NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0121

KENNETH K. KRYGIER

VERSUS

KAREN M. VIDRINE, PROGRESSIVE CASUALTY INSURANCE COMPANY, AND LIBERTY MUTUAL FIRE INSURANCE COMPANY

DATE OF JUDGMENT: SEP 10 2010

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2007-12327, DIVISION A, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE RAYMOND S. CHILDRESS, JUDGE

* * * * * *

Brent P. Frederick
Michael T. Beckers
Kenneth H. Hooks, III
M. Sean Reid
Baton Rouge, Louisiana

Counsel for Plaintiff-Appellee
Kenneth K. Krygier

David J. Schexnaydre
Mary B. Lord
Mandeville, Louisiana

Counsel for Defendant-Appellant
Progressive Casualty Insurance
Company

* * * * * *

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Disposition: AFFIRMED.

Kuhn, J.

On appeal, we review a summary judgment that awarded penalties to plaintiff-appellee, Kenneth K. Krygier, for the failure of defendant-appellant, Progressive Casualty Insurance Company ("Progressive"), an uninsured/underinsured motorist ("UM") insurer, to make a timely tender of its policy limits following a motor vehicle accident. See La. R.S. 22:1892.[1] We affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

On October 11, 2006, Krygier was a passenger in a 2006 Chevrolet Cobalt operated by a co-worker, Billy Toon, who had rented the vehicle in Louisiana. Both Krygier and Toon worked for Hornbeck Offshore Services, L.L.C. ("Hornbeck").[2] While Toon and Krygier were travelling to Hornbeck's office in Covington, Louisiana, the vehicle they occupied was rear-ended by a 2005 Ford Explorer operated by Karen Vidrine and insured by Liberty Mutual Fire Insurance Company ("Liberty Mutual"). Progressive had issued a policy to Toon that was in effect on the date of the accident and provided UM coverage to all occupants of an "insured" vehicle.

On May 14, 2007, Krygier filed suit naming as defendants, Vidrine, Progressive, and Liberty Mutual.[3] Krygier alleged that Vidrine's negligence caused the accident, that he had sustained severe and permanent personal injuries, and that

---

[1] Acts 2008, No. 415, § 1, eff. January 1, 2009, renumbered former La. R.S. 22:658 to La. R.S. 22:1892 without changing the substance of the provisions. Although the accident occurred before this renumbering, because the substance of the newly designated statute is the same, we reference La. R.S. 22:1892 throughout this opinion.

[2] When the accident occurred, Krygier worked for Hornbeck as a mate on an offshore supply boat.

[3] Although the petition named both Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company as defendants, the policy at issue was issued by Liberty Mutual Fire Insurance Company. We refer to these defendants collectively as "Liberty Mutual."

the policies issued by Progressive and Liberty Mutual provided coverage for the nature of the liability asserted in his petition.

In a first amended petition, filed on June 25, 2007, Krygier also named Hornbeck as a defendant. Krygier asserted that the motor vehicle accident occurred while he was in the course and scope of his employment with Hornbeck, for whom he alleged he was employed as a Jones Act seaman. Krygier alleged that Hornbeck had initially paid maintenance and cure benefits for a period of time after the accident but had ceased providing wages "in violation of the Admiralty law and [Hornbeck] sought reimbursement of all sums paid to [him]." Based on these allegations, Krygier sought to recover maintenance and cure benefits from Hornbeck.

Progressive answered the suit, generally denying the allegations of Krygier's original and first amended petition, and further denying coverage under its policy on the grounds that the rental vehicle in question was not a covered vehicle under Toon's policy, Krygier was not a "covered person" under the policy, and Vidrine was not underinsured.

Liberty Mutual answered Krygier's original petition, generally denying the allegations of the petition but admitting the existence of a liability policy. Thereafter, counsel for Liberty Mutual and Vidrine, D. Russell Holwadel, answered Krygier's first amended petition on behalf of both Liberty Mutual and Vidrine, generally denying its allegations. Hornbeck likewise answered Krygier's original and first amended petition, generally denying the allegations, asserting affirmative defenses, and asserting a cross-claim against Vidrine and Liberty Mutual.

In September 2007, Progressive filed a motion for summary judgment, seeking a determination that Krygier was not afforded UM benefits under Progressive's policy on the basis that coverage did not extend to the rental vehicle driven by Toon. Krygier also filed a motion for summary judgment on the same coverage issue, urging that Progressive's policy provided UM benefits to guest passengers when Toon drove the rental vehicle.[4] On December 6, 2007, the trial court granted Krygier's motion for summary judgment and denied Progressive's motion for summary judgment, determining that coverage under Progressive's policy extended to Toon's rental vehicle and to Krygier as a guest passenger.

In August 2007, Hornbeck had submitted a request for production of documents to Liberty Mutual, which requested, *inter alia*, "[a]ny and all policies of insurance providing liability coverage to [Vidrine] for the [October 11, 2006 accident]." Holwadel, in his capacity as counsel for Liberty Mutual, responded to this particular request on January 15, 2008, and therein referenced the "attached [Liberty Mutual] policy" that had been issued to Vidrine, which provided liability coverage with a $30,000 maximum limit for each accident involving the 2005 Ford Explorer for the period of April 2, 2006 to April 2, 2007.[5] It is undisputed that Liberty Mutual's response was served on all counsel of record.[6] Nevertheless,

---

[4] The parties had disputed whether Tennessee or Louisiana law controlled this coverage issue, since the Progressive policy had been purchased in Tennessee by a Tennessee resident, although Toon had rented the vehicle in Louisiana, the accident had occurred in Louisiana, and Vidrine was a Louisiana resident.

[5] The first page of the Liberty Mutual policy declarations lists "Jeffrey M. Vicknair" and "Karen V. Vicknair" as "named insureds," and the second page of the policy declarations lists "Jeffrey M. Vicknair" and "Karen Vidrine" as insured drivers. The parties do not contest that "Karen Vidrine" and "Karen M. Vicknair" are the same person.

[6] It is further undisputed that Krygier also provided a copy of the Liberty Mutual policy to Progressive on October 8, 2008.

Progressive took the position that it did not have sufficient documentation establishing that Vidrine was underinsured at the time of the accident.

On January 29, 2008, Progressive participated in Krygier's deposition, during which Krygier testified regarding the injuries he sustained in the accident, his ongoing medical treatments, and his pain and suffering related to the injuries sustained. Krygier had also previously provided documentation regarding his employment, lost earnings, and medical treatment in response to Progressive's requests for productions of documents.

On March 4, 2008, the trial court dismissed Vidrine and Liberty Mutual from the lawsuit with prejudice after Krygier settled his claims against them. On May 27, 2008, this court denied Progressive's application for supervisory writs on the issue of whether Progressive's policy afforded coverage to the rental vehicle driven by Toon (***Krygier v. Vidrine***, 08-0145 (La. App. 1st Cir. 5/27/08) (unpublished writ action)), and on September 26, 2008, the supreme court denied Progressive's application for supervisory writs on this issue (***Krygier v. Vidrine***, 08-1365 (La. 9/26/08), 992 So.2d 990).

In Krygier's second amended petition for damages, filed on November 17, 2008, he sought penalties, attorneys' fees, and costs based on Progressive's failure to timely tender its policy limits upon receipt of satisfactory proofs of loss. Krygier alleged that Liberty Mutual had paid him $15,000 in settlement of his claims against it and Vidrine. Krygier also averred that although he had sought maintenance and cure benefits from Hornbeck, it had failed to pay such benefits. Krygier alleged that when the supreme court denied Progressive's writ application on September 26, 2008, Progressive was well aware that Vidrine did not have

sufficient insurance to cover the damages sustained in the accident by Krieger. Krygier further alleged that although he had previously made demand on Progressive to tender its policy limits of $100,000, plus judicial interest in the amount of $12,378.52, Progressive had failed to tender any amount to Krygier despite Progressive's receipt of satisfactory proofs of loss and clear liability under the policy terms. Krygier claimed that Progressive had violated La. R.S. 22:1892A(1) (formerly La. R.S. 22:658A(1)), urging that its failure to tender its policy limits within thirty days after receipt of satisfactory proofs of loss was arbitrary, capricious, and without probable cause. As such, Krygier prayed for $50,000 in penalties, together with reasonable costs and attorneys' fees.

In December 2008, Progressive generally denied the allegations of Krygier's second amended petition and further answered that it was "entitled to a credit for any payments which have been made or may in the future be made by ... any other ... entity ... whatsoever ...." Progressive further answered that it had "acted reasonably and in good faith at all times in connection with the handling of the ... matter" and further averred that "[Krygier had] failed to provide satisfactory proofs of loss."

The parties do not dispute that on February 11, 2009, Progressive received an "Affidavit of No Other Insurance," executed by Vidrine, wherein she attested to the fact that she had no other liability insurance in effect on the date of the accident and that on March 12, 2009, Progressive unconditionally tendered $100,000 to Krygier.

On March 30, 2009, Krygier and Hornbeck filed a joint motion and order for dismissal of all claims against Hornbeck, and on May 13, 2009, Krygier's claims against Hornbeck were dismissed with prejudice. On June 1, 2009, Krygier filed a

motion for summary judgment, urging that no genuine issue of material fact remained in dispute that Krygier had provided satisfactory proofs of loss to Progressive by September 26, 2008, the date the supreme court denied Progressive's writ application on the coverage issue. Krygier urged that Progressive failed to timely tender its policy benefits in accordance with La. R.S. 22:1892 and that such conduct was arbitrary and capricious, resulting in liability for penalties, attorneys' fees and costs.

On July 10, 2009, Progressive opposed Krygier's motion for summary judgment, and Progressive also filed a cross motion for summary judgment, in which it urged that Krygier had not proven the underinsured status of Vidrine before February 11, 2009, because Krygier had not established that Vidrine had no insurance other than the Liberty Mutual insurance coverage. In opposing Krygier's motion, Progressive did not contest that: 1) Krygier was riding as a passenger in Toon's rental vehicle; 2) Vidrine had negligently failed to stop her vehicle which rear-ended the vehicle in which Krygier rode; 3) Krygier was a covered insured under Progressive's policy; and 4) it had been provided with "Krygier's employment and tax records evidencing that he was earning approximately $80,000 per year at the time of the accident, [Krygier had] been unable to return to work, and [he had] sustained approximately $200,000 in lost wages...." Further, Progressive did not contest that "[t]hroughout the course of [the] litigation [it] had been provided with [Krygier's medical records] that [evidenced] he sustained permanent and severe injuries, that he [was] unable to return to work and that he will likely be unable to return to work for the remainder of his life." Progressive also did not contest that approximately $22,000 of the $30,000 Liberty Mutual

policy limits was paid to satisfy claims other than those of Krygier. Rather, Progressive contested that it had not been provided with satisfactory proofs of loss that included information that Vidrine was underinsured when the supreme court issued its September 26, 2008 denial of Progressive's application for supervisory review of the December 6, 2007 summary judgment granted in Krygier's favor on the coverage issue.

Pursuant to a September 8, 2009 judgment, the trial court granted Krygier's motion for summary judgment, denied Progressive's motion for summary judgment, found Progressive was "arbitrary and capricious in failing to promptly tender policy limits," and awarded penalties in the amount of $50,000 to Krygier.
The judgment further declared that Krygier was entitled to "the remaining interest owed on the policy limits, plus attorneys' fees and costs."[7]

Progressive has suspensively appealed, urging that Krygier did not establish that it acted arbitrarily, capriciously, or without probable cause after receiving satisfactory proofs of loss. Progressive contends that "sufficient admissible proof of the [underinsured status]" of Vidrine was not conclusively established until February 11, 2009, when it received Vidrine's affidavit of no other insurance, and that it tendered its policy limits within thirty days of receiving this affidavit. Progressive urges that Krygier had the burden of proving Vidrine's underinsured status in order to establish a satisfactory proof of loss, and it further contends that this burden was not shifted to it as a result of Liberty Mutual's discovery responses.

---

[7] The September 8, 2009 judgment further provided, "The amount due for [attorneys'] fees, costs and remaining interest will be determined by hearing upon [m]otion of counsel." The trial court designated the judgment as a final appealable judgment based on its finding that there was no just reason for delay. La. C.C.P. art. 1915B. We likewise find there is no just reason for delay (see ***R.J. Messinger, Inc. v. Rosenblum***, 04-1664, p. 14 (La. 3/2/05), 894 So.2d 1113, 1122-23), and we find the trial court properly designated the judgment as final.

Thus, Progressive urges that Krygier had not established that Vidrine was underinsured as of September 26, 2008, and the judgment in Krygier's favor should be reversed.

II. ANALYSIS

A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B. The summary judgment procedure is favored in Louisiana and is designed to secure the just, speedy, and inexpensive determination of actions. La. C.C.P. art. 966A(2). Summary judgments are reviewed on appeal *de novo,* using the same criteria that govern the trial court's consideration of whether a summary judgment is appropriate, and in the light most favorable to the non-movant. ***Yokum v. 615 Bourbon Street, L.L.C.***, 07-1785, p. 25 (La. 2/26/08), 977 So.2d 859, 876. Thus, appellate courts must ask the same questions the trial court does in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. ***Hood v. Cotter***, 08-0215, p. 9 (La. 12/2/08), 5 So.3d 819, 824. A "genuine issue" is a "triable issue." ***Smith v. Our Lady of the Lake Hospital, Inc.***, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. An issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. ***Id.*** A fact is "material" when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. ***Jones v. Estate of Santiago,*** 03-1424, p. 6 (La.

4/14/04), 870 So.2d 1002, 1006. Summary judgment is usually not appropriate for claims based on subjective facts of motive, intent, good faith, knowledge, and malice. ***Id.*** However, an exception is recognized when no genuine issue of material fact exists concerning the relevant intent, and the only issue to be decided is the ultimate conclusion to be drawn from the uncontested material facts. See ***Jones***, 03-1424 at pp. 6 & 16, 870 So.2d at 1006 & 1010-11.

The initial burden of proof remains with the mover to show that no genuine issue of material fact exists. La. C.C.P. art. 966C(2); ***Jones,*** 03-1424 at p. 5, 870 So.2d at 1006. If the mover has made a prima facie showing that the motion should be granted, the burden shifts to the non-moving party to present evidence demonstrating that a genuine issue of material fact remains. ***Id.*** The failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. La. C.C.P. art. 966C(2); ***Jones,*** 03-1424 at p. 5, 870 So.2d at 1006.

Louisiana Revised Statutes 22:1892 provides, in pertinent part:

> A. (1) All insurers issuing any type of contract ... shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest. ...
>
> B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor ... within thirty days after receipt of satisfactory proofs of loss of that claim, ... when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs.

Because Section 1892 is penal in nature, it is strictly construed. See ***Reed v. State Farm Mut. Auto. Ins. Co.***, 03-0107, p. 13 (La. 10/21/03), 857 So.2d 1012, 1020. A satisfactory proof of loss is a necessary predicate to a showing that the insurer was arbitrary, capricious, or without probable cause. ***Id.*** Whether or not a refusal to pay is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action. ***Id.***, 03-0107 at p. 14, 857 So.2d at 1021. "Satisfactory proof of loss" in a claim pursuant to UM coverage is receipt by the insurer of "sufficient facts which fully apprise the insurer that (1) the owner or operator of the other vehicle involved in the accident was uninsured or underinsured; (2) that he [or she] was at fault; (3) that such fault gave rise to damages; and (4) establish the extent of those damages." ***Id.***, 03-0107 at p. 15, 857 So.2d at 1022.

In the instant appeal, Progressive challenges Krygier's proof as to only the first of the four enumerated requirements necessary to establish "satisfactory proof of loss," arguing that Krygier failed to establish that Vidrine was underinsured as of September 26, 2008. Progressive claims the underinsured status was not established until it obtained Vidrine's affidavit on February 11, 2009, wherein she attested that she had no insurance other than the Liberty Mutual policy. Progressive does not claim that it did not know of the Liberty Mutual policy and its limits as of September 26, 2008; it asserts merely that knowledge of these facts was not sufficient to apprise it of Vidrine's underinsured status.

We reject Progressive's contention. It is undisputed that Progressive had received Liberty Mutual's policy and its policy declarations, which established the $30,000 limits of the available liability coverage, and Progressive had been

provided with Krygier's employment records and medical records establishing losses greater than $130,000 (representing the limits of Liberty Mutual's liability coverage and the limits of Progressive's UM coverage) prior to September 26, 2008.[8] No countervailing evidence was presented. At this point, the burden then shifted to Progressive to prove the existence of other applicable liability policies in order to defeat the application of its UM coverage. See ***Gillmer v. Parish Sterling Stuckey***, 09-0901, pp. 8-9 (La. App. 1st Cir. 12/23/09), 30 So.3d 782, 788; ***Simon v. Reel***, 03-932, p. 6 (La. App. 3d Cir. 3/3/04), 867 So.2d 174, 179.[9]

We likewise find no merit in Progressive's assertion that Krygier's pending maintenance and cure claim against Hornbeck had some bearing on the amount due to Krygier as of September 26, 2008. Progressive's policy provides, "The damages recoverable under [the UM coverage] shall be reduced by all sums ... paid or payable because of bodily injury under any of the following or similar law: a. workers' compensation law; or b. disability benefits law." General maritime or admiralty law, pursuant to which Krygier sought maintenance and cure benefits, is not similar to workers' compensation law. ***Sanders v. Home Indemnity Ins. Co.***, 594 So.2d 1345, 1352 (La. App. 3d Cir. 1991), ***writ denied***, 598 So.2d 377 (La. 1992); see ***Sampsell v. B & I Welding Services and Consultants, Inc.***, 93-2456, p. 5 (La. App 4th Cir. 6/15/94), 638 So.2d 477, 479, ***writ denied***, 94-2175 (La.

---

[8] It was undisputed that Vidrine's negligence had caused the accident, and defendants did not controvert the evidence submitted by Krygier prior to September 26, 2008, which established that the accident had caused his resulting injuries.

[9] Progressive argues in brief that Krygier did not use the methods provided by La. R.S. 22:1295D(6) to prove that Vidrine was underinsured. However, the methods of proving the UM status provided by that statute are not exclusive and such status can be proven by other evidence. See ***Gillmer***, 09-0901 at p. 7, 30 So.3d at 787; ***Boudreaux v. State Farm Mut. Auto. Ins. Co.***, 385 So.2d 480, 484 (La. App. 1st Cir. 1980).

11/11/94), 644 So.2d 397, ***cert. denied***, 514 U.S. 1063, 115 S.Ct. 1692, 131 L.Ed.2d 556 (1995). This baseless defense was abandoned by Progressive before it even determined any amount that Krygier may have recovered as maintenance and cure benefits from Hornbeck.

Viewing the evidence in the record *de novo*, we find reasonable persons could reach only one conclusion, *i.e.*, that Progressive acted arbitrarily, capriciously, or without probable cause in not tendering its policy limits within thirty days of September 26, 2008. When a motion for summary judgment is made and supported, the adverse party may not rest on the allegations or denials of his pleadings but must set forth specific facts showing that there is a genuine issue for trial. La. C.C.P. art. 967B. Once Krygier made a prima facie showing that his motion for summary judgment should be granted, the burden shifted to Progressive to present evidence demonstrating there remained a genuine issue of material fact or that Krygier was otherwise not entitled to judgment as a matter of law. It failed to meet this burden.

III. CONCLUSION

For these reasons, we affirm the trial court's September 8, 2009 judgment, which granted Krygier's motion for summary judgment and awarded penalties in the amount of $50,000. Appeal costs are assessed against Progressive.

AFFIRMED.