be on the streets. Violators are subject to arrest. If you evacuated, DO NOT RETURN. St. Tammany Parish is closed. Do not attempt to cross St. Tammany Parish to reach other areas."

On September 8, 2005, the St. Tammany Parish Government Emergency Operations Center issued an Executive Order ordering that: "there remains a Parish-wide state of emergency in effect until further notice;" "the people of [the] Parish of St. Tammany may return to their respective homes and businesses effective 8:00 am on Friday, September 9, 2005;" and "all persons still within the jurisdictional boundaries of this Parish remain subject to a mandatory curfew in effect from 9:00 pm until 7:00 am each day until further notice, unless on official Parish business."

Also undisputed is that National Fire issued a Business Account Package

Insurance Policy ("the Policy") to Magee that was in effect from June 20, 2005 through June 20, 2006. Relevant to the present matter is the "Additional Coverages" section of the Policy and its subsections that obligate National Fire to make certain payments to its insured when the insured is not able to conduct its business, typically referred to as "business interruption coverage."

In general, the Policy's "Additional Coverages" section provides business interruption coverage for "Business Income," "Extra Expense," and "Extended Business Income" when the insured's inability to conduct business is "caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss." The "Additional Coverages" portion of the Policy also contains a provision for "Civil Authority" coverage. It provides the terms for business interruption coverage when there is no physical loss or damage at the described premises. The "Civil Authority" provision reads:

> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property other than at the described premises, caused by or resulting from a Covered Cause of Loss.[1]
>
> This coverage will apply for a period of up to 30 consecutive days from the date of that action of civil authority.

(Footnote added.)

On September 20, 2005, relying on the "Civil Authority" provision of the Policy, Magee filed a claim with National Fire for business income losses the law firm sustained as a result of the Evacuation Order. Contending that, after the Evacuation Order was issued, it sustained business income losses for more than 30 consecutive days, Magee submitted a claim for the Policy's maximum period of Civil Authority coverage, 30 days.

In response, National Fire informed Magee that because St. Tammany lifted

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[1] Additional Coverages, Business Income, subsection (2)(a)and (b) provide the method to determine the Business Income payment, and Additional Coverages, Extra Expense subsections (1), (2) and (3) provide the method to determine the Extra Expense payment.

the Evacuation Order and allowed re-entry on September 9th, Civil Authority coverage would start on August 29, 2005, and end on September 9, 2005. On December 15, 2005, National Fire tendered payment to Magee for the business income losses it determined Magee sustained from August 29, 2005 through September 9, 2005, and denied Magee's claim for Civil Authority coverage for the business losses Magee sustained after the Evacuation Order was lifted.[2]

On December 28, 2005, Magee filed a "Petition for Damages" and subsequently a "Motion for Partial Summary Judgment," seeking a legal determination that the Policy's business income losses coverage pursuant to the Civil Authority provisions does not automatically terminate when the civil authority allows access to the premises. National Fire responded with a "Cross-Motion for Summary Judgment and Opposition to Magee's Motion for Summary Judgment," wherein it contended that the Civil Authority coverage exits only during the period that the Evacuation Order was in place.[3]

On August 14, 2007, the district court signed a judgment denying Magee's motion for partial summary judgment and granting National Fire's cross-motion for summary judgment. In its oral reasons for judgment, the trial court determined that "the provision provides coverage for the business interruption losses during the 12-day period that the Magee firm was prohibited from going to do their business. And that coverage would have lasted up to 30 days." Magee now appeals the judgment.

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[2] There is some confusion, in the record, as to the number of days covered by National Fire's tendered payment. As this appeal only concerns the interpretation of the Civil Authority provision and not the accuracy of the amount National Fire tendered, such confusion does not prevent the court from addressing the interpretation issue raised in this appeal.

[3] Louisiana Code of Civil Procedure article 966(A)(1) clearly states that a plaintiff may move for summary judgment at any time after the answer is filed. The record does not show whether National Fire filed an answer. Although National Fire did not raise this issue, we note that National Fire waived any objection to this defect by filing an opposition to Magee's motion for partial summary judgment. Thus, the procedural defect is not fatal to the proceeding. See **American Bank & Trust Company v. International Development Corp.**, 506 So.2d 1234, 1236 (La. App. 1st Cir. 1987).

## LAW AND ANALYSIS

### I. Summary Judgment Law and Standard of Review

Summary judgment procedure is favored in Louisiana. **Campbell v. Markel American Ins. Co.**, 2000-1448, p. 4 (La. App. 1st Cir. 9/21/01), 822 So.2d 617, 620, writ denied, 2001-2813(La. 1/4/02), 805 So.2d 204. A motion for summary judgment shall be granted when the mover shows 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). When a contract is not ambiguous or does not lead to absurd consequences, it will be enforced as written and its interpretation is a question of law for a court to decide. **Campbell**, 2000-1448 at p. 4, 822 So.2d at 620. Thus, when the parties agree that a valid contract binds them and that the material facts involved in the dispute are not contested, the contract's application to a case is a matter of law and summary judgment is appropriate. **Campbell**, 2000-1448 at pp. 4-5, 822 So.2d at 620. When addressing legal issues, a reviewing court gives no special weight to the findings of the trial court. **Campbell**, 2000-1448 at p. 5, 822 So.2d at 620. It conducts a *de novo* review of questions of law and renders a judgment on the record. *Id.*

### II. Legal Standards Regarding Contact Interpretation

An insurance policy is an aleatory, nominate contract subject to the general rules of contract interpretation as set forth in our civil code. **Succession of Fannaly v. Lafayette Ins. Co.**, 2001-1144, 2001-1343, 2001-1355, 2001-1360, p. 3 (La. 1/15/02), 805 So.2d 1134, 1137; see La. C.C. arts. 1912, 1914-15. The extent of coverage under an insurance contract is dependent on the common intent of the insured and insurer. **Succession of Fannaly**, 2001-1114 at p. 3, 805 So.2d at 1137. Thus, when interpreting an insurance contract, courts must attempt to discern the common intent of the insured and insurer. *Id.;* see La. C.C. art. 2045.

The judiciary's role interpreting insurance contracts is to ascertain the

common intent of the parties to the contract. **Robinson Bros., Inc. v. Carter**, 2005-2452, p. 5 (La. App. 1st Cir. 2/14/07), 962 So.2d 446, 449. In ascertaining the common intent of the insured and insurer, courts begin their analysis with a review of the words in the insurance contract. **Succession of Fannaly**, 2001-1144 at p. 3, 805 So.2d at 1137. Words in an insurance contract must be ascribed their generally prevailing meaning, unless the words have acquired a technical meaning, in which case the words must be ascribed their technical meaning. *Id.*; see La. C.C. art. 2047. Moreover, an insurance contract is construed as a whole and each provision in the contract must be interpreted in light of the other provisions. One provision of the contract should not be construed separately at the expense of disregarding other provisions. **Succession of Fannaly**, 2001-1144 at pp. 3-4, 805 So.2d at 1137; see also La. C.C. art. 2050.

When the words of an insurance contract are clear and explicit and lead to no absurd consequences, courts must enforce the contract as written. **Succession of Fannaly**, 2001-1144 at p. 4, 805 So.2d at 1137; see La. C.C. art. 2046. Courts lack authority to alter the terms of an insurance contract under the guise of contractual interpretation when the contract's provisions are couched in unambiguous terms. **Succession of Fannaly**, 2001-1144 at p. 4, 805 So.2d at 1138. The rules of contractual interpretation do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists. *Id.* 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. **Campbell**, 2000-1448 at p. 9, 822 So.2d at 623. Absent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and to enforce reasonable conditions upon the policy obligations they contractually assume. *Id.*

However, if an ambiguity remains after applying the general rules of contractual interpretation to an insurance contract, the ambiguous contractual provision is construed against the insurer who furnished the contract's text and in favor of the insured. **Succession of Fannaly**, 2001-1144 at p. 4, 805 So.2d at 1138; see La. C.C. art. 2056. Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. **Robinson Bros., Inc.**, 2005-2452 at pp. 5-6, 962 So.2d at 449. That strict construction principle applies only if the ambiguous policy provision is susceptible to two or more reasonable interpretations; for the rule of strict construction to apply, the insurance policy must not be only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable. *Id.*

## III. Application of Legal Standards and Relevant Jurisprudence to Present Case

Magee claims that the Civil Authority provision is ambiguous as to when coverage terminates and urges that the Policy can be interpreted to provide Civil Authority coverage after the civil authority allows access to the premises. Specifically, Magee argues that while the Policy provides a maximum period for Civil Authority coverage up to "30 consecutive days," that clause does not state that coverage terminates when the civil authority rescinds or terminates its order that prohibited access. Accordingly, Magee contends that National Fire's failure to include a clause specifically terminating the Civil Authority coverage when the Civil Authority rescinds or terminates its order renders that term of the Policy ambiguous and susceptible to an interpretation that provides for coverage after assess is no longer prohibited. We disagree.

Using the general rules of contract interpretation, we begin our *de novo* review by analyzing the words in the Policy's Civil Authority coverage provisions.

See **Succession of Fannaly**, 2001-1144 at p. 3, 805 So.2d at 1137. At the outset, we note that the Policy's Civil Authority coverage section contains only two paragraphs, with each paragraph comprised of just one sentence. The second paragraph contains the following language, "This coverage will apply for a period of up to 30 consecutive days from the date of that action of civil authority." This provision establishes the maximum period that coverage applies. The plain meaning of the words "up to" clearly establish the parties' intent that Civil Authority coverage can terminate prior to 30 days. However, on its own, this language does not establish the parties' intent as to when coverage would no longer apply prior to the end of the maximum coverage period. While we cannot determine the parties' common intent by applying this rule, we do not immediately proceed to apply the rule of strict construction. Next, we must conclude if the parties' common intent can be determined by applying other general rules of contract interpretation.

Accordingly, we continue our analysis by construing the insurance contract as a whole and interpreting each provision in the contract in light of the other provisions. We are mindful that this rule provides that one provision of the contract should not be construed separately at the expense of disregarding other provisions. See **Succession of Fannaly**, 2001-1144 at pp. 3-4, 805 So.2d at 1137; see also La. C.C. art. 2050.

In examining the Civil Authority coverage provision in this manner, we find that the clauses in the first paragraph establish what losses National Fire "will pay for" and the elements and required relationship between the elements in order for the insured's losses to be covered under Civil Authority coverage. Pertinent to Magee's claim, the first clause establishes that Magee must show he sustained an "actual loss of Business Income." The next clause provides three additional elements: "action of civil authority that prohibits access to the described

premises," "due to direct physical loss of or damage to property other than at the described premises," and "caused by or resulting from a Covered Cause of Loss," that must cause the "actual loss of Business Income." After construing the terms within this provision, we conclude that the parties intended that the insurer would cover the insured's losses, under the Policy's Civil Authority coverage, only when the losses were caused by the remaining three elements. We further find that this provision shows the parties intended Civil Authority coverage to cover the insured's losses only during the period that the insured can show all four elements. Once Magee can no longer show an "action of civil authority that prohibits access to the described premises," he can no longer establish all of the elements for coverage. Thus, Civil Authority coverage no longer covers the losses he continues to sustain.

Moreover, an analysis of this provision in light of the Policy's other Additional Coverages provisions supports our conclusion. Under "Additional Coverages," the Policy provides for "Extended Business Income" coverage that obligates National Fire to pay the insured for loss of business income caused by damage/loss to the described premises after the property is "actually repaired, rebuilt or replaced" and "'operations' are resumed." In addition, "Extended Business Income" coverage specifically provides that payments will "[end] on the earlier of: (a) the date you could restore your 'operations' with reasonable speed, to the condition that would have existed if no direct physical loss or damage occurred; or (b) 30 consecutive days after the date determined in (1) above." We find it significant that National Fire specifically included a contractual provision that provides the insured payment for Business Income losses occurring after operations resume, but did not include a "Extended Business Interruption," or like provision, to extend Civil Authority coverage after access to the insured's premises resumes. We find that the specific inclusion of the "Extended Business Income"

coverage for business interruptions occurring on the insured's premises and the absence of a similar provision for Civil Authority coverage supports our conclusion.

We also find Magee unreasonably focuses on the "up to 30 consecutive days" clause in the second paragraph and the "actual loss of Business Income" element in the first paragraph and disregards the provision requiring the losses to be "caused by" an "action of civil authority that prohibits access to the described premises." We find Magee strains to enlarge coverage under the Civil Authority provisions. As such, Magee's interpretation conflicts with the general rule that 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. See **Campbell**, 2000-1448 at p. 9, 822 So.2d at 623. While we are sympathetic to devastating effects Hurricane Katrina had on business throughout our parishes, we are confined by the rule that contractual interpretation does not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists. **Succession of Fannaly**, 2001-1144 at p. 4, 805 So.2d at 1138. As we do not find the provision in question ambiguous, we find no merit in Magee's claim that the trial court erred in not applying the rule of strict construction to this matter.

## CONCLUSION

The only issue presented to the district court on Magee's motion for partial summary judgment and National Fire's cross-motion for summary judgment and to this court on Magee's appeal is limited to the legal question of whether the Policy provides Civil Authority coverage after a civil authority no longer prohibits access to the described premises. [4]

[4] The court cautions that it is not called upon to interpret and we expresses no opinion as to what may constitute an "action," "civil authority," "prohibits," or "access" under Civil Authority.

For the foregoing reasons, we find that the trial court did not legally err in determining that the Civil Authority coverage provisions of Magee's insurance contract limits Civil Authority coverage to the period of time that an action of a civil authority prohibits access to the described premises. Accordingly, the judgment appealed from is affirmed. All costs of this appeal are assessed to the appellant, William M. Magee, A Professional Corporation d/b/a Magee & Devereux.

**AFFIRMED.**