DANIEL MORENO

VERSUS

ENTERGY CORPORATION, ENTER GULF STATES, INC., ENTERGY LOUISIANA, LLC., EAGLE ENTERPRISES OF JEFFERSON, LAFAYETTE INSURANCE COMPANY, WALGREEN LOUISIANA CO., INC., ABC INSURANCE COMPANY AND THE PARISH OF JEFFERSON

C/W

LAFAYETTE INSURANCE COMPANY

VERSUS

WOODWARD DESIGN + BUILD, LLC

NO. 17-CA-182
C/W
17-CA-183

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 640-321 C/W 752-253, DIVISION "D"
HONORABLE SCOTT U. SCHLEGEL, JUDGE PRESIDING

November 15, 2017

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and Robert A. Chaisson

AFFIRMED

SMC
JGG
RAC

COUNSEL FOR DEFENDANT/APPELLEE,
WOODWARD DESIGN + BUILD, LLC

Christopher K. LeMieux
Brett W. Tweedel
Jonathan S. Forester
Johanna E. Lambert

COUNSEL FOR DEFENDANT/APPELLANT,
LAFAYETTE INSURANCE COMPANY

David V. Batt
Bradley S. Groce

CHEHARDY, C.J.

Lafayette Insurance Company appeals the 24th Judicial District Court's judgment of November 22, 2016, holding that Lafayette is obligated to defend and indemnify Carl E. Woodward, LLC in this litigation. For the reasons that follow, we affirm this judgment of the district court.

FACTUAL BACKGROUND

This litigation has been the subject of several reported opinions, including two from this Court and two from the Louisiana Supreme Court. *See Moreno v. Entergy Corp.*, 12-97 (La. 12/4/12), 105 So.3d 40; *Moreno v. Entergy Corp.*, 09-976 (La. App. 5 Cir. 10/27/11), 79 So.3d 406; *Moreno v. Entergy Corp.*, 10-2268, 10-2281 (La. 2/18/11), 64 So.3d 761; *Moreno v. Entergy Corp.*, 09-976 (La. App 5 Cir. 9/10/10), 49 So.3d 418. Our recitation of the factual history here draws from these prior opinions.

After Hurricane Katrina, Carl E. Woodward, LLC ("Woodward"), a general contractor, entered into a construction contract with Eagle Enterprises of Jefferson, Inc. ("Eagle"), the owner of the Walgreens Shopping Center at 7100 Veterans Memorial Boulevard in Metairie, Louisiana. Woodward subcontracted with Stewart Interior Contractors, LLC ("Stewart") to install framing and exterior wall material at the shopping center. Stewart, in turn, subcontracted with Landaverde Construction, LLC ("Landaverde") to assist with supplying labor. Plaintiff Daniel Moreno was an employee of Landaverde and one of the laborers supplied under this subcontract. While at the work site on January 5, 2006, Mr. Moreno sustained serious injuries as a result of contact with the overheard power lines owned and operated by Entergy Louisiana, LLC ("Entergy").[1]

[1] A more detailed presentation of the facts giving rise to Mr. Moreno's injuries is included in the Louisiana Supreme Court's opinion, *Moreno v. Entergy Corp.*, 12-97 (La. 12/4/12), 105 So.3d 40, 42-43.

PROCEDURAL HISTORY[2]

On January 4, 2007, Mr. Moreno sued Entergy, Eagle, Woodward, Stewart, Walgreen Louisiana Company, Inc., the Parish of Jefferson, and Stewart's liability insurer, Lafayette Insurance Company ("Lafayette"). On April 2, 2007, Entergy filed an answer denying fault and filed third party demands against Stewart, Landaverde, and Woodward, seeking complete indemnity under the Louisiana Overhead Power Line Safety Act, La. R.S. 45:141-146. Six months later, on October 11, 2007, Lafayette entered into a contract with Woodward, wherein Lafayette agreed to defend and indemnify Woodward up to the policy limits of the insurance contract between Lafayette and Stewart.

A plethora of cross-claims and motions for summary judgment amongst the parties ensued. These were ultimately resolved with several rulings from the district court in 2009, review of which necessitated two trips to this Court, s*ee Moreno v. Entergy Corp.*, 09-976 (La. App 5 Cir. 9/10/10), 49 So.3d 418; *Moreno v. Entergy Corp.*, 09-976 (La. App 5. Cir. 10/27/11), 79 So.3d 406, and two to the Louisiana Supreme Court, *see Moreno v. Entergy Corp.*, 10-2268, 10-2281 (La. 2/18/11), 64 So.3d 761; *Moreno v. Entergy Corp.*, 12-97 (La. 12/4/12), 105 So.3d 40. In the end, in 2012, the Louisiana Supreme Court vacated the district court's rulings granting summary judgment in favor of the contractors and remanded the matter to the district court for further proceedings. *See Moreno*, 105 So.3d at 52. A portion of these proceedings on remand is the subject of this appeal.

On remand, several parties re-urged and/or re-filed motions for summary judgment. The district court granted summary judgment in favor of Landaverde's insurer, Western World Insurance Company, as to Entergy's third party demand against Landaverde, finding that Western World's insurance policy did not provide coverage for the claims asserted by Entergy against Landaverde. The court also

[2] The procedural history presented here omits portions that are not pertinent to this appeal.

granted summary judgment in favor of Landaverde and dismissed Entergy's third party demand against Landaverde. On December 10, 2014, the court granted summary judgment in favor of Stewart and dismissed Entergy's third party demand against Stewart, but denied Woodward's motion for summary judgment on Entergy's third party demand against Woodward. In this judgment, the court also specified that in accordance with La. C.C.P. art. 966(F),[3] it made "no findings of negligence as to Stewart[.]" On December 11, 2014, counsel that had been representing Lafayette and Woodward enrolled additional counsel on the two companies' behalf.

On July 6, 2015, Lafayette filed a petition for declaratory judgment, seeking a ruling that Lafayette owes no duty to defend or indemnify Woodward.[4] On August 5, 2015, Entergy filed a supplemental third party demand against Woodward's insurers, Gray Insurance Company ("Gray") and Lafayette. Gray filed a cross-claim against Lafayette and an exception of no right of action as to Entergy's third party demand. Woodward and Lafayette filed cross-motions for summary judgment on Lafayette's petition for declaratory judgment.

The district court overruled Gray's exception of no right of action and heard the cross-motions for summary judgment on October 31, 2016. The court issued its judgment on November 14, 2016, in which it granted Woodward's motion for summary judgment and denied Lafayette's. The court followed this with an amended judgment on November 22, 2016, in which it held that the October 11, 2007 agreement between Lafayette and Woodward is a valid contract and that Lafayette waived its rights to deny coverage to Woodward. The court designated this a final judgment pursuant to La. C.C.P. art. 1915.

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[3] The version of La. C.C.P. 966(F) in effect at the time of the district court's December 10, 2014 ruling provided in pertinent part: "(1) A summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time."

[4] This petition was originally filed in separate proceedings in 24th Judicial District Court No. 751-253, but was consolidated with the instant litigation in 24th Judicial District Court No. 640-321.

Lafayette sought and was granted a devolutive appeal from this judgment.

ASSIGNMENTS OF ERROR

On appeal, Lafayette assigns three errors:

(1) The district court erred in denying Lafayette's motion for summary judgment.

(2) The district court erred in holding that Lafayette waived its rights to deny coverage to Woodward.

(3) The district court erred in granting Woodward's motion for summary judgment.

DISCUSSION

We address these interrelated assignments of error together. Our standard of review for a judgment granting or denying a motion for summary judgment is *de novo*. *Boutin v. Roman Catholic Church of the Diocese of Baton Rouge*, 14-313 (La. App. 5 Cir. 10/29/14), 164 So.3d 243, 246, *writ denied*, 14-2495 (La. 2/13/15), 159 So.3d 469. Under this standard, we use the same criteria as the trial court in determining if summary judgment is appropriate: whether there is a genuine issue as to material fact and whether the mover is entitled to judgment as a matter of law. *See id*.

The facts are not in dispute here and at issue is the interpretation of an insurance policy, which, as a matter of contract interpretation, is a question of law. *See Safeway Ins. Co. v. Gardner*, 15-696 (La. App. 5 Cir. 4/27/16), 191 So.3d 684, 687 (citing *Gorman v. City of Opelousas*, 13-1734 (La. 7/1/14), 148 So.3d 888, 892; *Cutsinger v. Redfern*, 08-2607 (La. 5/22/09), 12 So.3d 945, 949). As such, it may be resolved by means of a declaratory judgment. *Id.* (citing *Mapp Constr., LLC v. Amerisure Mut. Ins. Co.*, 13-1074 (La. App. 1 Cir. 3/24/14), 143 So.3d 520, 528 ("The function of the declaratory judgment is simply to establish the rights of the parties or express the opinion of the court on a question of law without ordering anything to be done."); *Poynter v. Fidelity & Casualty Co.*, 140 So.2d 42, 46-47

(La. App. 3 Cir. 1962) (finding a declaratory judgment was appropriate to determine whether an insurance policy required the liability insurer to defend a suit filed against the insured)).

Because an insurance policy is a contract between the parties, it is construed with the general rules of contract interpretation. *Safeway*, *supra* (citing *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Casualty Co.*, 93-0911 (La. 1/14/94), 630 So.2d 759, 763). Contracts have the effect of law for the parties and the interpretation of a contract is the determination of the common intent of the parties. *Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC*, 12-2055 (La. 3/19/13), 112 So.3d 187, 192 (citing *Marin v. Exxon Mobil Corp.*, 09-2368 (La. 10/19/10), 48 So.3d 234, 258; La. C.C. arts. 1983 and 2045). The reasonable intention of the parties to a contract is to be sought by examining the words of the contract itself, and not assumed. *Id.* (citing *Prejean v. Guillory*, 10-0740 (La. 7/2/10), 38 So.3d 274, 279). 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. *Id.* (citing La. C.C. art. 2046). Common intent is determined, therefore, in accordance with the general, ordinary, plain and popular meaning of the words used in the contract. *Id.* (citing *Prejean*, 38 So.3d at 279).

Accordingly, when a clause in a contract is clear and unambiguous, the letter of that clause should not be disregarded under the pretext of pursuing its spirit, as it is not the duty of the courts to bend the meaning of the words of a contract into harmony with a supposed reasonable intention of the parties. *Clovelly*, *supra*. However, even when the language of the contract is clear, courts should refrain from construing the contract in such a manner as to lead to absurd consequences. *Id.* (citing *Amend v. McCabe*, 95-0316 (La. 12/1/95), 664 So.2d 1183, 1187; La. C.C. art. 2046). Most importantly, a contract must be interpreted in a common-sense fashion, according to the words of the contract their common and usual

significance. *Id.* (citing *Prejean*, 38 So.3d at 279). Moreover, a contract provision that is susceptible to different meanings must be interpreted with a meaning that renders the provision effective, and not with one that renders it ineffective. *Id.* (citing *Amend*, 664 So.2d at 1187; La. C.C. art. 2049). Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. *Id.* (citing La. C.C. art. 2050; *Amend*, 664 So.2d at 1187.)

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. *Safeway*, *supra*. Insurers, like any other contracting party, are entitled to contractually limit coverage in any manner they desire, so long as the limitations do not conflict with statutory provisions or public policy. *Id.*

With these precepts in mind, we now turn to the relevant contracts. First we look to the contract entered into between Lafayette and Woodward.

On October 11, 2007, Lafayette and Woodward entered into a contract that provides, in its entirety: "Lafayette Insurance Company, as the insurer of Stewart Interior Contractors, LLC, has agreed to defend and indemnify Carl E. Woodward, LLC in the above-referenced matter up to the policy limits of the insurance contract between Lafayette Insurance Company and Stewart Interior Contractors, LLC."

Woodward maintains that this obligates Lafayette to defend and indemnify Woodward up to the monetary policy limits of the insurance contract, without any other terms, conditions, reservations, or limitations. By contrast, Lafayette argues that this agreement is derivative of and, therefore, limited by its insurance policy with Stewart and that we must look to that policy to determine the parameters of Lafayette's obligation to Woodward.

The pertinent portion of Stewart's insurance policy with Lafayette, the "Commercial General Liability Coverage Form," provides in part:

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

* * *

2. If we [Lafayette] defend an insured [Stewart] against a "suit" and an indemnitee [Woodward] of the insured is also named as a party to the "suit," we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
b. This insurance applies to such liability assumed by the insured;
c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
f. The indemnitee:
   (1) Agrees in writing to:
      (a) Cooperate with us in the investigation, settlement or defense of the "suit";
      (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
      (c) Notify any other insurer whose coverage is available to the indemnitee; and
      (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
   (2) Provides us with written authorization to:
      (a) Obtain records and other information related to the "suit"; and
      (b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I - Coverage A - Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

> Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when:
>
> a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or
> b. The conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

(Brackets added).

Lafayette maintains that the first clause of the above-quoted section—"If we defend an insured against a 'suit' and an indemnitee of the insured is also named as a party to the 'suit,'…."—is a condition necessary to trigger its duty to defend and indemnify Woodward. Lafayette also offers the concluding language of the above-quoted section—"Our obligation to defend an insured's indemnitee ends when…[t]he conditions set forth above…are no longer met[]"—as support for its contention that its duty to Woodward is conditional. Lafayette argues that both the insured, Stewart, and the indemnitee, Woodward, must be named parties for Lafayette to defend and indemnify Woodward. Because satisfaction of this condition ceased upon Stewart's dismissal from the litigation on December 10, 2014, Lafayette submits that it had no duty to Woodward thereafter.

Additionally, Lafayette argues that Stewart's dismissal from the litigation terminated its duty to Woodward pursuant to the terms of the subcontract between Stewart and Woodward. The pertinent portion of that subcontract, the "Indemnity and Insurance" provision, states:

> Subcontractor [Stewart] agrees to defend, indemnify and hold harmless Contractor [Woodward] and Owner [Eagle], and their agents and employees from and against any claim, cost, expense or liability (including attorneys' fees), attributable to bodily injury, sickness, disease or death, or to damage to or destruction of property (including loss of use thereof), caused by, arising out of, resulting from or occurring in connection with the performance of the Work by Subcontractor [Stewart], its Subcontractors, or their agents, or employees, but only to the extent such loss or damage is caused by the negligent acts or omissions of Subcontractors, its Subcontractors, or their agents, or employees or anyone for whom Subcontractor [Stewart] is liable.

* * *

> Subcontractor's obligation to defend shall not arise if the damage or injury to persons or property is caused by the sole negligence of any party indemnified hereunder.

(Brackets added).

Lafayette contends that this provision limits Stewart's duty to defend and indemnify Woodward to claims for Stewart's own negligence. And because Stewart's dismissal from the litigation precludes finding Stewart negligent, Lafayette argues that its duty to Woodward ceased on the date of Stewart's dismissal: December 10, 2014.

Woodward responds that this Court need not look to the insurance policy or the subcontract, but should look no further than the October 11, 2007 agreement in which Lafayette agreed to defend and indemnify Woodward up to the policy limits of the contract between Lafayette and Stewart. We find this is a matter of no moment since we ultimately conclude that Lafayette waived its right to deny coverage to Woodward. Accordingly, this brings us to Lafayette's argument that the district court's finding of waiver was erroneous on four grounds. We address each in turn.

First, Lafayette argues that the court's finding of wavier was in error because it impermissibly expanded the scope of coverage. Lafayette maintains that its obligation to Woodward is controlled by the subcontract between Woodward and Stewart, which limits coverage to Woodward for claims of negligent acts by Stewart, not Woodward. Thus, once Stewart was dismissed from the proceedings, Lafayette's obligation was extinguished, and the court's ordering Lafayette to continue to defend and indemnify Woodward impermissibly allows coverage for a risk never contemplated by or agreed to by the parties in the insurance policy or subcontract, *i.e.*, negligent acts by Woodward. Lafayette submits that, as a matter of law, waiver cannot expand the scope of coverage of an insurance policy.

This argument is without merit. The Louisiana Supreme Court has held that waiver may expand coverage beyond the terms of an insurance policy. *See Arceneaux v. Amstar Corp.*, 10-2329 (La. 7/1/11), 66 So.3d 438, 451. "Waiver occurs when there is an existing right, a knowledge of its existence and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished." *Id.* at 450-51. "As an insurer is charged with knowledge of the contents of its own policy, when an insurer, with knowledge of facts indicating non-coverage under the insurance policy, assumes or continues the insured's defense without obtaining a non-waiver agreement to reserve its coverage defense, the insurer waives such policy defense." *Id.* at 451. "Waiver may apply to any provision of an insurance contract under which the insurer knowingly and voluntarily elects to relinquish his right, power or privilege to avoid liability, *even though the effect may bring within coverage risks originally excluded or not covered*." *Id.* (Emphasis added); *Tate v. Charles Aguillard Ins. & Real Estate, Inc.*, 508 So.2d 1371, 1375 (La. 1987); *Cugini, Ltd. v. Argonaut Great Cent. Ins. Co.*, 04-795 (La. App. 5 Cir. 11/30/04), 889 So.2d 1104, 1114, *writ denied*, 04-3218 (La. 3/11/05), 896 So.2d 71.

Second, Lafayette argues that a finding of waiver here violates public policy, relying on the following holding from the Louisiana Supreme Court:

> A contract of indemnity whereby the indemnitee is indemnified against the consequences of his own negligence is strictly construed, and such a contract will not be construed to indemnify an indemnitee against losses resulting to him through his own negligent act, unless such an intention was expressed in unequivocal terms.

Home Ins. Co. v. Nat'l Tea Co., 588 So.2d 361, 364 (La. 1991).

This rule of strict construction is founded on equitable considerations, as the court explained: "[I]mposing on a person an obligation to indemnify another against the indemnitee's own negligence without the obligor's unambiguous consent is contrary to the principles of equity." *Id.* at 365 (Quotations and citations

omitted). "The equitable basis for this rule…is that the obligor lacks the ability to evaluate, predict, or control the risk that the indemnitee's future conduct may create." *Id.* "To ensure that the indemnitee is not unjustly enriched at the obligor's expense, equity dictates that such a provision be enforced only if there is clear evidence that the risk was bargained for and accepted." *Id.*

Lafayette contends that pursuant to the terms of the subcontract, Stewart, as the named insured, did not agree to defend and indemnify Woodward, the indemnitee, for Woodward's own negligence. Lafayette points to the provision of the subcontract that provides: "[Stewart's] obligation to defend shall not arise if the damage or injury to persons or property is caused by the sole negligence of any party indemnified hereunder." For Lafayette to defend and indemnify Woodward in violation of these express terms contravenes the aforementioned principles of equity.

Woodward responds that the equitable considerations underlying this rule of strict construction are inapposite here because Lafayette agreed to defend and indemnify Woodward *after* the conduct giving rise to the claim occurred. We agree. As stated above, "[t]he equitable basis for this rule…is that the obligor lacks the ability to evaluate, predict, or control the risk that the indemnitee's future conduct may create." *Home Ins., supra*. When Lafayette agreed on October 11, 2007 to defend and indemnify Woodward, no risk was posed by Woodward's future conduct. Lafayette enjoyed the full benefit of hindsight.

It is well established that an insurer is charged with knowledge of the contents of its own policy. *Steptore v. Masco Constr. Co.*, 93-2064 (La. 8/18/94), 643 So.2d 1213, 1216. In addition, notice of facts which would cause a reasonable person to inquire further imposes a duty of investigation upon the insurer, and failure to investigate constitutes a waiver of all powers or privileges which a reasonable search would have uncovered. *Id.*

Lafayette contracted with Woodward more than a year-and-a-half after Mr. Moreno sustained his injuries and nine months after suit was filed. At that time, it is reasonable to presume that such a sophisticated business entity as an insurance company did not enter into this contract without due circumspection. We see no reason to doubt that Lafayette contracted with Woodward fully informed of the underlying facts, the insurance policy, and the subcontract. Under these circumstances, the aforementioned equitable considerations are inapplicable and we find this argument is without merit.

In Lafayette's third argument against waiver, it submits case law in further support of its position that any duty it had to defend and indemnify Woodward was extinguished upon Stewart's dismissal from the case. Lafayette first points to *Maldonado v. Kiewit La. Co.*, 13-0756 (La. App. 1 Cir. 3/24/14), 146 So.3d 210. There, Twin City Fire Insurance Company had issued a comprehensive general liability policy to JL Steel Reinforcing, a subcontractor to KMTC-JV, which was the general contractor on a DOTD construction project. *Maldonado*, 146 So.3d at 213. The subcontract between KMTC-JV and JL Steel required Twin City's insured, JL Steel, to provide insurance coverage to KMTC-JV as an "additional insured." *Id.* JL Steel procured insurance from Twin City to comply with the subcontract and provide additional insurance coverage for organizations with which JL Steel contracted. *Id.*

Two JL Steel employees were killed on the construction project. *Maldonado*, *supra*. In the litigation that ensued, KMTC-JV, a named defendant, demanded defense and indemnification from JL Steel pursuant to the subcontract. *Id.* at 214. Twin City, in turn, filed a petition for declaratory judgment, seeking a judgment declaring that its policy precluded additional insurance coverage for the claims against KMTC-JV as of March 21, 2011, the date on which the plaintiffs filed their third supplemental and amended petition that: (1) removed JL Steel as a

defendant; (2) withdrew all allegations of fault on the part of JL Steel; and (3) no longer alleged that KMTC-JV was vicariously liable for acts or omissions of JL Steel. *Id.* On Twin City's petition for declaratory judgment, the trial court ruled in favor of KMTC-JV, finding Twin City's policy to JL Steel affords coverage to KMTC-JV as an "additional insured" and that Twin City has a duty to defend KTMC-JV through the appeal process. *Id.* at 215.

On appeal, the First Circuit Court of Appeal reached a different conclusion, finding that Twin City's duty to defend KMTC-JV did not extend beyond the date JL Steel was dismissed from the litigation. *Maldonado* at 221. The First Circuit reasoned:

> On March 21, 2011, when plaintiffs filed their third amended petition deleting all allegations of fault against JL Steel, the petition in the Maldonado matter ceased to allege any claim that could be covered by Twin City's additional insured policy endorsement. While the duty to defend certainly terminated by that date, we find that it actually terminated prior thereto.[5] …[T]he duty of an insurer to defend is triggered when the petition suggests the potential for coverage; however, when an event occurs which shows that coverage is unambiguously excluded, the duty to defend the insured terminates. We conclude that Twin City owed KMTC-JV a duty to defend through the date of the occurrence that eliminated any possibility that KMTC-JV could have been cast in liability, vicariously, for the fault of JL Steel. That date is March 11, 2011, the date on which the trial court signed a judgment dismissing JL Steel with prejudice from the underlying Maldonado matter.

Id. at 220-21 (Footnote added).

Lafayette next relies on a Maryland case, *Baltimore Gas & Elec. Co. v. Commercial Union Ins. Co.*, 688 A.2d 496 (1997). There, Ferguson Trenching Company contracted with Baltimore Gas and Electric Co. ("BGE") to dig a pit into which the plaintiffs later drove their car and sustained injuries. *Baltimore Gas*, 688 A.2d at 499. The plaintiffs sued BGE, Ferguson, and others. *Id.* Pursuant to the contract with BGE, Ferguson had a general commercial liability insurance policy

[5] Prior to plaintiffs' third supplemental and amended petition, they had moved to dismiss JL Steel, which the trial court granted on March 11, 2011. *Maldonado* at 220.

with Commercial Union Insurance Company to protect both Ferguson and BGE in connection with the work. *Id.* This policy limited BGE's coverage to claims based on Ferguson's negligence and claims that BGE negligently failed to supervise Ferguson. *Id.* at 500. Pursuant to these terms, Commercial refused to defend BGE, asserting that the plaintiffs' claim was not within the scope of coverage under the policy. *Id.* BGE instituted a declaratory action against Commercial, seeking a determination of its rights under the policy. *Id.* at 499. Prior to trial on the underlying tort suit, the plaintiffs determined that BGE alone was negligent and dismissed all of their claims against all parties, except BGE. *Id.* at 500. The underlying tort matter proceeded to trial and a verdict was returned in favor of the plaintiffs against BGE. *Id.* Thereafter, BGE's declaratory action was resolved on motions for summary judgment, in which the trial court found that Commercial did not have a duty to defend BGE. *Id.* at 501-02. On appeal, the appellate court reversed in part and affirmed in part, finding that Commercial had a duty to defend BGE, but only up until the plaintiffs revised their allegations to sue BGE solely for its own negligence and the court granted their motion to dismiss Ferguson from the underlying litigation. *Id.* at 513-15. Consequently, the court ordered that on remand the trial court "should determine the reasonable fees, costs, and expenses that BGE incurred during the period when BGE was entitled to representation, for which Commercial may be liable." *Id.* at 514.

Lafayette submits that as in *Maldonado* and *Baltimore Gas*, its duty to defend and indemnify Woodward ended on December 10, 2014, the day Stewart was dismissed from the litigation. Woodward responds that *Maldonado* and *Baltimore Gas* are of little precedential value because both are factually distinguishable from the present case. For instance, in *Maldonado*, Twin City issued "a complete reservation of rights on the grounds that [its] policy provided coverage to additional insureds, but only when the additional insured is found to be

vicariously liable for the conduct of JL Steel or those acting on its behalf." *Maldonado* at 214 n.3. And in *Baltimore Gas*, Commercial refused to defend the claim from the beginning. By contrast, Lafayette did not issue any reservation of rights to Woodward in this matter and specifically agreed to defend and indemnify Woodward after suit had been filed and continued to supply Woodward's defense after Stewart was dismissed from the proceedings. Accordingly, in *Maldonado* and *Baltimore Gas*, where the insurers either reserved or invoked coverage defenses, waiver was not applicable. Here, on the other hand, Lafayette did neither and a finding of waiver is supported by the facts.

In Lafayette's fourth argument against waiver, it submits that the court's finding of waiver was erroneous because Woodward cannot demonstrate prejudice, an element it contends is required for a finding of waiver. In support of this contention, Lafayette relies on *Arceneaux v. Amstar Corp.*, 06-1592 (La. App. 4 Cir. 10/31/07), 969 So.2d 755, 767, *writs denied*, 07-2486, 08-0053 (La. 3/24/08), 977 So.2d 952, 953, in which the Louisiana Fourth Circuit Court of Appeal asserted that "[i]n order to support a finding of waiver of the right to enforce a policy provision, the insured must also demonstrate prejudice, either actual or presumptive, as a result of the insurer's actions." *Arceneaux*, 06-1592, 969 So.2d at 767 (citing Allan Windt, *Insurance Claims & Dispute, Representation of Insurance Companies and Insureds,* § 2:10 (5th ed. 2007)). The Fourth Circuit added:

> Although the Louisiana Supreme Court in *Steptore* did not expressly address the prejudice requirement, it implicitly recognized that prejudice arises when a conflict of interest exists between an insurer and its insured, reasoning that "waiver principles are applied stringently to uphold the prohibition against conflicts of interest between the insurer and the insured which could potentially affect legal representation in order to reinforce the role of the lawyer as the loyal advocate of the client's interest."

Arceneaux, 06-1592, 969 So.2d at 767-68 (quoting *Steptore*, 643 So.2d at 1216).

The Louisiana Supreme Court has expounded upon how stringent application of waiver principles serves to reinforce conflict-free legal representation:

> [W]here the insurer undertakes to defend the insured with knowledge of facts indicating non-coverage under the policy, the insured is led to believe the insurer has relinquished that right and acts accordingly. From that point, the insured has the right to believe the insurer's attorney is acting in his best interest without regard to coverage defenses the insurer has seemingly relinquished. …[A] belated disclaimer may prejudice the insured because it loses the opportunity to assume and manage its own defense. Therefore, the insurer cannot later avoid liability based on a coverage defense if it has assumed the defense without a reservation of rights and with knowledge of facts which would bring the claim outside the policy based on that defense.

Arceneaux, 10-2329, 66 So.3d at 451 (citation omitted).

From this, we find that prejudice of the insured is presumed in those instances when the insurer seeks to invoke a coverage defense after it has supplied a legal defense to the insured with knowledge of facts indicating non-coverage under the policy and with no prior reservation of rights. In such instances, application of waiver is proper. For example, in *Steptore*, the Louisiana Supreme Court found that because the insurer assumed the defense of the insured without first reserving its right to deny coverage under the policy and continued to represent the insured with counsel that was also representing its own interests, the insurer waived any coverage defense it may have had under the policy. *Steptore*, *supra* at 1217.

Likewise, we find waiver is applicable in the present case. Mr. Moreno's petition was filed on January 4, 2007 naming as defendants Lafayette and Stewart, among others. On April 2, 2007, Woodward was named as a defendant in Entergy's third party demand. In Woodward's answer to this third party demand in July of 2007, Woodward was represented by counsel of Jones Walker LLP. In the October 11, 2007 agreement, Woodward was represented by Jones Walker and Lafayette was represented by Bernard, Cassisa, Elliott & Davis APLC. Thereafter,

pursuant to that agreement, the record reflects that Woodward was represented by Bernard Cassisa for several more years in this litigation. Pleadings filed in April 2008, June 2009, and September 2009 all reflect counsel of Bernard Cassisa as Woodward's counsel of record. In fact, in Woodward's motion for summary judgment on Entergy's third party demand filed September 17, 2009, this pleading listed counsel as both Woodward's and Lafayette's representatives, *i.e.*, "Attorneys for Carl E. Woodward, LLC and Lafayette Insurance Company."

This representation of Woodward continued on appeal to this Court, *see Moreno v. Entergy Corp.*, 09-976 (La. App 5 Cir. 9/10/10), 49 So.3d 418, upon certiorari to the Louisiana Supreme Court, *see Moreno v. Entergy Corp.*, 10-2268, 10-2281 (La. 2/18/11), 64 So.3d 761, back on remand to this Court, *see Moreno v. Entergy Corp.*, 09-976 (La. App 5. Cir. 10/27/11), 79 So.3d 406, back on certiorari to the supreme court, *see Moreno v. Entergy Corp.*, 12-97 (La. 12/4/12), 105 So.3d 40, and upon remand to the district court, as evidenced in Woodward's motion for summary judgment on Entergy's third party demand filed July 2, 2014.

Crucially, this representation continued even after Stewart's dismissal from the proceedings. On December 11, 2014, the day after Stewart was dismissed, Lafayette did not invoke its claimed coverage defense. Instead, counsel for Lafayette and Woodward moved to enroll additional counsel from Bernard Cassisa as counsel of record for both Lafayette and Woodward. This was granted by the district court on December 17, 2014. It was not until a later date, at some point prior to July 6, 2015—the date Lafayette filed its petition for declaratory judgment against Woodward—that Lafayette procured separate counsel.

Under these facts, we agree with the district court that Lafayette waived its right to deny coverage to Woodward. Therefore, upon our *de novo* review, we conclude that the district court properly denied Lafayette's motion for summary judgment and properly granted Woodward's motion for summary judgment.

DECREE

For the foregoing reasons, the district court's November 22, 2106 judgment is affirmed.

AFFIRMED

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

(504) 376-1400
(504) 376-1498 FAX

NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 15, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-CA-182

C/W 17-CA-183

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HON. SCOTT U. SCHLEGEL (DISTRICT JUDGE)
BRETT W. TWEEDEL (APPELLEE)
J. ALEX WATKINS (APPELLEE)
T. CAREY WICKER, III (APPELLEE)
HOWARD B. KAPLAN (APPELLEE)
GLEN E. MERCER (APPELLEE)

MAILED

JEFFREY S. BERKOWITZ (APPELLEE)
ATTORNEY AT LAW
1421 N. CAUSEWAY BOULEVARD
SUITE 100
METAIRIE, LA 70001

DAVID V. BATT (APPELLANT)
BRADLEY S. GROCE (APPELLANT)
ATTORNEYS AT LAW
400 POYDRAS STREET
SUITE 2300
NEW ORLEANS, LA 70130

CHRISTOPHER K. LEMIEUX (APPELLEE)
JONATHAN S. FORESTER (APPELLEE)
JOHANNA E. LAMBERT (APPELLEE)
ATTORNEYS AT LAW
3421 NORTH CAUSEWAY BOULEVARD
SUITE 900
METAIRIE, LA 70002

SIMEON B. REIMONENQ (APPELLEE)
KATHERINE L. OSBORNE (APPELLEE)
ATTORNEYS AT LAW
601 POYDRAS STREET
SUITE 2775
NEW ORLEANS, LA 70130

MARGARET A. CASSISA (APPELLEE)
ATTORNEY AT LAW
3838 NORTH CAUSEWAY BOULEVARD
SUITE 3050
METAIRIE, LA 70002

CATHARINE O. GRACIA (APPELLEE)
JOHN A. BRAYMER (APPELLEE)
CORY R. CAHN (APPELLEE)
ATTORNEYS AT LAW
639 LOYOLA AVENUE
26TH FLOOR
NEW ORLEANS, LA 70113