COURT OF APPEALS FOR THE FIFTH CIRCUIT
STATE OF LOUISIANA

IN RE: Court of Appeal No. 2008-CA-0438

BOTTOM LINE EQUIPMENT, LLC

Versus

SMITH & ASSOCIATES CONSULTING, LLC, ET AL

(29th Judicial District Court, Parish of St. Charles, NO. 64,966, "C")

Appeal from the 29th Judicial District Court, Honorable Emile R. St. Pierre,

Presiding Civil Action No. 64,966, a Civil Proceeding, on Appeal

Original Brief of Appellant, Bottom Line Equipment, L.L.C.

Counsel for Appellant:	Counsel for Appellee:
Scott G. Wolfe, Jr. Wolfe Law Group, L.L.C. 4821 Prytania Street New Orleans, Louisiana 70115 (504) 894-9653 Fax: (866) 761-8934 scott@wolfelaw.com Louisiana Bar No. 30122	Traveler's Property Casualty Company of America Pierce A. Hammond, II 650 Poydras St. Suite 1400 New Orleans, LA 70130 (504) 299-3458 Fax: (504) 299-3491 Louisiana Bar No. 18076

BRIEF OF APPELLANT

Appeal from the 29th Judicial District Court for the Parish of St. Charles,

Honorable Judge Emile R. St. Pierre, Presiding Civil Action No. 64,966.

I. Table of Contents

II. Table of Authorities

CODE ARTICLES:

CASE LAW:

III. Statement of Jurisdiction

This is an appeal from a judgment rendered by the Honorable Emile R. St. Pierre of the First City Court for the Parish of Orleans. This Court has jurisdiction to hear this appeal pursuant to Article V, §10(A) of the Louisiana Constitution of 1974.

IV. Statement of the Case

a) Introduction

This case involves the improper handling by multiple parties of the insuring and adjusting of two pieces of equipment originally owned by the Appellant. Appellant leased the equipment to a contractor who was required to provide insurance for the replacement value of both pieces of equipment. The contractor obtained coverage under its general contractor's pac policy and commercial excess policy with the Appellee, who claimed that the equipment would be covered to the extent required under the rental contract with Appellant. After being sued for failing to pay on claims after the equipment was stolen, Appellee obtained summary judgment based upon declarations of an adjuster who stated that (1) neither policy provided coverage for the first piece of equipment, (2) the second piece of equipment was covered merely for actual cash value, and (3) that Appellee owed no other obligations to Appellant. Though Appellee (1) refused to address tort claims, additional insurance possibilities, and claims of vicarious liability, and (2) Appellant and other parties to the suit opposed Appellee's declarations and alleged undisputed facts, the trial court improperly ruled in Appellee's favor.

b) Action of the Trial Court and Procedural History

The Appellant filed a Petition for Damages in the trial court on or around December 6, 2006 against Smith & Associates Consulting, LLC (hereinafter

"Smith & Associates"), Travelers Indemnity Company, Travelers Property Casualty Company of America ("Appellee") and Insurance Underwriters (hereinafter "UW"). The Appellee was served a cross-claim by Smith & Associates thereafter and answered both demands by or around April 19, 2007.

Discovery requests were issued to Appellee on or around September 11, 2007. On September 12, 2007, Appellee filed its Motion for Summary Judgment. Appellee provided some limited responses to those requests on or around October 17, 2007.

On November 30, 2007, the trial court held a hearing on the matter and both parties' counsel appeared. A judgment was submitted on February 8, 2008, providing a simple and brief explanation of the court's findings, and discussing merely contractual claims related to the coverages cited by Appellee.

Motion for Devolutive Appeal was filed on April 7, 2008.

c) Assignment of Errors

Error Number 1: The trial court erred in granting Appellee's Motion for Summary Judgment as it was untimely and improperly brought before the court.

Error Number 2: The trial court erred in granting Appellee's Motion for Summary Judgment as there exists at least one genuine issue of material fact as to coverage for the 70 XT skid.

Error Number 3: The trial court erred in granting Appellee's Motion for Summary Judgment as there exists at least one genuine issue of material fact as to coverage for the replacement value of the insured machinery.

Error Number 4: The trial court erred in granting Appellee's Motion for Summary Judgment as there exists at least one genuine issue of material fact as to whether the Appellee has other duties to Appellant under the contract which remain unsatisfied.

Error Number 5: The trial court erred in granting Appellee's Motion for Summary Judgment because it failed to adjudicate, hear or observe contract and tort claims which were before the court.

d) Issues Presented for Review

This Court is presented with the following issues:

1) Was there a genuine issue of material fact that coverage for the 70 XT existed or should have existed?
2) Was there a genuine issue of material fact that coverage for the replacement value of insured machinery existed or should have existed?
3) Was there a genuine issue of material fact that Appellee owes and owed further contractual duties to the Appellant?
4) Did the trial court error in granting the Appellee's Motion for Summary Judgment without adjudicating other contract and tort claims presented by the Appellant?
5) Did the trial court error in granting the Appellee's Motion for Summary Judgment when it was untimely, improper and based upon insufficient evidence?

V. Legal Argument

Error 1: The Motion for Summary Judgment Was Improper and Untimely

Table of Contents for Legal Argument of Error 1

A. Relevant Code Article Regarding Louisiana Motion for Summary Judgment Standard

The La. C.C.P Art. 966 states in pertinent part that for a case to be dismissed under a Motion for Summary Judgment standard then it must "show that there is no genuine issue as to a material fact." Further, "a material fact is one that would matter in the trial on the merits." *Knight v. Owens*, 869 So. 2d 188 (La App. 5th Cir. 2004).

In its Memorandum in Support of Motion for Summary Judgment, Appellee moves the trial court for summary judgment based on the sole assertion that Plaintiff has no claim against the Defendant because Defendant makes a legal determination as what coverage applies to the losses claimed. To be successful on its motion for summary judgment, Appellee must have demonstrated to the court that it had properly formulated and filed a satisfactory motion for summary judgment which satisfies movant's burden of showing that *no* genuine issue of

material fact remains as to each of the claims. "Mover for summary judgment must meet strict standard by showing that it is quite clear as to what truth is, and that excludes any real doubt as to existence of material fact." *Broom v. Leebron & Robinson Rent-A-Car, Inc.*, App. 2 Cir.1993, 626 So.2d 1212.

The issues will be discussed in-turn and Plaintiff will demonstrate that (1) Defendant's motion for summary judgment was not satisfactorily compliant with the law; and (2) Defendant's motion for summary judgment is not timely offered to this Court.

B. Requirements of a Sufficient Motion for Summary Judgment

(i) Affidavits

Local Rule 9.10, along with LA CCP Article 966 and 967 provide that a Motion for Summary Judgment should include affidavits demonstrating that there is no genuine issue of material fact. Appellee has enclosed one single, and disputed, affidavit which support its position that no coverage exists.

While a Motion for Summary Judgment is an allowable procedural vehicle, it is a matter to be taken seriously by courts as the fate of a litigant's claim is at risk. As such, Appellant contends that the allegations proposed as the undisputed truth be at least verified through a valid and sufficient affidavit.

Appellee offers no affidavit of written testimony of any of the specific actors or employees of the actors involved in this dispute. The Defendant merely makes conclusory allegations based upon the existence of a policy.

There is nothing in the supporting documentation which indicates the nature of any and all requests, correspondence, or discussions between the parties regarding the insurance, or which speaks to the majority of the declarations made by the Appellant within its Petition and Memorandum in Opposition to Motion for Summary Judgment The existence of this document, directly contradicts the Appellee's own allegations that Smith & Associates has general coverage under the Commercial Excess Policy, Commercial General Liability Policy and Businessowners Policy . In fact, Plaintiff's affidavits speak directly to these issues, by failing to address such at least warranting notice that an issue which is before the court speaks to a material fact and is at dispute.

According to Louisiana courts, "Summary judgment must be denied if supporting documents presented by mover are not sufficient to resolve all material fact issues." *Herman v. Rome*, App. 5 Cir.1996, 668 So.2d 1202, 95-666, 95-831 (La.App. 5 Cir. 1/17/96). Further, it is indicated that a court's first task on motion for summary judgment is "determining whether moving party's supporting documents--pleadings, depositions, answers to interrogatories, admissions and affidavits--are sufficient to resolve all material factual issues." *Daniel v. Blaine Kern Artists, Inc.*, App. 4 Cir.1996, 681 So.2d 19, 1996-1348 (La.App. 4 Cir.

9/11/96), writ denied 684 So.2d 934, 1996-2463 (La. 12/6/96); *Walker v. Kroop*, App. 4 Cir.1996, 678 So.2d 580, 1996-0618 (La.App. 4 Cir. 7/24/96).

Where supporting documents of proponents and opponents of motion for summary judgment indicate a genuine issue of material fact may exist, a motion should be denied. *LeBlanc v. Landry*, App. 3 Cir.1979, 371 So.2d 1276. Appellee's affidavits undoubtedly illustrate that Appellee fails to respond to several claims that further obligations exist which benefit the Appellant and which should be set for the trier of fact. At the least, Appellee's sole affidavit indicates that there are several issues remaining as to whether or not Appelle has some liability to the Plaintiff, whether that be tort or contract.

Therefore, Appellee's motion was insufficient and this court should overturn the trials court's ruling.

(ii.) Disputed Facts

A motion for summary judgment requires that the mover illustrate that no issue remains as to a material fact. The Appellee attempted to satisfy this requirement by offering to the court a memorandum stating a simple argument that it believes precludes this action, without calling attention to or defending the various disputed facts herein.

Within its Petition, Appellant states an understanding of facts that are directly adverse to those stated by the Appellee. Appellee has not made a declaration that the disputed elements are uncontested simply because Appellee feels that those

facts and assertions are wrong or inapplicable. Appellant differs as to validity of these facts and has pled that position within its Petition where allegations abound as to the vast assortment of issues presented in the subsequent paragraph.

There are several, if not many, contested facts before the court. The Appellant has been active in relaying these disputed facts to the court during these proceedings throughout pleadings and memoranda. Appellant avers that the disputed facts before the court include but are not limited to the following:

(1) It is disputed that the date of theft occurred in the rather ominous period of "March 2006."

(2) It is disputed whether or not the date of reporting to the Appellee fell within the sixty (60) day period, because Appellee cannot provide the date of theft.

(3) It is disputed whether the Contractors Pac Policy, Commercial Inland Marine Coverage (Exhibit A, Motion for Summary Judgment, hereinafter "CPIM") provides coverage of the 70 XT.

(4) It is disputed that the 70 XT was "acquired" on or around December 7, 2005.

(5) It is disputed that the 70 XT constitutes "newly acquired" under the CPIM.

(6) It is disputed that the Contractors Pac Policy, Businessowners Coverage (Exhibit A, Motion for Summary Judgment, hereinafter "BOC") provides coverage for the 70 XT skid.

(7) It is disputed that the 70 XT constitutes Business Personal Property under the BOC.

(8) It is disputed that the Contractors Pac Policy Commercial General Liability (Exhibit A, Motion for Summary Judgment, hereinafter "CGL") provides coverage for the loss of the 70 XT.

(9) It is disputed that the Contractors Pac Policy Commercial General Liability (Exhibit A, Motion for Summary Judgment, hereinafter "CGL") provides coverage for the replacement value of the 60 XT.

(10) It is disputed that the Contractors Pac Policy Commercial General Liability (Exhibit A, Motion for Summary Judgment, hereinafter "CGL") covers Smith & Associates' negligence in failing to preserve the 60 XT and 70 XT resulting their loss.

(11) It is disputed that the contracts for insurance for both the 60 XT and 70 XT, between Appellant and Smith & Associates (Exhibits A and B, Opposition to Motion for Summary Judgment, hereinafter "BLE Contracts") creates a duty for Appellee to provide comparable insurance.

(12)It is disputed that the BLE Contracts represents evidence of a conventional obligation between Appellant and Appellee.

(13)It is disputed that Appellee was in receipt of the Certificate of Insurance (Exhibit C, Memorandum in Opposition to Motion for Summary Judgment, hereinafter "COI") confirming coverage for replacement value of the

equipment and thereafter failed to amend the Declarations to the CPIM to reflect such.

(14)It is disputed that the COI creates and/or reflects an obligation on behalf of the Appellee to the Appellant in regards to providing coverage for replacement value.

(15) It is disputed that Insurance Underwriters acts as agent for Appellee.

(16) It is disputed that Appellee provided through its agent a COI that led to the detrimental reliance of Appellant.

(17)It is disputed that Appellee's actions in failing to observe the terms of the certificate of insurance constituted negligence.

(18) It is disputed that the Appellant's equipment was not covered by the Commercial Excess Liability Insurance Policy (Exhibit B, Motion for Summary Judgment, hereinafter "CEL").

(19) It is disputed that the Appellant's equipment qualify as "first party property" as designated in the Appellee's Motion for Summary Judgment.

(20) It is disputed that the Appellant's authorization of payment for the 60 XT skid was an acceptance of the price of the equipment or rather a simple payment under the Appraisal Loss for disputed values.

(21) It is disputed that Appellant had asserted tort claims in the trial court.

(22) It is disputed that the declarations of Smith & Associates do not constitute allegations of tort damages to which Appellee has not responded.

(23) It is disputed that all of Appellant's claims made by way of its petition are related to the contractual obligations of Appellee under its various insurance policies.

(24) It is disputed that Appellee failed to properly fulfill its obligations to properly adjust claims made in regards to the 60 XT and 70 XT skids.

(25) It is disputed that Appellee provides coverage for the 70 XT skid under the CPIM Section C's Amendment (Page 10 of Exhibit B/2 to Motion for Summary Judgment).

(26) It is disputed that the 70 XT skid is "unscheduled tools and equipment" under CPIM Additional Coverage, Section 5(c) (Page 7 of EXhibit B/2 to Motion for Summary Judgment)

(27) It is disputed that Appellee provides coverage for repair and replacement damages for the 60 XT and 70 XT under CPIM Additional Coverage, Section 5 (c) (Page 7 of Exhibit B/2 to Motion for Summary Judgment).

In regards to many of these, what Appellant terms as "disputed facts," it may be true that some, if not several, are actually facts *undisputed* by the Appellee who failed to provide any defense, response, or argument to upend such an allegation. Those allegations left unanswered by the Appellee are discussed later in this brief.

Furthermore, Appellee's submitted statement of undisputed facts, as supported by the affidavit of Ms. Elizabeth G. Lochte (Exhibit 1, Motion for Summary Judgment, hereinafter "Affidavit), includes several statements which are in fact

disputed facts. Appellant disputes that #2, #3, #4, #5, #6, #10, and #12 of the Affidavit are undisputed and cannot find any document, pleading or assertion which states otherwise. According to law cited by Appellant in its Opposition to the Motion for Summary Judgment, "an insurer seeking to avoid coverage through summary judgment bears the burden of proving some exclusion applies to preclude coverage. *McMath Constr. Co., Inc. v. Dupuy*, 03-1413 (La. App. 1st Cir. 11/17/04). Clearly, Appellee's Answer, Defenses and Motion for Summary Judgment, and attachments, fail to speak to a wide assortment of potential major issues of coverage remaining in the pleadings.

For these reasons, Appellant believes that the Appellee failed to satisfy its obligation to provide necessary and undisputed facts, which are necessary to sustain a motion for summary judgment. As Louisiana court has stated, "Only when reasonable minds must inevitably conclude that mover is entitled to judgment is matter of law on facts before court is summary judgment warranted ... any doubt is resolved against granting summary judgment and in favor of trial on merits to resolve disputed facts." *Durrosseau v. Century 21 Flavin Realty, Inc.*, App. 3 Cir. 1992, 594 So.2d 1036. Appellant argues that the trial court's ruling is flawed based upon these findings.

(iii) Time to Obtain Adequate Discovery

Under La. C.C.P. Art. 966(C), a motion for summary judgment should not be

submitted to the court until after ample time has been given for discovery of material fact. La. C.C.P. Art. 966(C) is prefaced by stating, "After *adequate discovery or after a case is set for trial*, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted. (emphasis added) Therefore, the law is clear in stating at the least its preference that a motion for summary judgment not be considered until a non-moving is permitted and actually granted a suitable or "adequate" time for which to obtain discovery from the moving party or parties.

Appellant was not able to procure discovery because of its inability to control the service of and deadlines to pleadings filed against Smith & Associates, a necessary party to the proceedings, whom the Appellant believed can and will provide much information, documentation and correspondence pertaining to the relationship between Appellee and the insurance policies at dispute. Further, discovery was delayed because of potential settlement discussions which seemed to be conclusory. Needless to say, immediately at the point of breakdown, Appellant initiated discovery against the Appellees.

Appellee has not provided discovery related to major points of contention, specifically the dates of the theft of the covered equipment; the dates of reporting of theft; the definition of "acquisition" as defined within the CPIM; the definition or evidence precluding the coverage of equipment as business personal property under the BOC; evidence precluding the coverage of "unscheduled tools and

equipment;" evidence related to preclusion of Appellant's tort claims for failing properly handle the insuring of the equipment; evidence precluding the Appellant's quasi-contractual or reliance claims; nor any evidence illustrating that UW and Appellee do not have an agency relationship creating vicarious liability; all allegations, which among others, have gone unnoticed by the Appellee and the trial court.

Appellant further argues that the trial court ignored its rights to furnished enough time to collect "adequate" discovery. Plaintiff has only been granted an opportunity to obtain discovery over period of less than five (5) months from the date of Appellee's response to cross-claims up to and until its filing of its motion for summary judgment. Appellant also avers that the five month period was actually clouded with potential settlement which stalled out all discovery.

To date, Appellant has been unable to depose any individual in connection with this matter; nor has it been able to secure the full response of any of the Defendants in regards to discovery requests made. In fact, at this very moment Appellant is engaged in requesting the trial court to compel other defendants to respond to its original discovery requests.

According to law, it would seem to indicate that even a full and productive five months is not enough time to compile adequate discovery. In a case held in the 2nd Circuit, the Court held that *seven months was not adequate time* to depose a

person essential to the matter and therefore a continuance should have been granted. *West ex rel. West v. Watson*, App. 2 Cir.2001, 799 So.2d 1189, 35,278 (La.App. 2 Cir. 10/31/01), writ denied 809 So.2d 140, 2001-3179 (La. 2/8/02).

Even looking at the case law pertaining to this discovery issue from the other end of the spectrum, or opposing point of view, it would indicate that the courts are in agreement that time to obtain discovery is necessary. "Although the language of the summary judgment statute does not grant a party the absolute right to delay a decision on a motion for summary judgment until all discovery is complete, the law *does require* that the parties be given a f*air opportunity to present their case. Leake & Andersson, LLP v. SIA Ins. Co. (Risk Retention Group), Ltd.,* App. 4 Cir. 2004, 868 So. 2d 967, 2003-1600 (La.App. 4 Cir. 3/3/04), rehearing denied; *Doe v. ABC Corp.*, App. 4 Cir. 2001, 790 So.2d 136, 2000-1905, 2000-1906 (La.App. 4 Cir. 6/2, 2000-1906 La.App. 4 Cir. 6/27/01, writ denied 801 So.2d 377, 2001-2207 (La. 11/9/01). Given the Appellee and the trial court's failure to observe and adjudicate several key claims made by the Appellant as well as Smith & Associates, it is clear that Appellant was not afforded the opportunity to present its case. Once again, the trial court has erred in granting summary judgment as to all claims made by Appellant.

Error 2: The Trial Court Erred in Granting Appellee's Motion for Summary Judgment as There Exists at Least One Genuine Issue of Material Fact as to Coverage for the 70 XT Skid.

Table of Contents for Legal Argument of Error 2

A. Relevant Code Article Regarding Genuine Issues of Material Fact

A motion for summary judgment will not prevail if the moving party cannot illustrate that no issue of material fact remains. This principle solely governed by La. C.C.P. Art. 966:

C. (1) After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.

(2) The *burden of proof remains with the movant.* However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to

establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

Appellee's obligation to the court is to satisfy its burden to negate the essential elements of the claims against him. Appellee cannot prevail without carrying its burden of proving there was an absence of support for *all* of a plaintiff's claims. *Pittman v. State Farm Mut. Auto. Ins. Co.*, La. App. 06-920, 958 So. 2d 689, 2007 La. App. LEXIS 749 (La.App. 5 Cir. Apr. 24 2007) (emphasis added). "The moving party cannot prevail on the motion by merely arguing there is a general lack of proof for the non-movant's claims. Rather, the movant *must point out with specificity which specific elements of proof are lacking.* *Pittman* at 694, 958 So. 2d 689 (emphasis added) Case law indicates that summary judgment is not appropriate where the petition and depositions provided enough factual support for *a reasonable fact finder to find acts* constituting liability on the part of the movant and thus, summary judgment was improperly granted. *King v. Parish Nat'l Bank*, La. 2004-0337, 885 So. 2d 540, 2004 La. LEXIS 2979 (La. Oct. 19 2004). A better way at looking at the burden on the movant is shown in the *Vermilion* case where the court stated, "mover must meet a *strict standard* by a showing that excludes any real doubt as to the existence of a genuine issue of material fact. *Vermilion Corp. v. Vaughn*, 397 So. 2d 490 (La. 1981).

Appellate courts review summary judgments de novo under the same criteria that govern the district court's consideration of whether summary judgment is

appropriate. *Harper v. Advantage Gaming Co.*, La. App. 38837, 880 So. 2d 948, 2004 La. App. LEXIS 1991, 3 A.L.R.6th 795 (La.App. 2 Cir. Aug. 18 2004). Appellant's stated facts shall be reassessed to determine if (a) they consitute a genuine issue, and (b) that issue was dispelled by Appellee.

B. Applicable Law Coupled with Circumstances of Case Indicate that the Motion for Summary Judgment was Improper.

Appellant has been clear throughout this brief that numerous issues of material fact remain as to whether or not (a) Appellee provided coverage for the 70 XT skidsteer (hereinafter "70 XT"), (b) Appellee remains responsible for the loss of the 70 XT due to a breach of its duty to Appellant, or (c) Appellee remains responsible for Appellant's detrimental reliance. These issues were presented clearly by the Appellant and in the opinion of Appellant all but disregarded by the trial court. The error generally centers around the trial court's inability to consider vague or ambiguous language as possibly beneficial to the non-movant.

(i) CPIM Scheduled Coverage for the 70 XT

Appellant's factual assertions made by way of its petition and memorandum in opposition to summary judgment provide assertions that the Appellee provides some form of coverage for the 70 XT.

Appellant has argued that the Appellee's failure to evidence the date of the theft of the 70 XT, through any means, whether that be documentation or statement

of a person familiar with the incident leading to the theft, has caused a question to linger as to whether or not the alleged "newly acquired equipment" provision of the CPIM has application. Because the Appellees were unable to provide substantiation for their allegation that the theft occured more than 60 days from the "rental" of the 70 XT, the issue is genuinely at dispute between the parties. Further, Appellees have been unable to properly provide any evidence or contradictory statement which even implies that the "rental" of a peice of machinery constitutes the "acquisition" of a peice of machinery for purposes of coverage under the CPIM. As such, a large portion of undefined, vague and ambiguous contract language remains unsolved by the Appellee's offerings to the trial court.

"An insurance policy is a contract between the parties and should be construed by using the general rules of interpretation set forth in the Civil Code." *Louisiana Insurance Guaranty Assoc. ("LIGA") v. Interstate Fire & Casualty Co.*, 93-0911 (La. 1/14/94), 630 So. 2d 759. "The judicial responsibility in interpreting insurance contracts is to determine the parties' common intent." LSA-C.C. art. 2045; *LIGA*, supra. Such intent is to be determined in accordance with the general, ordinary and plain meaning of the words used in the policy, *unless the words have acquired a technical meaning. Gedward v. Sonnier*, 98-1688 (La. 3/2/99), 728 So. 2d 1265 (emphasis added)

If language remains unclear after resorting to plain and technical reasoning, the rules of strict construction apply. 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. LSA-C.C. art. 2056; *LIGA*, supra (emphasis added). As the Appellant is the insured, it should have been given a narrow meaning to the vague wording of the policy.

(ii) Potential Additional Coverage for 70 XT

Appellant argues that the discrepancies with language and potential coverage does not end with the CPIM general coverage. Additional coverage remains to be refuted under (a) BOC and (b) CPIM Section C (hereinafter "CPIM C").

Under the provisions of the BOC, Appellants may have coverage for the 70 XT if in fact the equipment can be interpreted as "business personal property." No definition for business personal property has been provided by the BOC, nor has the Appellee provided contridictory evidence that the 70 XT cannot be covered under this provision.

CPIM C, as amended by Form CM T3 88 08 97 (Exhibit B2, Page 10, Moton for Summary Judgment) provides coverage for "unscheduled tools and equipment for any one item." Similarly, CPIM Additional Coverage Section 5 provides potential additional recovery for temporary loss due to the absence of the covered property. Once again the policy provides no meaning for these terms, nor does the responsive documentation provided by Appellee.

Appellee's failure to respond to allegations such as those cited above, does not in any way fulfill the duty it has to negate each and every claim made against it.

"Summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is *no reasonable interpretation of the policy*, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. *Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94), 634 So. 2d 1180; *Davis v. American Heritage Life Insurance Co.*, 35,153 (La. App. 2d Cir. 10/31/01), 799 So. 2d 705. Appellant believes that its interpretation of this policy is more than reasonable after examining both the plain and technical meanings of the language put forth in the policies at dispute.

(iii) Alternative Responsibility for Loss of 70 XT

Appellant also argued that Appellee is likely alternatively responsible for the loss of the 70 XT regardless of whether or not the machinery is actually covered by the policy. Appellant believes there is a genuine issue of material fact that UW acts as agent for Appellee, and after receiving a copy of the BLE Contract for the 70 XT, negligently mishandled that information resulting in unlisting of the 70 XT among the declarations of the CPIM policy.

In regards to a vicarious liability claim surviving summary judgment, the moving party must of course illustrate that there is no genuine issue of material fact. If movant can satisfy that duty, the non-movant is required to produce factual support sufficient to establish that they would be able to satisfy their evidentiary

burden demonstrating the principal's right to control the work or actions of the agent for the insuring of the the equipment. *Pender v. Elmore*, La. App. 37690, 855 So. 2d 930, 2003 La. App. LEXIS 2514 (La.App. 2 Cir. Sept. 24 2003), writ denied by La. 2003-2968, 864 So. 2d 632, 2004 La. LEXIS 209 (La. Jan. 16, 2004). Further, if the evidence showed that there was a factual dispute as to whether the agent was working in the course of its agency when it caused the damage, it would impute liability to the employer under La. Civ. Code Ann. Art. 2320, and inevitably survive summary judgement. *Alford v. State Farm Auto. Ins. Co.*, La. App. 31763, 734 So. 2d 1253, 1999 La. App. LEXIS 1322 (La.App. 2 Cir. May 5 1999), writ denied by La. 99-1595, 747 So. 2d 548, 1999 La. LEXIS 2318 (La. Sept. 3, 1999).

Under La. C.C. Art. 2320, "masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." This duty of the master extends to independent contractors as well. *Arroyo v. E. Jefferson Gen. Hosp.*, La. App. 06-799, 956 So. 2d 661, 2007 La. App. LEXIS 463 (La.App. 5 Cir. Mar. 13 2007), writ denied by 957 So. 2d 179, 2007 La. LEXIS 1360 (La. 2007). Because it was alleged that UW acted specifically at the direction of Appellee in procuring the policies, collecting premiums and updating, maintaining and amending the policies, there is a genuine issue of material fact as to whether or not Appellee may be responsible for UW's failure to properly handle the BLE Contracts.

C. Review of All Claims as to 70 XT Proper on Appeal

As stated above, this Court reviews the matter *de novo. Harper*, 880 So. 2d 948. The Appellant avers that each and every one of its claims were stated as matters of law within its pleadings to the trial court and specifically its petition. A petition must merely cite a "short, clear, and concise statement of the causes of action." La. C.C.P. Art. 891. Appellant sought damages for Appellee's failure to provide coverage under its numerous policies and failure to provide proper and sufficient coverage. (Petition, Section 15) Appellant's claims were not vague and did not deprive the Appellee of notice of the claims. *State ex rel. Guste v. Green*, La. App. 94-1138, 657 So. 2d 610, 1995 La. App. LEXIS 1898 (La.App. 1 Cir. June 23 1995).

Appellee's claims were absolutely before the court, and Appellee waived ant objection when it filed an answer, because an objection based on failure to properly state its claims is dilatory and had to have been pleaded prior to answer, or it is waived under La. Code Civ. Proc. Ann. art. 928. *Richwood v. Goston*, 340 So. 2d 632, 1976 La. App. LEXIS 3508 (La.App. 2 Cir. 1976), writ of certiorari denied by 342 So. 2d 871, 1977 La. LEXIS 6345, 1977 La. LEXIS 6968 (La. 1977).

Appellee failed to raise any objection to any of the Appellant's claims and cannot object on appeal that it could not identify the Appellant's claims which were overstated in correspondence and its memorandum in opposition to the motion for

summary judgment. Appellee entered the insurance policies into the record and put at dispute each and every single term of that policy. Appellant made a general claim that it was provided coverage by Appellee and such was before the trial court for ruling.

In considering whether summary judgment was appropriate in this case, the use of undefined terms and ambiguous language is construed in *its most inclusive sense in favor of coverage*. *Smith v. Rocks*, 957 So. 2d 886 (La.App. 2 Cir. 05/16/07). Therefore, it is clear that the judgment was improperly entered and that it goes against the law and evidence. Appellant desires this Court to overturn summary judgment dismissing claims as to coverage and responsibility for the 70 XT.

Error 3: The Trial Court Erred in Granting Appellee's Motion for Summary Judgment as There Exists at Least One Genuine Issue of Material Fact as to Coverage for the Replacement Value of the Insured Machinery.

Table of Contents for Legal Argument of Error 3

A. Relevant Code Article Regarding Genuine Issues of Material Fact

As stated above in Error 2, the determination of whether or not claims should be dismissed pursuant to summary judgment are solely governed by La. C.C.P. Art. 966. Appellee cannot prevail without carrying its burden of proving there was an absence of support for *all* of a plaintiff's claims. *Pittman v. State Farm Mut. Auto. Ins. Co.*, La. App. 06-920, 958 So. 2d 689, 2007 La. App. LEXIS 749 (La.App. 5 Cir. Apr. 24 2007) (emphasis added). The burden on the movant is shown in the *Vermilion* case where the court stated, "mover must meet a ***strict standard*** by a showing that excludes any real doubt as to the existence of a genuine issue of material fact. *Vermilion Corp. v. Vaughn*, 397 So. 2d 490 (La. 1981). Appellate courts review summary judgments de novo under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Harper v. Advantage Gaming Co.*, La. App. 38837, 880 So. 2d 948, 2004 La. App. LEXIS 1991, 3 A.L.R.6th 795 (La.App. 2 Cir. Aug. 18 2004).

B. Applicable Code Provisions and Case Law, Coupled with Circumstances of Case Indicate that a Genuine Issue of Material Fact Remains Unsettled as to Coverage for Replacement Value.

Appellant has provided adequate evidence of fact relating to the Appellee's obligation to provide coverage for the Replacement Value of the 60 XT skidsteer (hereinafter "60 XT"), and if covered, which we argue for coverage, the 70 XT. (The 60 XT and 70 XT are referred to as the "Skids") The submission to the trial

court of (a) the COI indicating coverage for the replacement value of the Skids; (b) the BLE Contracts unequivocally requiring coverage for replacement cost; and (c) the face of the CPIM policy undoubtedly provides that Appellee was obligated to and does provide coverage to the Appellant for replacement value (hereinafter "RV") of the Skids.

(i) Replacement Value Coverage Provided by the Policies

The Petition clearly states that Appellant and Smith & Associates entered into an agreement to provide coverage for the RV of the Skids. The effect of this intention was evidenced by the BLE Contracts. Appellants aver that the BLE Contracts were utilized in order to obtain the COI provided by UW and Appellee. The COI once again clearly reflects the intention and the agreement with both UW and Appellee that the Skids were to be covered by the policies, and most specifically the CPIM.

Appellees have argued that the language of the CPIM policy itself precludes each and every issue of fact remaining. Appellee argues that one portion of the CPIM, Section E, determines that Appellee's sole obligation, without dispute, is that "valuation" will be the "least of the following amounts: ... (1) The actual cash value of that property." However, the first page of the Declarations to the CPIM states that the coverage to the specific 60 XT leased to Smith & Associates by Appellant is alloted at $36,000.00, the Appellant's declared RV of the 60 XT,

therefore providing more than a simple question as to (a) whether or not Appellee received and implemented the COI and BLE Contracts into the policy, and (b) whether or not the CPIM does in fact provide coverage for the RV of the Skids.

Specifically regarding the question of insurance coverage, the jurisprudence of Louisiana consistently holds, "[a] court should only grant the motion for summary judgment when the *facts are taken into account* and it is clear that the provisions of the insurance policy do not afford coverage. *Reynolds v. Select,* 93-1480 (La. 4/11/94), 634 So.2d 1180, 1183. (emphasis added) Summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. *Smith v. Terrebonne Parish Consol. Gov't,* La. App. 2002-1423, 858 So. 2d 671, 2003 La. App. LEXIS 1965 (La.App. 1 Cir. July 2 2003). As has been illustrated above in Error 1, the court did not review any undisputed facts related to the manner in which Appellee reviewed the COI or BLE Contracts. In fact, the only undisputed facts presented was that the CPIM Section E, reads as is cited above.

Nothing has been presented by the Appellee to discredit the notion put forward by the Appellant that the COI, BLE Contracts and CPIM Declaration page each indicate something opposite to that which is stated in the CPIM. In *McGuire v. Davis Truck Services*, Inc., 518 So. 2d 1171 (La. App. 5th Cir. 1988), writ

denied, where two or more policy provisions of equal stature conflicted, the policy required interpretation under a different legal standard and in favor of the insured. It can also be said that the CPIM Section E provision and the Declaration page create ambiguity in the policy, therefore the 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. La. C.C. art. 2056 (emphasis added)

In *Sayes v. Safeco Ins. Co.*, 567 So. 2d 687; 1990 La. App. LEXIS 2057, (3 Cir. 1990), the court stated that "interpretation of a contract [for insurance] is the determination of the common intent of the parties. La. C.C. Arts. 2045 and 2046. Louisiana law is clear that any ambiguities in a contract are to be construed against the drafter of a contract. *Sayes*, 567 So. 2d 687, citing *Cotton v. Wal-Mart Stores, Inc.*, 552 So. 2d 14, at page 18 (La. App. 3 Cir. 1989). There is no doubt that Appellee was the drafter of this policy and that its inclusion of the RV of Skids on the Declarations page indicates a valud issue of material fact which must be reviewed by the trier of fact.

Appellant has also argued that coverage may indeed exist for the replacement value of the Skids under the CGL and CEL policies. The CEL provides coverage for replacement of covered property, the definition of which may apply to the Skids and is at dispute. The CGL provides coverage for the loss or damage to property resulting from the actions of Smith & Associates. It has been alleged that Smith & Associates was negligent in causing the loss of the Skids.

Therefore, Appellant has additional issues which have not been answered by the Appellees, nor have been acknowledged by the trial court.

(ii) Alternatively, Appellee Bears Burden of Loss of RV for 60 XT

It has been alleged by the Appellant that the Appellee was in receipt of the BLE Contracts and had knowledge of Smith & Associates' intent to procure coverage for the RV of the Skids. (Petition, Section 15, as well as Opposition to Motion for Summary Judgment, Page 6) The Appellee has failed to provide any evidence of fact or even inference which indicates Appellees handling of the BLE Contracts and the COI which was issued back to the Appellant.

Appellant believes that the mishandling of documentation providing the intent of the Appellants constitutes negligence, error and omission in violation of Louisiana law. This tortuous relationship was in question before. Neither the trial court nor the Appellee provided evidence that this claim was being observed.

Obviously, by failing to observe a claim clearly before the court, the trial court has entered a judgment which is against the law and fact, since the law dictates that the Appellee be responsible for its duties to Appellant and the facts clearly show that a genuine issue of material fact remains concerning Appellee's satisfaction of this duty.

Error 4: The Trial Court Erred in Granting Appellee's Motion for Summary Judgment as There Exists at Least One Genuine Issue of Material

Fact as to Whether the Appellee Has Other Duties to Appellant Under the Contract which Remain Unsatisfied or Which Were Breached.

The trial court has decided within its Judgment that the Appellant and Smith & Associates' claims were dismissed due to merely two factors: (1) that the policy does not contain coverage for the 70 XT; (2) that the policy only provides coverage for actual cash value. See Exhibit A, Judgment.

The trial court has failed to examine the Appellant's claims that additional contractual duties remain regarding the Appellee's failure to adjust its claims for insurance proceeds. In the petition, Appellant stated that the Appelle "failed to provide insurance coverage for the replacement value of the stolen equipment." (Petition, Section 15). This sentiment is reflected in the Cross-Claims asserted by Smith & Associates, wherein they assert general claims related to Appellee's failure to properly and timely adjust claims made by Appellant. Once again, these claims were entirely omitted from the Appellee's Motion for Summary Judgment and not reflected in the Judgment.

An insurer owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

Under La. R.S. 22:1220, an insurer will be liable for "any one of the following acts, if knowingly committed or performed ...

> (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
> (2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
> (3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured. ..
> (5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.
> (6) Failing to pay claims pursuant to R.S. 22:658.2 when such failure is arbitrary, capricious, or without probable cause."

Furthermore, a cause of action for an insured against an insurer for dealing in bad faith when handling a claim does not rest solely on La. Rev. Stat. Ann. § 22:1220. *Smith v. Audubon Ins. Co.,* La. App. 94-1571, 656 So. 2d 11, 1995 La. App. LEXIS 1100 (La.App. 3 Cir. May 3 1995). Therefore, Appellants may rely on general bad faith provisions in order to find remedy.

Surely, Appellants claims along with the allegations made by Smith & Associates represent at least one genuine issue of material fact for the court to consider. At the least, the trial court's failure to enter judgment as to these claims, and provide notice of observation calls into question the value of the Judgment's determination that all claims are dismissed.

Error 5: The Trial Court Erred in Granting Appellee's Motion for Summary Judgment Because it Failed to Adjudicate, Hear or Observe Contract and Tort Claims Which Were Before the Court.

Appellant has put forth various instances of claims which were not observed and consequently unsettled by the trial court, even though the Judgment indicates that all claims are dismissed. Similar to Appellant's claims, Smith & Associates' claims were dismissed without being heard. While Appellant does not assume to have the right to discuss the substantive nature of Smith & Associates' claims, it does point out the objective observation that the Motion for Summary Judgment and Judgment fail to notice these claims, though they are inevitably dismissed.

Appellant has put forth implied tort and contract claims related to, (1) failure to properly adjust claims for coverage and (2) failure to provide coverage. These assertions call into account claims for negligence, negligent supervision, negligent handling, violations under Title 22, and general breach of contract claims, among others. Due to the infancy of the proceedings, Appellant's claims were unable to develop, but were inevitably before the Court for determination.

By law, a judgment which adjudicates fewer than all claims shall not constitute a final judgment for the purpose of an immediate appeal. La. Code Civ. Proc. art. 1915(B)(2). Thus, this Court would be required to dismiss the appeal and order the trial court to continue in its adjudication of the proceedings. *City of New Orleans v. Howenstine*, 98-2157 (La. App. 4 Cir. 5/5/99), 737 So. 2d 197; *Narcise*

v. Jo Ellen Smith Hosp., 98-0918, 98-2417 (La. App. 4 Cir. 3/10/99), 729 So. 2d 748, writ denied, 99-0953 (La. 5/28/99), 743 So. 2d 679; *Deal v. Housing Authority of New Orleans*, 98-1530 (La. App. 4 Cir. 2/17/99), 735 So. 2d 685, writ denied, 99-0728 Pg 2 (La. 6/18/99), 745 So. 2d 21; *Jackson v. America's Favorite Chicken Co.*, 98-0605 (La. App. 4 Cir. 2/3/99), 729 So. 2d 1060. While this does not favor the Appellant's argument that Summary Judgment was improper, it does call into the obligation of the trial court to continue to hear the claims before it.

If the trial courts actions in not giving creedance to the Appellant's allegations should be determined failures to identify valid and genuine issues of material fact then the Judgment should be overturned so that a trier of fact can make determinations as to the claims. However, if this Court feels compelled that the failure to observe claims were simply failures to adjudicate those claims, than the claims should remain in the trial court for adjudication.

VI. Conclusion

Appellant argues that a grave injustice has been done unto it by the trial court's failure to observe vital factual allegations which provide support for the claims it presented against Appellee. Appellee's failure to respond sufficiently, or in some cases failure to respond at all, actually acted to further substantiate those factual assertions. Appellant feels that Appellee has failed to satisfy its burden to

the trial court and that Appellant has accurately provided the trial court with more than at least one genuine issue of material as to each of its claims.

Appellee's failure to present a sufficient or timely motion for summary judgment, nor one supported by sufficient evidence, provides additional objective observation leading to the insufficiency of the Judgment.

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Appellee's Motion for Summary Judgment.

VII. Certificate of Service

I, Scott G. Wolfe, Jr., of Wolfe Law Group, L.L.C., hereby certify that a copy of this Appellant Brief was mailed via regular U.S. Mail, postage prepaid, to counsel of record for Appellee, Pierce A. Hammond, II, 650 Poydras St., Suite 1400, New Orleans, LA 70130, on July 3, 2008.

VI. Exhibits

Exhibit A - Judgment Appealed From

Respectfully Submitted,

Scott G. Wolfe, Jr. (30122)
Wolfe Law Group, L.L.C.
4821 Prytania Street
New Orleans, Louisiana 70115
T: (504) 894-9653
F: (866) 761-8934

BOTTOM LINE EQUIPMENT, L.L.C.	NO. 64,966 DIVISION "C"
VERSUS	29TH JUDICIAL DISTRICT COURT PARISH OF ST. CHARLES
SMITH & ASSOCIATES CONSULTING, L.L.C., ET AL	STATE OF LOUISIANA

2008 FEB 1 PM 4:21
DEPUTY

JUDGMENT

The Motion for Summary Judgment of Travelers Property and Casualty Company of America was brought on for hearing on November 30, 2007.

Present were:

Peirce A. Hammond, II on behalf of Travelers Property and Casualty Company of America

M. Todd Alley on behalf of Bottom Line Equipment, L.L.C.

After considering the pleadings, evidence and arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Travelers Property and Casualty Company of America's Motion for Summary Judgment be and is hereby GRANTED. The Court finds that Travelers Property and Casualty Company of America's policy only covers the 60xt skid steer and does not cover the 70xt skid steer. Furthermore, the policy only provides for the payment of actual cash value and not for the payment of replacement cost. Furthermore, Travelers Property and Casualty Company of America has paid the actual cash value for the 60xt skid steer. Therefore, all claims against Travelers Property and Casualty Company of America by Bottom Line Equipment, L.L.C. and all claims filed in the Answer and Cross-Claim of Smith & Associates Consulting, L.L.C. against Travelers Property and Casualty Company of America be and are hereby DISMISSED, with prejudice, and with each party to bear their own costs.

This 8th day of February, 2008.

JUDGE

A TRUE COPY
DEPUTY