Judgment rendered February 23, 2022.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

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ON REMAND

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No. 54,087-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

SAFEWAY INSURANCE COMPANY OF LOUISIANA — Appellant

versus

GOVERNMENT EMPLOYEES INSURANCE COMPANY — Appellee

* * * * *

On Remand from the
Louisiana Supreme Court

Originally Appealed from the
Second Judicial District Court for the
Parish of Bienville, Louisiana
Trial Court No. 45-160

Honorable William R. “Rick” Warren, Judge

* * * * *

TRACY L. OAKLEY
MICHAEL W. LANDRY — Counsel for Appellant

LAW OFFICE OF J. BRAD SMITHERMAN
By: J. Brad Smitherman — Counsel for Appellee

* * * * *

Before PITMAN, COX, and HUNTER, JJ.

**COX, J.**

Appellant, Safeway Insurance Company of Louisiana ("Safeway"), appeals a motion for summary judgment granted in favor of Appellee, Government Employees Insurance Company ("GEICO"), finding that Safeway's policy provided primary coverage. On remand from the Louisiana Supreme Court, this Court has been ordered to reconsider its previous ruling in *Safeway Ins. Co. of La. v. Government Employees Ins. Co.*, 54,087 (La. App. 2 Cir. 8/11/21), 326 So. 3d 360 ("*Safeway I*"). For the following reasons, we affirm the trial court's ruling.

## FACTS

The background in this matter was set forth in detail in this Court's earlier opinion in *Safeway I*:

> The facts of this case are undisputed. On May 13, 2018, at approximately 3:24 p.m., a two-vehicle accident occurred on LA Highway 14 in Bienville Parish. While Shawn Alford ("Alford") was driving Alexis Bradley's ("Bradley") 2006 Nissan Titan, the rear driver-side tire and rim detached from the vehicle and rolled into oncoming traffic, injuring a third-party driver, Johnell Gray ("Gray"). Alford was using Bradley's vehicle with her permission. At the time of the accident, Bradley's vehicle was insured by Safeway, which provided $15,000 in bodily injury coverage. Alford, however, was a named insured under GEICO's automobile policy, which provided a $30,000 bodily injury policy limit.
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> Safeway settled Gray's claim for damages out of court for the sum of $8,303. Safeway then filed suit against GEICO for subrogation for the total settlement amount paid, asserting that GEICO, as the insurer for the driver, had primary liability for the coverage of the accident. Alternatively, Safeway asserted that because both policies contained "other insurance" clauses, both Safeway and GEICO were co-primary insurers, each proportionately responsible for their share of the settlement amount. GEICO filed a motion for summary judgment, arguing that it was not liable to Safeway for the settlement. GEICO asserted that the "other insurance" clauses contained within each policy were easily reconciled.

> Specifically, GEICO argued that under Safeway's "other insurance" clause, Safeway's coverage is considered excess to any other insurance which would also cover the insured's liability for the damages. However, GEICO noted that in contrast, its own "other insurance" clause specified that when the vehicle in question is considered a non-owned vehicle under the insured's policy, its liability for any damages sustained is considered excess coverage. Therefore, GEICO argued that Safeway had the primary policy on the owned vehicle and its policy provided only excess coverage such that no contribution was owed.
>
> On December 1, 2020, Judge Teat granted GEICO's motion. The written judgment was submitted and signed on February 8, 2021, by Judge Rick Warren dismissing all claims and demands against GEICO with prejudice and certifying the judgment as final for purposes of immediate appeal.

On August 11, 2021, this Court reversed the motion for summary judgment and remanded the matter to the trial court, finding that further factual inquiry was needed to determine whether the borrowed vehicle was a temporary vehicle or a non-owned vehicle. After this Court's ruling, Safeway filed a writ of certiorari[1] with the Louisiana Supreme Court, which was granted on December 12, 2021, and the matter was remanded to this Court for reconsideration on the merits of the issues raised on the motion and opposition filed by the parties. *See Safeway Ins. Co. of La. v. Government Employees Ins. Co.*, 21-01382 (La. 12/21/21), 329 So. 3d 273.

## DISCUSSION

The issue at the heart of this appeal is whether the "non-owned" vehicle was afforded primary coverage under GEICO's policy, primary coverage under Safeway's policy, or joint coverage under both policies.

[1] In its writ to the Louisiana Supreme Court, Safeway contended that it chose to abandon its argument concerning the vehicle's classification as a temporary substitute vehicle.

When reviewing summary judgments on appeal, an appellate court reviews a trial court's granting of summary judgment *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate, i.e., whether there is any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Samaha v. Rau*, 07-1726 (La. 2/26/08), 977 So. 2d 880. An insurance policy is a contract between the parties and should be construed using the general interpretation of contracts. *State Farm Mutual Auto. Ins. Co., v. Safeway Ins. Co.* 50,098 (La. App. 2 Cir. 9/30/15), 180 So. 3d 450; *Green ex rel. Peterson v. Johnson*, 14-0292 (La. 10/15/14), 149 So. 3d 766.

Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to or made part of the policy. La. R.S. 22:881. Each provision in the policy must be interpreted in light of the other provisions so that each is given meaning; one provision of the insurance contract should not be construed separately at the expense of disregarding other provisions. La. C.C. art. 2050. The role of the judiciary in interpreting insurance contracts is to ascertain the common intent of the parties as reflected by the words of the policy. *Id.*; La. C.C. art. 2045. When 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, and the agreement must be enforced as written. *See* La. C.C. art. 2046.

Often, multiple insurance policies will cover a given loss; therefore, insurance contracts generally contain "other insurance" clauses[2] that attempt to define the insurer's responsibility for payment or determine how liability should be apportioned when other insurance coverage is available. *Green v. Johnson* 16-1525 (La. App. 1 Cir. 1/10/18), 241 So. 3d 1188; 15 La. Civ. Law Treatise §7:19. However, "other insurance" clauses in one contract may conflict with "other insurance" clauses within another contract providing coverage for a particular claim. *Id*. In reconciling conflicting "other insurance" clauses, courts must give effect to both and find them mutually repugnant only if, by giving each effect, the insured is left with no coverage. If the "other insurance" clauses are mutually repugnant they are not given effect; instead, both insurers are primary, and the loss is shared on a pro rata basis. *Green*, *supra*.

Safeway contends that GEICO, as the insurer for the driver of the vehicle, maintained primary liability for the damages sustained and is liable in full to Safeway for the settlement amount paid. Alternatively, Safeway argues that each insurer should be considered co-primary for the accident, and, each insurance company should bear proportionate liability[3] for the sum

[2] There are three basic types of "other insurance" clauses: 1) pro rata, 2) escape, and 3) excess. A pro rata clause provides for a sharing of responsibility among the insurers; an escape clause purports to make coverage under the policy applicable only in the event that there is no other insurance coverage available to the insured; and an excess clause defines the coverage provided under the policy as excess over other valid and collectible insurance. William S. McKenzie & H. Alston Johnson III, 15 La. Civ. Law Treatise, Ins. Law & Prac., § 7:19, at 699–700 (4th ed. 2012).

[3] From the total amount of coverage provided between the two insurance companies, Safeway argues that as a co-primary insurer, its proportionate share would be one-third and GEICO's would be two-thirds of the $8,303. Therefore, GEICO's liability to Safeway would total $5,535.33.

paid predicated on their respective coverages because the "other insurance" clauses contained within the two policies are mutually repugnant.

Safeway first cites *Safeway Ins. Co. of La. v. State Farm Mut. Auto. Ins. Co.*, 36,853 (La. App. 2 Cir. 3/5/03), 839 So. 2d 1022, in which this Court found that State Farm, the insurer of the driver who operated a borrowed vehicle while her covered vehicle was under repair, rather than Safeway, the insurer of the borrowed vehicle, provided primary liability coverage for the damages sustained in the pedestrian accident. Safeway contends that GEICO, because of its status as the driver's insurer, is primarily liable for the damages sustained in the present case.

GEICO argues that the 2006 Nissan is insured under Safeway but as to it, the vehicle is non-owned, and under its policy, it is excess coverage. GEICO cites the Fourth Circuit opinion in *Thomas v. Neeb-Kearney & Co.*, 334 So. 2d 465 (La. App. 4 Cir. 1978). In *Thomas, supra,* a truck driver employed by Neeb-Kearney injured the plaintiff in a motor vehicle accident. Although Dixie Leasing, which owned the truck, was insured by Liberty Mutual, Neeb-Kearney, which leased the truck from Dixie, was insured by Aetna. Aetna's policy contained an "other insurance" clause which designated its coverage as excess to non-owned vehicles, whereas Liberty Mutual's policy contained a "pro rata" clause.

In following the Louisiana Supreme Court's analysis in *Juan v. Harris*, 279 So. 2d 187 (La. 1973), the Fourth Circuit found that the two insurance policies were not mutually repugnant; Liberty Mutual had the primary policy on the owned vehicle and Aetna had the excess coverage because as to it, the truck was a hired or non-owned vehicle. GEICO asserts that the vehicle involved in this case is neither owned by Alford nor listed on

his policy, but rather is listed under Safeway's policy for Bradley, then Safeway is the primary insurer and GEICO is the excess.

After a thorough reading and review of the two insurance policies, we find that the "other insurance" clauses in the Safeway and GEICO policies are not mutually repugnant.

Generally, with respect to coverage for temporary substitute vehicles, courts enforce the provisions of La. R.S. 22:1296[4] and find the insurer for driver of the vehicle liable. *See Litton v. White*, 49,958 (La. App. 2Cir. 7/1/15), 169 So. 3d 819, *writ denied*, 15-1653 (La. 1/15/16), 184 So. 3d 705; *Safeway*, *supra*. With respect to non-owned classified cars, however, the specific provisions of the insurance policy apply. *See Shelter Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 07-0163 (La. App. 1 Cir. 7/18/08), 993 So. 2d 236. Here, the vehicle in question, based on the limited facts before us, is "non-owned;"[5] therefore, the language of each clause is examined.

Safeway's other insurance clause provides:

> "If there is other insurance which covers the insured liability with respect to a claim also covered by this policy, Part I of this policy will apply only as excess to such other insurance."

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[4] La. R.S. 22:1296, in pertinent part, provides: "[e]very approved insurance company, reciprocal or exchange, writing automobile liability. . . shall extend to temporary substitute motor vehicles as defined in the applicable insurance policy and rental motor vehicles any and all such insurance coverage in effect in the original policy or policies. Where an insured has coverage on multiple vehicles, at least one of which has comprehensive and collision insurance coverage, that comprehensive and collision substitute coverage shall apply to the temporary substitute motor vehicle or rental motor vehicle. ***Such insurance shall be primary***. However, if other automobile insurance coverage is purchased by the insured for the temporary substitute or rental motor vehicle, that coverage shall become primary." (Emphasis added.)

[5] Safeway's policy defines a non-owned vehicle as "A private passenger or utility automobile not owned by or furnished for the regular use of either the named insured or any relative other than a temporary substitute automobile."

GEICO's policy defines a non-owned vehicle as "A private passenger auto or trailer not owned by or furnished for regular use of either you or a family member, other than a temporary substitute auto. An auto rented or leased for more than 30 days will be considered as furnished for your regular use."

GEICO's other insurance clause provides:

> "If there is other applicable insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any liability we provide to a ***covered person*** for the maintenance or use of a vehicle ***you*** do not own shall be excess over any other applicable liability insurance." (Emphasis added.)

Safeway's policy provides that an insured person under its policy, with respect to the 2006 Nissan, may either be: 1) the named insured, Bradley, or 2) any other person using such automobile to whom the named insured has given the express or implied permission, provided the use is within the scope of such permission.

Because Alford was permitted to drive the 2006 Nissan, he qualifies as an insured person under Safeway's policy. However, under GEICO's policy, Alford is covered, but the vehicle, which is non-owned as to Alford, is not insured. GECIO's policy specifically designates that for any non-owned vehicles that its insured operates, its coverage is excess. Because of the language found in GEICO's "other insurance" clause, we find that the trial court reasonably determined that Safeway's policy provided primary coverage and GEICO's policy provided excess coverage under the circumstances of this case.

## CONCLUSION

For the reasons expressed, the judgment is affirmed. All appellate costs are assessed to Safeway.

**AFFIRMED**.