STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

24-212 c/w 24-429

AMALEETA O'NEAL, ET VIR

VERSUS

FOREMOST INSURANCE COMPANY, ET AL.

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APPEAL FROM THE
NINTH JUDICIAL DISTRICT COURT
PARISH OF RAPIDES, DOCKET NO. 254,445
HONORABLE MONIQUE F. RAULS, DISTRICT JUDGE

****

JONATHAN W. PERRY
JUDGE

****

Court composed of Shannon J. Gremillion, Van H. Kyzar, Jonathan W. Perry, Sharon Darville Wilson, and Clayton Davis, Judges.

Wilson, J., dissents and assigns reasons.

Kyzar, J., dissents for the reasons assigned by Judge Wilson.

REVERSED AND RENDERED.

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PERRY, Judge.

This case involves the interpretation of a real estate company's professional liability insurance contract and its bodily injury exclusion. For the following reasons, we reverse the trial court's judgment which found the exclusion inapplicable.

FACTS AND PROCEDURAL HISTORY

Amaleeta O'Neal ("Ms. O'Neal")[1] sued RLN Investments, LLC ("RLN") and its liability carrier, Foremost Insurance Company, Grand Rapids, Michigan ("Foremost") for bodily injuries Ms. O'Neal allegedly sustained when a tree fell from RLN's property. Ms. O'Neal alleges that on or about March 31, 2013, a tree from property RLN owned fell across the road in front of her vehicle, causing a collision between the fallen tree and the vehicle. As a result of the collision, Ms. O'Neal allegedly sustained bodily injuries to her cervical spine, the left knee and elbow, as well as aggravation of preexisting Crohn's disease and degenerative disc disease. Ms. O'Neal asserts that RLN and Foremost are liable for her damages because RLN owned the property and the tree, and it had actual or constructive knowledge of the defective condition of the tree but failed to remove it from the property.

After RLN answered Ms. O'Neal's petition, RLN filed a third party demand against Messina Realty, LLC ("Messina"), alleging that Messina was the manager for the property pursuant to a property management agreement and that Messina knew of "concerns" with the tree but "failed to ensure the necessary maintenance and/or notify RLN[.]" Later, RLN amended the third party demand adding claims

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[1] We note that Ms. O'Neal's husband, Jeffery O'Neal ("Mr. O'Neal"), was also a party plaintiff. Mr. O'Neal maintained a separate and distinct cause of action for damages resulting from the loss of service, society, and consortium of his wife. Because Mr. O'Neal's cause of action against Continental exists only by virtue of Ms. O'Neal's, we refer only to Ms. O'Neal in the discussion of the issues now before us.

against Don Van Cleef ("Van Cleef"), the real estate agent who acted for Messina as property manager, and against Continental Casualty Company ("Continental"), the professional liability insurer of Van Cleef and Messina. Subsequently, RLN again amended and supplemented its third party demand adding claims against Messina, Van Cleef, and Continental, contending that they were liable for any damage that may be assessed against RLN. Finally, Messina filed a third party demand against Continental, seeking a defense and/or insurance coverage for the claims brought against it in RLN's third party demand.

Foremost filed a motion for partial summary judgment, seeking the following pronouncements: (a) Continental issued policies of insurance to Messina and Van Cleef; (b) those policies provide coverage for property management services; (c) Messina and Van Cleef had a property management agreement with RLN in which they provided property management services; and (d) the policies issued by Continental to Messina and Van Cleef provide coverage for the loss claimed, up to the limits of the policy of $100,000 per claim, per insured, and a $300,000 aggregate limit.

Continental opposed Foremost's motion and moved for summary judgment, seeking a dismissal of the claims asserted by RLN, Messina, and Van Cleef against Continental based upon the following Bodily Injury Exclusion contained in Continental's policies:

> This insurance does not apply to any **Claim** alleging, arising from or related to:
>
> . . . .
>
> E. Bodily Injury
>
> bodily injury, sickness, disease, mental anguish, pain or suffering, emotional distress or death of any person.

The trial court denied Continental's motion for summary judgment and granted Foremost's motion for partial summary judgment. Continental then perfected an appeal of the trial court's judgment which granted Foremost's motion for partial summary judgment on the issue of coverage. Continental also filed a writ application with this court seeking review of the trial court's denial of its motion for summary judgment on the issue of coverage. Subsequently, this court granted Continental's writ application "for the limited purpose of ordering the consolidation of the writ application with the appeal currently lodged in this court in this same matter bearing this court's docket number CA 24-212." *O'Neal v. Foremost Ins. Co.*, 24-429 (La.App. 3 Cir. 9/18/24) (unpublished writ decision).

ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the Bodily Injury Exclusion in the Continental Policy did ***not*** apply to RLN's Third Party Claim Against Continental, Messina and Van Cleef, which arises from and/or is related to Plaintiff's bodily injury claims against RLN in the underlying case.

2. The trial court erred in finding that the Bodily Injury Exclusion in the Continental Policy did ***not*** apply to Messina's claim against Continental for coverage, which arises from and/or is related to Plaintiff's bodily injury claims against RLN in the underlying case.

3. The trial court erred in failing to apply the holding of the Louisiana Fourth Circuit Court of Appeal in *Haun v. Cusimano*, [Inc.], []11-1288 (La.App. 4 Cir. 2/29/12), 86 So.3d 84, which is factually similar with this case and interprets policy language ***identical*** to the exclusion in the present case, and therefore compels a finding that the Bodily Injury Exclusion contained in the Continental Policies does apply to preclude coverage for RLN's and Messina's claims.

STANDARD OF REVIEW

Appellate courts review motions for summary judgment using a de novo standard. *Planchard v. New Hotel Monteleone, LLC*, 21-347 (La. 12/10/21), 332 So.3d 623. An appellate court assesses whether summary judgment is appropriate utilizing the same standard as the trial court to determine "whether there is any

genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law." *Id*. at 625.

Initially, the burden of producing evidence at the motion hearing is "on the mover, who can ordinarily meet that burden by submitting affidavits or by pointing out the lack of factual support for an essential element in the opponent's case." *Schultz v. Guoth*, 10-343, p. 6 (La. 1/19/11), 57 So.3d 1002, 1006. Procedurally, therefore, the court's first task is to determine whether the moving party's motion, memorandum, affidavits, and supporting documents "are sufficient to resolve all material factual issues." *Smith v. Our Lady of the Lake Hosp., Inc*., 93-2512, p. 28 (La. 7/5/94), 639 So.2d 730, 752. "To satisfy this burden, the mover must meet a strict standard of showing that it is quite clear as to what is the truth and that there has been excluded any real doubt as to the existence of a genuine issue of material fact." *Indus. Sand & Abrasives, Inc. v. Louisville & Nashville R.R. Co*., 427 So.2d 1152, 1154 (La.1983).

In making this determination, the court must closely scrutinize the mover's supporting documents, while treating those submitted by the adverse party indulgently. *Smith*, 639 So.2d 730. Moreover, because the moving party bears the burden of proving the lack of a material issue of fact, we must view all inferences drawn from the underlying facts in a light most favorable to the adverse party. *Schroeder v. Bd. of Supervisors of La. State Univ*., 591 So.2d 342 (La.1991).

If we determine that the moving party has met this onerous burden, the burden then shifts to "the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law." La.Code Civ.P. art. 966(D)(1). "At that point, the party who bears the burden of persuasion at trial (usually the plaintiff) must come forth with evidence (affidavits or discovery responses) which demonstrates he or she

will be able to meet the burden at trial." *Babin v. Winn-Dixie La., Inc*., 00-78, p. 4 (La. 6/30/00), 764 So.2d 37, 39.

As our courts have long held, "summary judgment may be granted when reasonable minds must inevitably conclude that the mover is entitled to judgment on the facts before the court." *Smith*, 639 So.2d at 752. However, "[o]nce the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion." *Babin*, 764 So.2d at 40.

We further note that the summary judgment procedure is favored and, by law, shall be construed to accomplish the ends for which it was designed: "to secure the just, speedy, and inexpensive determination of every action[.]" La.Code Civ.P. art. 966(A)(2) With these principles in mind, we now turn to the motions for summary judgment at issue in this litigation.

CONTINENTAL'S ARGUMENT

It is Continental's contention that because its policies expressly exclude claims "alleging, arising from or related" to bodily injury, there is no coverage under the policies for the respective third party demands asserted by RLN and Messina against Continental. Both demands seek to impose liability on Continental for any damage that may be assessed against RLN or Messina for Ms. O'Neal's injuries in the underlying litigation. Continental contends that it is undisputed that Ms. O'Neal's claims in the underlying litigation arise out of or, at the very least, are related to bodily injuries.

In determining Continental's bodily injury exclusion was inapplicable to the present case, Continental contends that the trial court incorrectly interpreted and misapplied the plain and unambiguous language of the exclusion. Additionally, Continental contends that the trial court ignored jurisprudence such as *Haun*, 86

So.3d 84, that correctly interpreted the very same bodily injury exclusion at issue in the present case.

FOREMOST'S POSITION

Foremost contends that the question before this court is whether a bodily injury exclusion in Continental's policies of insurance applies when the only claim asserted is one for breach of contract arising from a property management agreement. Foremost concedes that the bodily injury exclusion would apply if Ms. O'Neal had filed suit against Messina, Van Cleef, and Continental. However, no such claim was asserted. Rather, the only claim at issue is the one filed by RLN which asserts that Messina and Van Cleef breached the terms of the property management agreement between Messina/Van Cleef and RLN, an action that is clearly covered under the terms of the Continental policy.

In further argument, Foremost asserts that Continental has failed to provide any factually similar jurisprudence to support its contention that because the claim between Ms. O'Neal and RLN arises from alleged bodily injury, the claim asserted by RLN against Messina and Van Cleef is excluded. On the contrary, Foremost argues that Continental's policies provide coverage for property management services and do not unambiguously exclude a breach of contract claim between a property owner and property manager when a bodily injury claim has been asserted against the property owner. Therefore, Foremost maintains that coverage should be afforded to Messina and Van Cleef because the bodily injury exclusion in the policies does not unambiguously apply to a breach of contract claim between a property owner and property manager.

APPLICABLE LAW AND JURISPRUDENCE

In the present case, no factual matters are disputed. "Rather, interpretation of an insurance policy is a question of law, and we have authority to construe the

provisions of the policy[.] *Finnie v. LeBlanc*, 03-457, p. 2 (La.App. 3 Cir. 10/1/03), 856 So.2d 208,211, *writ denied*, 03-3333 (La. 3/19/04), 869 So.2d 849.

Interpretation of Insurance Policies

"The starting point in analyzing insurance policies is the principle that an insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code." *Sensebe v. Canal Indem. Co*., 10-703, p. 6 (La. 1/28/11), 58 So.3d 441, 445. Moreover, in *Louisiana Insurance Guaranty Association v. Interstate Fire & Casualty Co*., 93-911 (La. 1/14/94), 630 So.2d 759, 763–64 (footnotes omitted), the court stated:

> The judicial responsibility in interpreting insurance contracts is to determine the parties' common intent. LSA–C.C. Art. 2045 (defining contractual interpretation as "the determination of the common intent of the parties"); *Garcia v. St. Bernard Parish School Bd*., 576 So.2d 975, 976 (La.1991) (citing W. McKenzie & H. Johnson, 15 *Civil Law Treatise, Insurance Law and Practice* § 4 (1986) ("*Civil Law Treatise*")).
>
> The parties' intent as reflected by the words in the policy determine[s] the extent of coverage. *Trinity Industries, Inc. v. Ins. Co. of North America*, 916 F.2d 267, 269 (5th Cir.1990) (citing *Pareti v. Sentry Indemnity Co*., 536 So.2d 417 (La.1988)). 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. LSA–C.C. Art. 2047; *Breland v. Schilling*, 550 So.2d 609, 610 (La.1989); *Capital Bank & Trust Co. v. Equitable Life Assur. Society of United States*, 542 So.2d 494, 497 (La.1989).
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> 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. *Lindsey v. Poole*, 579 So.2d 1145, 1147 (La.App. 2d Cir.), *writ denied*, 588 So.2d 100 (La.1991) (citing *Zurich Ins. Co. v. Bouler*, 198 So.2d 129 (La.App. 1st Cir.1967)); *Harvey v. Mr. Lynn's, Inc*., 416 So.2d 960, 962 (La.App. 2d Cir.1982) (collecting cases); *Jefferson v. Monumental General Ins. Co*., 577 So.2d 1184, 1187 (La.App. 2d Cir. 1991). 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. *Oceanonics, Inc. v. Petroleum Distributing Co*., 292 So.2d 190, 192 (La.1974); *Fruge v. First Continental Life and Accident Ins. Co*., 430 So.2d 1072, 1077 (La.App. 4th Cir.), *writ denied*, 438 So.2d 573

(La.1983) (collecting cases); *Hartford Acc. & Indem. Co. v. Joe Dean Contractors, Inc*., 584 So.2d 1226, 1229 (La.App. 2d Cir. 1991) (collecting cases).

Ambiguity in an insurance policy must be resolved by construing the policy as a whole; one policy provision is not to be construed separately at the expense of disregarding other policy provisions. LSA–C.C. Art. 2050; *Pareti v. Sentry Indemnity Co*., 536 So.2d 417, 420 (La.1988); *Benton Casing Service, Inc. v. Avemco Ins. Co*., 379 So.2d 225, 231 (La.1979) ("one section or its placement is not to be construed separately and at the expense of disregarding other sections or placements"); *Hartford*, 584 So.2d at 1229 ("[n]o single portion of an insurance contract should be construed independent of the whole, i.e., the policy is to be construed in its entirety").

If after applying the other general rules of construction an ambiguity remains, the ambiguous contractual provision is to be construed against the drafter, or, as originating in the insurance context, in favor of the insured. This rule of strict construction requires that ambiguous policy provisions be construed against the insurer who issued the policy and in favor of coverage to the insured. *Smith v. Matthews*, 611 So.2d 1377, 1379 (La.1993) (citing *Breland*, *supra*). Under this rule, "[e]quivocal provisions seeking to narrow the insurer's obligation are strictly construed against the insurer, since these are prepared by the insurer and the insured had no voice in the preparation." *Garcia v. St. Bernard Parish School Bd*., 576 So.2d 975, 976 (La.1991). LSA–C.C. Art. 2056 codifies this rule of strict construction, providing that "[i]n case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." LSA–C.C. Art. 2056; *Civil Law Treatise*, *supra* § 4; *see also* W. Freedman, 2 *Richards on the Law of Insurance* § 11:2[f] (6th Ed.1990) ("*Richards* ") (noting that the rule of strict construction is also labeled the doctrine of *contra proferentum*).

Determination of Coverage

In *Succession of Fannaly v. Lafayette Insurance Co*., 01-1355, p. 6 (La. 1/15/02), 805 So.2d 1134, 1139, the court stated:

> [I]n determining whether an insurance policy provides coverage, every provision of the policy must be read and interpreted, particularly the provisions relating to what is insured, usually contained in a section entitled "Insuring Agreement," the provisions relating to who is insured, usually contained in a section entitled "Who Is An Insured," and the provisions relating to what is excluded from coverage, usually contained in a section entitled "Exclusions." Only then can a determination of coverage be made. *See Magnon v. Collins,* 98–2822 (La.07/07/99), 739 So.2d 191.

Additionally, "[e]xclusionary provisions in insurance contracts are strictly construed against the insurer." *Calogero v. Safeway Ins. Co. of La.*, 99-1625, p. 6 (La. 1/19/00), 753 So.2d 170, 173. Furthermore, in *Steptore v. Masco Construction Co., Inc.*, 93-2064, p. 8 (La. 8/18/94), 643 So.2d 1213, 1218, the court also stated:

> The insurer's duty to defend suits brought against its insured is determined by the allegations of the plaintiff's petition, with the insurer being obligated to furnish a defense unless the petition unambiguously excludes coverage. *Meloy v. Conoco, Inc*., 504 So.2d 833, 838 (La.1987); *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 230 So.2d 253 (1969); *Leon Lowe & Sons, Inc. v. Great American Surplus Lines Ins. Co*., 572 So.2d 206 (La.App. 1st Cir.1990); *Benoit v. Fuselier*, 195 So.2d 679 (La.App. 3d Cir.1967). Accordingly, the insurer's obligation to defend suits against its insured is generally broader than its obligation to provide coverage for damage claims. *Czarniecki*, supra 230 So.2d at 259. Thus, if, assuming all of the allegations of the petition to be true, there would be both coverage under the policy and liability of the insured to the plaintiff, the insurer must defend the insured regardless of the outcome of the suit. Id. An insured's duty to defend arises whenever the pleadings against the insured disclose even a possibility of liability under the policy. *Meloy*, supra.

Finally, it is well established that the party who seeks coverage under a policy of insurance bears the burden of proving that its claim falls within the insuring agreement of the policy. *Tunstall v. Stierwald*, 01-1765 (La. 2/26/02), 809 So.2d 916; *Ewing v. Progressive Cas. Ins. Co*., 24-10 (La.App. 3 Cir. 6/5/24), 390 So.3d 473, *writ denied*, 24-858 (La. 10/23/24), 395 So.3d 255. Likewise, the insurer bears the burden of demonstrating any policy limits or exclusions. *Id*.

ANALYSIS

Foremost argues that Continental's policy of insurance covers property management services. It points to the definition of property management services contained in the policy of insurance which states the following:

> **Property Management Services** means the following services provided in connection with the management of commercial or residential property:

1. development and implementation of management plans and budget;
2. oversight of physical maintenance of property;
3. solicitation, evaluation, and securing of tenants and management of tenant relations, collection of rent, and processing evictions;
4. development, implementation, management of loss control and risk management plans for real property;
5. solicitation and negotiation of contracts for sale and leasing of real property;
6. development, implementation, and management of contracts and subcontracts, excluding property and liability insurance contracts, necessary to the daily functioning of the property;
7. personnel administration; and
8. record keeping.

In light of that definition, Foremost asserts that there are no genuine issues of material fact regarding the following particulars: (1) Messina purchased a certificate of coverage under group policies of professional liability coverage issued to the Louisiana Real Estate Commission for policy periods of January 1, 2016, to January 1, 2017, and January 1, 2017, to January 1, 2018; (2) Van Cleef purchased a certificate of coverage under group policies of professional liability coverage issued to the Louisiana Real Estate Commission for policy periods of January 1, 2016, to January 1, 2017, and January 1, 2017, to January 1, 2018; (3) these policies of insurance contain a limit of liability in the amount of $100,000 per claim and a $300,000 aggregate limit; (4) Messina and RLN entered into a Property Management Agreement on April 26, 2012, where Messina was to manage the property by collecting rents, ensuring necessary maintenance was performed, and/or notifying RLN of any maintenance issues; (5) the Property Management Agreement further provided that if the property owner chooses to maintain the property, the manager is to contact the owner "immediately upon maintenance issues being reported[;]" (6) RLN is the owner/lessor of 207 Nation Road, Deville, Louisiana, which was being rented to Christopher Mayes ("Mayes") on or about March 31, 2013; (7) Van Cleef was the real estate agent who acted for Messina as property manager of the Nation Road property on or about March 31, 2013; (8) RLN, the third party plaintiff, alleged

that prior to March 31, 2013, Mayes notified Messina concerning the allegedly defective tree at the Nation Road property; and (9) RLN, as the third party plaintiff, alleged that following Mayes's notification to Messina and Van Cleef, neither Messina nor Van Cleef removed the tree and/or notified RLN of the alleged condition of the tree. Thus, Foremost contends that the trial court correctly granted its motion for partial summary judgment and denied Continental's.

While not disputing that coverage under the policy for property management services may exist under certain facts, Continental points out that such coverage is limited by additional exclusionary language in the policies of insurance. Specifically, Continental relies on the relevant "Bodily Injury Exclusion" in Section VI. E. of its policies which states that the insurance does not apply to "any **Claim** alleging, arising from, or related to: bodily injury, sickness, disease, mental anguish, pain or suffering, emotional distress, or death of any person[.]"

After reviewing the record, Continental explains that the pleadings first show that Ms. O'Neal sought to be compensated for bodily injuries when she sued RLN and Foremost. It is equally clear that RLN's third party demand against Messina, Van Cleef, and Continental, contended that the alleged negligence of these third party defendants would make them liable to RLN for any damages that may be assessed against RLN for the injuries caused to Ms. O'Neal. Similarly, Continental argues that Messina's third party demand against Continental for coverage is premised on Messina being held liable for any damages associated with the claims of Ms. O'Neal and/or RLN and/or Ronald Nation, the Officer/Registered Agent of RLN, individually.

After reviewing the record de novo, we find that Ms. O'Neal's claim against RLN is for bodily injuries. It is this same claim for bodily injuries that underpins RLN's third party demand against Messina, Van Cleef, and Continental, as well as

Messina's third party demand against Continental. Even though Continental's policies of insurance may cover certain property management damages, the language of the policies' bodily damage exclusion clearly and unambiguously excludes the damages sought against it in this instance. As such, we find the trial court erred when it granted the motion for partial summary judgment in favor of Foremost, finding coverage for the acts of Messina and Van Cleef under Continental's policies of insurance. Likewise, the trial court erred when it denied Continental's motion for summary judgment that sought to deny coverage to Messina and Van Cleef because of its bodily injury exclusion. Simply stated, the language of Continental's bodily injury exclusion is unambiguous, and it has not been shown to violate any statute or public policy.

In reaching those conclusions, we find the following excerpt from *Haun*, 86 So.3d at 86, particularly supportive:

> In the instant case, Continental's E & O policy contains an exclusion for bodily injuries. There is nothing about this exclusion that conflicts with any statute or that is contrary to public policy. Under the Louisiana Real Estate Law, licensed real estate brokers are required to carry E & O insurance to cover real estate activities set forth in the license law. *See* La. R.S. 37:1466(A). These activities include managing or leasing real estate on behalf of another. La. R.S. 37:1431[(20) and (21)]. There is nothing in the law that would require an E & O policy to cover bodily injuries; the policies are more geared toward covering a broker for a negligent act, error or omission in the performance of or the failure to perform professional services and not so much for the condition of a piece of immovable property. That being said, Continental's policy clearly states that there is an exclusion for bodily injuries. There is no dispute as to that.

The same is true in the present case.

DISPOSITION

For the foregoing reasons, it is: **ORDERED, ADJUDGED, AND DECREED** that the motion for partial summary judgment urging insurance coverage filed by FOREMOST INSURANCE COMPANY, GRAND RAPIDS,

MICHIGAN is hereby DENIED. **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the motion for summary judgment filed by CONTINENTAL CASUALTY COMPANY denying coverage to MESSINA REALTY, LLC and DONALD VAN CLEEF is hereby GRANTED. Accordingly, the demands filed by RLN Investments, LLC; Foremost Insurance Company, Grand Rapids, Michigan; and Messina Realty, LLC against Continental Casualty Company are dismissed with prejudice. All costs are assessed to RLN Investments, LLC; Foremost Insurance Company, Grand Rapids, Michigan; and Messina Realty, LLC.

REVERSED AND RENDERED.

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

24-212

AMALEETA O'NEAL, ET VIR

VERSUS

FOREMOST INSURANCE COMPANY, ET AL.

Wilson, Judge, dissents with reasons.

I respectfully disagree with the majority opinion in this case and would affirm the rulings of the trial court, which granted the motion for partial summary judgment filed by Foremost Insurance Company, Grand Rapids, Michigan (Foremost), and ruled that there was coverage under the Continental Casualty Company (Continental) policies for the acts of Messina Realty, LLC (Messina Realty) and Don Van Cleef (Van Cleef) and which denied the motion for summary judgment filed by Continental.

Foremost alleges that this case presents an issue that has not been decided by the Louisiana courts: whether a bodily injury exclusion in a policy applies when the only claim asserted against the insurance company is one for breach of contract arising out of a property management agreement. Foremost concedes that the bodily injury exclusion would apply to a claim by the original plaintiff against Messina Realty, Van Cleef, and Continental, but no claim was asserted against these parties by Amaleeta O'Neal (O'Neal). Foremost contends that the bodily injury exclusion does not apply to the breach of contract claim asserted by RLN Investments, LLC (RLN). Foremost claims that the Continental policies unequivocally provide

coverage for this type of claim and that Continental failed to meet its burden of proof that the bodily injury exclusion unambiguously applies to this type of claim.

As cited by the majority, the court in *Haun v. Cusimano, Inc.*, 11-1288, p. 4 (La.App. 4 Cir. 2/29/12), 86 So.3d 84, 86, stated:

> In the instant case, Continental's E & O policy contains an exclusion for bodily injuries. There is nothing about this exclusion that conflicts with any statute or that is contrary to public policy. Under the Louisiana Real Estate Law, licensed real estate brokers are required to carry E & O insurance to cover real estate activities set forth in the license law. *See* La. R.S. 37:1466(A). These activities include managing or leasing real estate on behalf of another. La. R.S. 37:1431[(20) and (21)]. There is nothing in the law that would require an E & O policy to cover bodily injuries; the policies are more geared toward covering a broker for a negligent act, error or omission in the performance of or the failure to perform professional services and not so much for the condition of a piece of immovable property. That being said, Continental's policy clearly states that there is an exclusion for bodily injuries. There is no dispute as to that.

I find that *Haun* is distinguishable because Huan, the person who suffered the bodily injury, filed suit against Continental as the errors and omissions insurer for the real estate agent/property manager. There was no allegation that anyone put the property manager on notice of a defect in the property prior to Haun's accident. The injured plaintiff's claim against the errors and omissions insurer is the claim that the fourth circuit found was not covered by the errors and omissions policy: "the policies are more geared towards covering a broker for a negligent act, error or omission in the performance or the failure to perform professional services and not so much for the condition of a piece of immovable property." *Haun*, 86 So.3d at 86.

In this case, however, the person with the bodily injury, O'Neal, did not make a claim against Messina Realty, Van Cleef, and Continental. The claim at issue in the litigation that is before us in this appeal is the third-party demand, which is a claim for breach of the property management agreement between Messina

Realty/Van Cleef and RLN. The property management agreement stated that the manager's responsibility was:

> [t]o make or cause or be made all decorating, maintenance, alterations and repairs to said property and to hire and supervise all employees and other labor for the accomplishment of same unless owner chooses to maintain own properties. If so, owner will be contacted immediately upon maintenance issues being reported and owner will be expected to respond in a timely manner.

The errors and omissions policy defined "Property Management Services" as including "oversight of physical maintenance of property."

This is a claim by RLN alleging that its property manager, Messina Realty/Van Cleef, was negligent in making sure that necessary maintenance was performed at the property and/or failing to notify RLN of any maintenance issues with the tree. RLN's claim does not arise from the bodily injury suffered by O'Neal, rather it arises from the alleged negligent act of Messina Realty/Van Cleef in failing to perform under the property management agreement, which is exactly what this errors and omissions policy is intended to cover. The reasoning in *Haun* is sound, but I find this distinction to be such that *Haun* does not require dismissal of RLN's claims against Continental on a motion for summary judgment. It is not that the trial court in this case failed to follow *Haun*, it is that the reasoning in *Haun* does not mandate the dismissal of the claim that is now before us. To rule otherwise makes errors and omissions coverage meaningless.