RICHARD PERNICIARO & ROBERT CLEVELAND INDIVIDUALLY AND ON BEHALF OF PARATECH, LLC	*	**NO. 2018-CA-0113**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
GUY MCINNIS, RAY LAUGA, JR., CASEY W. HUNNICUTT, RICHARD LEWIS & ST. BERNARD PARISH GOVERNMENT, ET AL	* * * * * * *	**STATE OF LOUISIANA**

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 16-0969, DIVISION "AD HOC"
Honorable Jerome Joseph Barbera, III,

* * * * * *

Judge Paula A. Brown

* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Paula A. Brown, Judge Tiffany G. Chase)

LEDET, CONCURRING WITH REASONS

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AFFIRMED
September 7, 2018

This appeal involves an insurance policy coverage dispute between RSUI Indemnity Company ("RSUI") and its Insured, the St. Bernard Parish Government (the "SBPG") and its elected and appointed officials. The plaintiffs, ParaTech, LLC ("ParaTech"), Richard Perniciaro ("Mr. Perniciaro"), and Robert Cleveland ("Mr. Cleveland") (collectively, "the Plaintiffs") filed a petition for damages against the SBPG and several of its council members[1]—Guy Mclnnis ("Mr. McInnis"), Ray Lauga, Jr. ("Mr. Lauga"), Casey W. Hunnicutt ("Mr. Hunnicutt"), and Richard Lewis ("Mr. Lewis") (collectively the "Parish"), and RSUI.[2] RSUI filed a Motion for Summary Judgment contesting coverage. On September 1, 2017, the district court granted RSUI's motion for summary judgment and dismissed with prejudice all of Plaintiffs' direct action claims against RSUI. The Parish appeals, seeking review of this judgment. For the reasons set forth below, the district court's judgment is affirmed.

[1] Collectively referred to as the "Council Members."

[2] The Times Picayune, LLC, and Benjamin Alexander-Bloch are also named as Defendants in the instant suit but are not the subject of RSUI's motion for summary judgment.

FACTUAL AND PROCEDURAL HISTORY

Mr. Perniciaro was a member/owner of ParaTech.[3] On behalf of ParaTech, he entered into a contract with the SBPG to provide Information Technology ("IT") services to the SBPG. Mr. Perniciaro averred that on October 27, 2014, he was informed by a Council Member, Mr. McInnis, that the St. Bernard Parish Council (the "Parish Council") planned to hire Todd's Technology ("Todd's") to provide IT services and to establish a separate computer system for the Parish Council.[4] Subsequently, between November 2014 and July 2015, the Parish Council passed several ordinances that mandated the Parish President to sign the contract with Todd's; that terminated the contract with ParaTech; that restricted ParaTech's access to the public buildings and computer systems; and that defunded the parish's IT department which resulted in ParaTech having outstanding invoices. Although the Parish President vetoed the ordinances, the Parish Council voted to override the vetoes. ParaTech's contract was officially terminated in July, 2015. The dispute between ParaTech and the Council Members was reported by news agencies—the Times Picayune and WGNO television New Orleans. Several of the Council Members were quoted in the news stories.

On November 7, 2014, ParaTech filed, in St. Bernard Parish, a "Petition for Damages, Breach of Contract, and Request for a Temporary Restraining Order" ("Para I") against the SBPG alleging breach of contract, intentional interference with contract, negligence, and defamation. Additionally, ParaTech sought to enjoin the SBPG from contracting or commencing IT work with any person or company other than ParaTech.

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[3] Mr. Cleveland was also a member/owner of ParaTech.

[4] Other representatives from the SBPG were also present at the meeting.

ParaTech filed an amended petition which named RSUI as a Defendant. RSUI issued a "Directors and Officers Liability Policy" to the SBPG. There were two policies issued during the relevant time period. One policy covered February 1, 2014 to February 1, 2015;[5] the second policy covered February 1, 2015 to February 1, 2016.[6] Both were claims-made-reported policies which contained identical pertinent language.[7] In the policy, "Insured Persons" included the SBPG and its elected and appointed officials. The policy required RSUI to defend the Insured against any claim for which coverage applied under the policy.[8]

On October 27, 2015, Plaintiffs filed, in Jefferson Parish, a "Petition for Damages" ("Para II"). In Para II, the named defendants were Messrs. McInnis, Lauga, Hunnicutt, and Lewis, individually and in their capacity as council members for the SBPG, the SBPG, and RSUI.[9] Plaintiffs alleged claims of defamation and injury against those Defendants and set forth a general allegation of "[a]ny and all other negligent and/or intentional acts perpetrated . . . which will be proven or identified by discovery." Due to improper venue, Para II was dismissed without prejudice.

On August 5, 2016, Plaintiffs filed, in St. Bernard Parish, a "Petition for Damages" ("Para III") which is the instant suit. Para III named the same parties

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[5] Policy number HP655864.

[6] Policy number HP661160.

[7] "Claim" is generally defined in the policy as "a written demand for monetary or non-monetary relief [.]"

[8] The record is unclear as to the disposition of the first suit filed by Plaintiffs. The Parish alleges it is still pending in St. Bernard Parish District Court in Division D, Docket Number 14-1331. The appellate record reflects Docket Number 14-1331 is one of the cases consolidated for this appeal.

[9] The defendants also included those named in footnote 1, *supra*.

and alleged the same causes of action as Para II.[10] Particularly, Plaintiffs alleged Messrs. McInnis, Lauga, Hunnicutt, and Lewis, personally and as council members of the SBPG, and the SBPG were liable to Plaintiffs for negligent and/or intentional acts which included:

- Defaming and injuring the Plaintiffs by their public statements to the press and others;

- Defaming and injuring the Plaintiffs by entering into an illegal contract with Todd's and that contract was recorded in the public record;[11]

- Defaming and injuring the Plaintiffs by initiating and voting on illegal ordinances that terminated ParaTech's contract with the parish, prevented ParaTech from entering any public building in the parish, and refused to pay money owed to ParaTech all in violation of the St. Bernard Parish Charter; and

- "Any and all other negligent and/or intentional acts. . . which will be proven or identified through discovery."

Messrs. Perniciaro and Cleveland sought damages for public embarrassment and humiliation, mental anguish and anxiety, loss of income, loss of earning capacity, loss of enjoyment of life, and loss of and damage to reputation. ParaTech prayed for damages for loss of business, loss of business partners and members, and loss of and damage to its reputation in the industry.

On March 29, 2017, RSUI filed a motion for summary judgment asserting the following grounds:

- The SBPG untimely notified RSUI of the claims asserted by ParaTech in Para I. RSUI asserted the petition in Para I was served on November 12, 2014, but the claim was not reported to RSUI until August 31, 2015. RSUI explained the applicable policy required a claim to be reported during the

[10] The named defendants also included those named in footnote 1, *supra*.

[11] On March 6, 2017, the district court, in docket number 14-331, granted a summary judgment in favor of ParaTech, finding the SBPG failed to perform its contract with ParaTech when it entered into the contract with Todd's.

policy period, not to exceed sixty days after the expiration date of the policy;[12]

- The claims alleged by ParaTech in Para III are deemed to be a single claim which arose in Para I. Because the single claim was untimely reported by the SBPG, RSUI did not owe the SBPG a defense; and

- The policies excluded coverage for Plaintiffs' claims of breach of contract, defamation, and mental anguish.

Before the hearing on the motion for summary judgment was held, the Council Members filed a motion to compel discovery and a notice to depose RSUI, pursuant to La. C.C.P. art. 1442.[13] In response, RSUI filed a motion to quash the notice of deposition, requested a protective order, and filed an opposition to the motion to compel. On June 14, 2017, a hearing was held, and the district court rendered judgment on June 20, 2017, denying the Council Members' motion to compel, and granting RSUI's motion to quash and request for a protective order.[14]

On August 22, 2017, the district court heard RSUI's motion for summary judgment. The district court's judgment, rendered on September 1, 2017, provided in pertinent part:[15]

> [T]he Court finds there is no coverage afforded to St. Bernard Parish Government, Guy McInnis, Ray Lauga, Jr., Casey W. Hunnicutt, and Richard Lewis under RSUI Directors and Officers Liability Policy no. HP655864 (2/1/2014–2/1/2015) and RSUI Directors and Officers

[12] At the hearing, RSUI admitted that the SBPG gave it timely notice of the claims asserted in Para II as to Messrs. Perniciaro and Cleveland, and the Council Members.

[13] La. C.C.P. art. 1442 provides in part: "A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested."

[14] Council Members did not seek supervisory review of the district court's judgment.

[15] Appellate courts review judgments and not reasons for judgments. *Wooley v. Lucksinger*, 09-0571, 09-0584, 09-0585, 09-0586, pp. 77-78 (La. 4/1/11), 61 So.3d 507, 572. Although oral reasons are not reviewable by an appellate court, they may be insightful. In the case *sub judice*, the district court espoused that the claims asserted in Para I were not timely reported to RSUI; the dismissal of Para II resulted in the claims being dismissed; the claims asserted in Para III were averred outside of the policy period; and the policy excluded coverage for claims for breach of contract, defamation, mental anguish, emotional distress, and loss of income.

> Liability Policy no. HP661160 (2/1/2015–2/1/2016) for Plaintiffs claims, and there is a judgment herein dismissing with prejudice all claims asserted by Plaintiffs against RSUI . . . .

From this judgment, the Parish appeals.

DISCUSSION

On appeal, the Parish assigns essentially two errors: (1) the district court erred in denying the Council Members' motion to compel discovery and request to depose RSUI, and granting RSUI's motion to quash and protective order; and (2) the district court erred in granting the summary judgment based on certain policy exclusions including excluding coverage for Plaintiffs' general tort liability claims; in considering an argument not raised by the moving party contrary to La. C.C.P. art. 966(f); and by finding Plaintiffs' claims asserted in Para III fell outside of the policy period.

Discovery

The Parish asserts the district court erred by denying the Council Member's motion to compel discovery and notice to depose RSUI and by granting RSUI's motion to quash the deposition and protective order. RSUI asserts the Parish untimely seeks review on appeal of the interlocutory rulings. Alternatively, RSUI argues further discovery was not needed for the district court to decide the coverage issue on summary judgment.

In *Sporl v. Sporl*, 00-1321, p. 2 (La. App. 5 Cir. 5/30/01), 788 So.2d 682, 683-84, the appellate court explained:

> An interlocutory judgment determines "preliminary matters in the course of the action" and is generally non-appealable. La. Code Civ. P. arts. 1841 and 2083. When an unrestricted appeal is taken from a final judgment, the appellant is entitled to a review of all adverse interlocutory rulings prejudicial to him, in addition to the review of the correctness of the final judgment from which the party

> has taken the appeal. *Bielkiewicz v. Ins. Co. of North America*, 201 So.2d 130 (La. App. 3 Cir.1967).

The granting of the summary judgment is a final appealable judgment; thus, the denial of the motion to compel discovery is properly before this Court on appeal.

The Parish asserts the district court erred in denying the Council Members' motion to compel and quashing the notice to depose RSUI as discovery was incomplete. The Parish points to the lack of responses in the answer to interrogatories by RSUI; markedly, the lack of "substantive responses to interrogatories involving the underwriting process or drafting of the policy terms (footnotes omitted)." Additionally, the Parish contends that the Article 1442 deposition of RSUI was necessary to determine the history of drafting and application of the provisions relied on by RSUI to exclude coverage.

"In ruling upon discovery matters, the trial court is vested with broad discretion and, upon review, an appellate court should not disturb such rulings absent a clear abuse of discretion." *Channelside Servs., LLC v. Chrysochoos Grp., Inc.*, 15-0064, p. 8 (La. App. 4 Cir. 5/13/16), 194 So.3d 751, 756 (citing *Sercovich v. Sercovich*, 11-1780, p. 5 (La. App. 4 Cir. 6/13/12), 96 So.3d 600, 603).

Louisiana Code of Civil Procedure Article 966A(3) provides that a summary judgment may be granted "[a]fter an opportunity for adequate discovery." However, in *Orleans Par. Sch. Bd. v. Lexington Ins. Co.*, 12-1686, pp. 29-30 (La. App. 4 Cir. 6/5/13) 118 So.3d 1203, 1223, this Court held:

> Construing Article 966, this court has held that "while parties must be given fair opportunity to carry out discovery and present their claim, there is no absolute right to delay action on motion for summary judgment until discovery is complete." *Thomas v. North 40 Land Development, Inc.*, 04-0610, p. 31 (La. App. 4 Cir. 1/26/05), 894 So.2d 1160, 1179 (quoting *Butzman v. Louisiana Power and Light Co.*, 96-2073, p. 4 (La. App. 4 Cir. 4/30/97), 694 So.2d 514, 517). . . . Unless plaintiff shows a probable injustice a suit should not be

> delayed pending discovery when it appears at an early stage that there is no genuine issue of fact." *Simoneaux v. E.I. du Pont de Nemours and Co.*, 483 So.2d 908, 912-13 (La.1986).

This Court further espoused that "[w]hen the words of an insurance contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent (La. C.C. art. 2046); and additional discovery cannot change the result." *Id*., 12-1686, p. 30, 118 So.3d at 1223 (citations omitted.) Moreover, "[w]hether the policy unambiguously excludes coverage . . . is solely a question of law to be decided from the four corners of the policy . . . ." *Burmaster v. Plaquemines Par. Gov't*, 10-1543, p. 13 (La. App. 4 Cir. 3/30/11), 64 So.3d 312, 321 (citations omitted).

As will be discussed *infra*, the words of the RSUI policy were clear and explicit; thus, no further discovery was needed. Accordingly, we find the district court did not abuse its discretion by denying the Council Members' motion to compel and by granting RSUI's motion to quash the deposition and protective order.

Summary Judgment

The Parish asserts the district court erred in granting RSUI's motion for summary judgment.

"A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by the litigant." *Tate v. Touro Infirmary*, 17-0714, p. 1 (La. App. 4 Cir. 2/21/18), __ So.3d ___, ___, *writ denied*, 18-0558 (La. 6/15/18), ___ So.3d ___ (citing La. C.C.P. art. 966(A)(1)).[16] An appellate court's standard of review for a grant of a

[16] 2018 WL 992322.

summary judgment is *de novo*, and it employs the same criteria district courts consider when determining if a summary judgment is proper. *Madere v. Collins*, 17-0723, p. 6 (La. App. 4 Cir. 3/28/18), 241 So.3d 1143, 1147 (citing *Kennedy v. Sheriff of E. Baton Rouge*, 05-1418, p. 25 (La. 7/10/06), 935 So.2d 669, 686). In *Chanthasalo v. Deshotel*, 17-0521, p. 5 (La. App. 4 Cir. 12/27/17), 234 So.3d 1103, 1107 (quoting *Ducote v. Boleware*, 15-0764, p. 6 (La. App. 4 Cir. 2/17/16), 216 So.3d 934, 939, *writ denied*, 2016-0636 (La. 5/20/16), 191 So.3d 1071), this Court explained:

> This [*de novo*] standard of review requires the appellate court to look at the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine if they show that no genuine issue as to a material fact exists, and that the mover is entitled to judgment as a matter of law. A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, no need for trial on that issue exists and summary judgment is appropriate. To affirm a summary judgment, we must find reasonable minds would inevitably conclude that the mover is entitled to judgment as a matter of the applicable law on the facts before the court.

"Interpretation of an insurance policy usually involves a legal question that can be resolved properly within the framework of a motion for summary judgment." *Thebault v. Am. Home Assur. Co.*, 15-0800, p. 5 (La. App. 4 Cir. 4/20/16), 195 So.3d 113, 116 (citing *Bonin v. Westport Ins. Corp.*, 05-0886, p. 4 (La.5/17/06), 930 So.2d 906, 910). In *Burmaster*, 10-1543, p. 4, 64 So.3d at 316, (citation omitted), this Court explained that "[a]n insurance policy is a contract between the parties and should be construed employing the general rules of

interpretation of contracts set forth in the Louisiana Civil Code." The extent of coverage is determined by "[t]he parties' intent as reflected by the words in the policy," and "[s]uch 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." *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So.2d 759, 763 (La. 1994) (citations omitted). Insurers can limit their liability absent a conflict with statutory provisions or public policy. *Id*. (citations omitted). The insurer has the burden of proving that a claimed loss falls within the policy exclusion. *Supreme Servs. & Specialty Co. v. Sonny Greer, Inc*., 06-1827, p. 6 (La. 5/22/07), 958 So.2d 634, 639 (citation omitted).

"'Generally the insurer's obligation to defend suits against its insured is broader than its liability for damage claims.'" *Plaia v. Stewart Enterprises, Inc.*, 14-0159, p. 35 (La. App. 4 Cir. 10/26/16), 229 So.3d 480, 504 (quoting *Mossy Motors, Inc. v. Cameras Am.*, 04-0726, pp. 5-7 (La. App. 4 Cir. 3/2/05), 898 So.2d 602).[17] In *Plaia*, this Court explained:

> The issue of whether a liability insurer has the duty to defend a civil action against its insured is determined by application of the "eight-corners rule," under which an insurer must look to the "four corners" of the plaintiff's petition and the "four corners" of its policy to determine whether it owes that duty. *Vaughn v. Franklin*, 00-0291, p. 5 (La. App. 1 Cir. 3/28/01), 785 So.2d 79, 84. Under this analysis, the factual allegations of the plaintiff's petition must be liberally interpreted to determine whether they set forth grounds which raise even the possibility of liability under the policy. *Id.* In other words, the test is not whether the allegations unambiguously assert coverage, but rather whether they do not unambiguously exclude coverage. *Id.* Similarly,

[17] The Supreme Court denied writs in this case. *Plaia v. Stewart Enterprises, Inc.*, 16-2264 (La. 2/3/17), 215 So.3d 692; 16-2261 (La. 2/3/17), 215 So.3d 698; and 16-2258 (La. 2/3/17), 215 So.3d 699.

> even though a plaintiff's petition may allege numerous claims for which coverage is excluded under an insurer's policy, a duty to defend may nonetheless exist if there is at least a single allegation in the petition under which coverage is not unambiguously excluded. *Employees Ins. Representatives, Inc. v. Employers Reinsurance Corp.*, 94-0676, p. 3 (La. App. 1 Cir. 3/3/95), 653 So.2d 27, 29.

Id. This Court espoused in *Holzenthal v. Sewerage & Water Bd. of New Orleans*, 06-0796, p. 49 (La. App. 4 Cir. 1/10/07), 950 So.2d 55, 84 (citing *American Home Assur. Company v. Czarniecki,* 255 La. 251, 230 So.2d 253 (La. 1969)), that "[a]n insurer must provide a defense to an insured if, assuming all of the allegations of the petition to be true, there would be both coverage under the policy and liability to the plaintiff."

With these precepts in mind, we review the district court's judgment *de novo*.

Breach of contract exclusion

The policy issued by RSUI to the SBPG explicitly excluded liability "under or pursuant to any contract or agreement." The Parish does not contest the policy excludes coverage for breach of contract claims. Rather, the Parish urges the breach of contract exclusion policy language—"such **Insured** would have been liable in the absence of such contract or agreement"—provides for a "but for" test to determine whether coverage is excluded. The Parish asserts there is indeed coverage for the Plaintiffs' negligent and non-contractual claims. The Parish explains that "the Parish allegedly owed an independent tort duty to Plaintiffs and allegedly breached that duty."[18] In support, the Parish cites *Borden, Inc. v.*

[18] The Parish sets forth possible non-breach of contract claims that Plaintiffs' could assert:

> (1) "preventing [Plaintiffs] from entering any public building in the parish" was in violation of the Plaintiffs' "civil rights and due process rights under Louisiana law";

Howard Trucking Co., 454 So.2d 1081, 1096 (La. 1983), wherein the Supreme Court held that "[t]here is a general rule that a party can incur liability in tort, notwithstanding a contractual relationship between parties, for consequential damages . . . where the act causing the damage constitutes both a breach of contract and legal fault."

RSUI counters that Plaintiffs fail to allege any negligence claims that are separate and distinct from the breach of contract claims. RSUI contends that the only factually plead tort claims in the petition are for defamation; and the assertion of "any and all other negligent and/or intentional acts" asserted by the Plaintiffs in the petition is merely a general allegation.[19] We agree.

In *Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Cas. Co.*, 677 F.3d 250 (5th Cir. 2012), the United States Fifth Circuit discussed the "but for" test. The issue in *Looney Ricks Kiss Architects, Inc.*, was an interpretation of a

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> (2) "[C]ouncil Members 'passed ordinances to mandate that the Parish President terminate the professional services contract with ParaTech and to defund the entire parish IT department'';
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> (3) "[C]ouncil Member Ray Lauga, Jr. acted to 'undermine the success' of Plaintiffs for personal gain";
>
> (4) "[P]arish's attorney had the Parish sign an IT contract with a third-party contractor";
>
> (5) "[C]ouncil Member Ray Lauga, Jr. allegedly made statements about helping an owner of ParaTech start a new company'";
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> (6) A Council member made a statement that "ParaTech was given a 'sweet heart deal' in receiving the contract"; and
>
> (7) The Parish's handling of business "through a personal email server and a personal email account, instead of through the parish IT network, was unsafe and likely illegal under the Louisiana Public Records Laws."

[19] In *Tuban Petroleum, L.L.C. v. SIARC, Inc.*, 09-0302, p. 4 (La. App. 4 Cir. 4/15/09), 11 So.3d 519, 522 (quoting *Montalvo v. Sondes*, 93-2813, p. 6 (La.5/23/94), 637 So.2d 127, 131), this Court explained that "Louisiana utilizes fact pleading, which means that the 'mere conclusion of the pleader unsupported by facts does not set forth a cause or right of action.'"

breach of contract exclusion contained in pertinent insurance policies. The court, applying Louisiana law, noted Louisiana courts had not considered the issue of whether a breach of contract exclusion in an insurance policy precluded coverage of tort claims the insured had a contractual obligation not to commit. The plaintiff asserted the Louisiana cases of *In re St. Louis Encephalitis Outbreak in Ouachita Parish*, 01-4224 All Cases, 41,250-41,259 (La. App. 2 Cir. 9/1/06), 939 So.2d 563 and *Everett v. Philibert*, 08-2270 (La. App. 1 Cir. 5/8/09) 13 So.3d 616, supported application of the "but for" test. The court agreed and was of the opinion that Louisiana court's would likely adopt the "but for" test to determine whether a breach of contract exclusion precluded coverage. *Id*. at 257.[20] The court explained in this test, "'the injury is only considered to have arisen out of the contractual breach if the injury would not have occurred *but for* the breach of contract.'" *Looney Ricks Kiss Architects, Inc*., 677 F.3d at 256 (quoting *Houbigant, Inc. v. Fed. Ins. Co.*, 374 F.3d 192, 202 (3d Cir.2004)).[21]

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[20] The United State Fifth Circuit explained that this is referred to as an "*Erie* guess": "When making an *Erie* guess, our task is to attempt to predict state law, not to create or modify it." *Looney Ricks Kiss Architects, Inc*., 677 F.3d at 256 (quoting *SMI Owen Steel Co. v. Marsh USA, Inc.*, 520 F.3d 432, 442 (5th Cir.2008) (internal quotation marks omitted).

[21] In *Looney Ricks Kiss Architects, Inc.*, 677 F.3d 250, the plaintiff, an architecture firm, brought an action for copyright infringement against a former client, Steve Bryan, and his affiliated building companies. The plaintiff created a design known as the Island Park Apartments which was constructed by companies associated with Steve Bryan. The plaintiff and Island Park, LLC, as represented by Mr. Bryan, in 1996, entered into a Standard Form of Agreement Between Owner and Architect wherein the plaintiff "retain[ed] all common law, statutory, and other reserved rights, including the copyright" and the "Technical Drawings or other documents shall not be used by the Owner or others on other projects, for additions to this Project or for completion of this Project by others." *Id*. at 253-54 (emphasis in the original). The plaintiff registered the Island Park Apartments with the United States Copyright Office as an Architectural Work and Technical Drawings. The suit arose when Cypress Lake Development, a company associated with Bryan, applied for and obtained permits to construct the Cypress Lake Apartments in Baton Rouge, Louisiana; the plaintiff alleged that these apartments infringed on its copyrighted work without his consent or permission. The district granted a summary judgment, in part, in favor of the defendants' insurers finding no coverage under the insurance policy for breach of contract. On appeal, the United States Fifth Circuit, applying the "but for" test, reversed the district court and held that "[a]s [the plaintiffs] claim for relief under the federal copyright laws would exist even in the absence of its 1996 Agreement with Bryan, the 'breach of

In *In re St. Louis Encephalitis*, 939 So.2d 563, the appellate court found the breach of contract exclusion in an insurance policy did not exclude the plaintiffs' tort claims. The Ouachita Parish police jury contracted with Mosquito Control, Inc. ("MCI") for mosquito control and/or abatement services. MCI was insured under two different commercial general liability policies during the pertinent time period. After an encephalitis outbreak, the plaintiffs, several citizens of Ouachita Parish who contracted encephalitis, brought a mass tort action against the Ouachita Parish Police Jury, MCI, and its liability insurers to recover for negligence and breach of contract. The insurers claimed that any duty owed to the plaintiffs originated in contract between MCI and the police jury; that absent the contract, no specific duty was owed the plaintiffs; and that any liability for damages necessarily arose out of failure to perform under that contract. *Id*., 41,250-41,259, p. 4, 939 So.2d at 566. The appellate court rejected the insurers' arguments and agreed with the district court that the breach of contract exclusion did not apply. The court explained that the plaintiffs pled causes of action in both tort and contract and alleged a breach of duty owed to all persons which supported an action in tort. *Id*., 41,250-41,259, p. 5, 939 So.2d at 567.

In contrast, the appellate court, in *Everett*, 13 So.3d 616, found a breach of contract exclusion precluded coverage.[22] The plaintiffs brought suit against a contractor for deficiencies in the construction of their residence. In addition to the breach of contract claims, the plaintiffs asserted claims for bodily injury and

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contract' provisions of the relevant insurance policies do not apply to preclude coverage . . . ." *Id*., 677 F.3d at 257.

[22] The district court granted summary judgment as to the contractor's insurance carrier finding the policy provided no coverage for the tort claims alleged in plaintiffs' petition, and the insurance company had no duty to defend the contractor against those claims. *Everett*, 08-2270, p. 2 (La. App. 1 Cir. 5/8/09), 13 So.3d at 617-618.

emotional distress. In affirming the district court's judgment, the appellate court held that for the plaintiffs to succeed under their tort theory, they must show that their negligence claims were separate and distinct and not arising from the breach of contract claim. *Id*., 08-2270, p. 5 (La. App. 1 Cir. 5/8/09), 13 So.3d at 620 (citing *Dubin v. Dubin*, 25,996 (La. App. 2 Cir. 8/17/94), 641 So.2d 1036, 1039-1040). The appellate court explained the tort claim "must arise from a duty other than one imposed by the contract." *Id*., 08-2270, p. 5 (La. App. 1 Cir. 5/8/09), 13 So.3d at 620. The appellate court rejected plaintiffs' assertion that the tort claims were separate from the breach of contract claim concluding that "[a]ll the tort claims alleged by the Everetts' stem from [the contractor's] contractual duty to properly and timely construct a residence [for the Everetts]. There is no showing of a breach of a general duty. The only allegations in the petition are for breaches of duty confected by contract." *Id*., 08-2270, p. 6, 13 So.3d at 620.

In the case *sub judice*, the facts are more comparable to the proposition espoused in *Everett*. The negligent and intentional torts alleged by Plaintiffs stem from the contract between ParaTech and the Parish. These alleged claims would not have occurred but for the breach of contract by the Parish, and the claims are not separate and distinct from the breach of contract.[23] Moreover, Plaintiffs have not shown the Parish breached any general duty owed to the public at large.[24]

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[23] The Parish argues, in its reply brief, that that the breach of contract exclusion does not apply to the Council Members, and Messrs. Perniciaro and Cleveland because they were not a party to the contract—just the SBPG and ParaTech. The Parish did not raise this argument in its opposition to the summary judgment or at the hearing on the motion. In *Nixon v. K & B, Inc*., 93-2055, pp. 3-4 (La. App. 4 Cir. 1/19/95), 649 So.2d 1087, 1089, this Court held:

> An issue not raised in pleadings or in a motion for summary judgment in the Court below cannot be raised for the first time on appeal. Uniform Rules, Courts of Appeal, Rule 1-3, *Poirier v. National Union Fire Insurance Company*, 517 So.2d 225 (La. App. 1st Cir.1987); *Lusk v. Aetna Casualty & Surety Company*, 295 So.2d 238 (La. App. 3d Cir.1974).

Thus, Plaintiffs' general allegation of "any and all other negligent and/or intentional acts" is excluded from coverage under the breach of contract exclusion.

Defamation, mental anguish, and emotional distress exclusions

Moreover, the Parish asserts RSUI failed to prove Plaintiffs' claims related to mental anguish, emotional distress, and defamation were excluded under the policy.[25] We disagree. Review of the policy provisions reveals that the policy expressly excluded coverage "for any actual or alleged libel, slander or defamation in any form," and damages for mental anguish and emotional distress damages.[26] Thus, Plaintiffs' general allegation of "any and all other negligent and/or intentional acts" is excluded from coverage under the defamation and mental anguish and emotional distress exclusions.

Accordingly, the district court did not err in granting RSUI's motion for summary judgment.[27]

As this issue was raised for the first time on appeal, it is not properly before this court.

Moreover, the undisputed material facts indicate the Council Members, acting in their capacity of the SBPG, took actions which impacted the contract between ParaTech and the SBPG, and the duty owed to Messers. Perniciaro and Cleveland by the Parish emanated from the contract.

[24] In its oral reasons, the district court concluded all the claims made by the Plaintiffs had to do with "the efforts of St. Bernard Parish Government to disassociate itself, terminate the contract, get way from, kick out of the building Mr. Perniciaro, his companies."

[25] In its oral reasons, the district court found the defamation claims and anything arising out of the defamation claims were excluded by the defamation exclusion, and the mental anguish claims were excluded by the mental anguish, emotional distress exclusion.

[26] In *Kennedy v. Sheriff of E. Baton Rouge*, 05-1418, p. 5 (La. 7/10/06), 935 So.2d 669, 674-75, (citations omitted), the Supreme Court explained there are two forms of defamatory words: those that are defamatory per se and those that are susceptible of a defamatory meaning.

[27] Because the Plaintiffs' claims are excluded from coverage, the remaining claims—whether the claims fell within the applicable time period of the policy to trigger coverage and the alleged violation of Article 966(f)—need not be addressed; and these claims are pretermitted.

CONCLUSION

The district's court judgment granting RSUI's motion for summary judgment is affirmed.

AFFIRMED