**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

WFK

NO. 2012 CA 1632

KIMBERLY GRIFFIN, BERONESS GRIFFIN
AND LISA MCDOWELL

VERSUS

SAFEWAY INSURANCE COMPANY

Judgment Rendered: JUL 29 2013

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 573,313

The Honorable Janice Clark, Judge Presiding

* * * * *

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* * * * *

BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

[1] Hon. William F. Kline, Jr., retired, is serving as judge *ad hoc* by special appointment of the Louisiana Supreme Court.

Parro, J. concurs without reasons by WFK

FW Welch, J. concurs without reasons

**KLINE, J.**

This is an appeal by defendant, Safeway Insurance Company (Safeway), following a judge trial in which plaintiffs, Kimberly Griffin, Beroness Griffin, and Lisa McDowell (plaintiffs), were found to be entitled to compensation for injuries they suffered as the result of an automobile accident. For the following reasons, we reverse and render.

## FACTS AND PROCEDURAL HISTORY

This matter arose out of a December 15, 2007 automobile accident in West Feliciana Parish, wherein the tortfeasor, Ladd W. Perritt, caused a collision with a vehicle containing three occupants: Beroness Griffin, the driver; Kimberly Griffin, the owner of the vehicle and a passenger; and Lisa McDowell, a passenger. Mr. Perritt's vehicle was insured by State Farm Insurance Company (State Farm), with policy limits of $25,000 per person and $50,000 per accident.

The Griffin vehicle was insured by Safeway, pursuant to a liability policy containing uninsured/underinsured (UM) coverage issued to Kimberly Griffin in the state of Mississippi. The Safeway policy was issued by Foster Insurance Company of Gloster, Inc., an independent insurance agency located in Gloster, Mississippi; the policy provided UM coverage in the amount of $25,000 per person and $50,000 per accident.

At the time of the accident, Mr. Perritt's address, as indicated on the accident report and on his Mississippi license, was in Mississippi. The vehicle operated by Mr. Perritt was a Ford F-150 registered in the state of Mississippi, with a Mississippi license plate, and was insured in Mississippi by State Farm. The Griffin vehicle also had a Mississippi license plate. Both Kimberly Griffin and Lisa McDowell gave the police officer Mississippi addresses on the date of the accident.

The plaintiffs settled their claims with Mr. Perritt and State Farm on October 31, 2008, for the policy limits of $50,000, with each plaintiff receiving one-third of that total. Plaintiffs sent Safeway a demand letter on October 30, 2008, which was received on November 4, 2008. According to Safeway's litigation supervisor, Margaret May, the letter sent by plaintiffs was Safeway's first notice of the December 15, 2007 accident and the claims of plaintiffs. Ms. May had no record of any call by Kimberly Griffin to Safeway following the accident, and no collision claim was made for damages to the vehicle insured by Safeway.[2]

Plaintiffs filed suit against Safeway on December 9, 2008, in East Baton Rouge Parish, seeking UM coverage under the policy issued to Kimberly Griffin. In its pleadings, Safeway contended that Mississippi law governed the applicability of UM coverage and that Mississippi law precluded such coverage. The matter was tried before the judge on May 4, 2010.

At trial, Lisa McDowell testified that her address was in Mississippi, but that she worked at Angola State Penitentiary in Tunica, Louisiana (Angola). Approximately twice a month, Ms. McDowell would stay at the BOQ, Bachelors Quarters, at Angola, rather than drive home to Mississippi. Ms. McDowell admitted that she had never been a resident of West Feliciana Parish.

Kimberly Griffin testified that she was living in Mississippi at the time of the accident. She also worked at Angola and spent some time at the BOQ, rather than drive home to Mississippi.[3] Kimberly Griffin possessed a Mississippi driver's

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[2] Kimberly Griffin testified that she contacted Safeway after the accident. The policy issued to Kimberly Griffin required that notice be given to Safeway following an accident. The policy also excludes UM coverage when the insured settles the bodily injury claim without the consent of Safeway. Because we find Mississippi law applies and precludes UM coverage because the tortfeasor's vehicle is not an "insured vehicle" as defined by Mississippi, we do not reach the issue of notice in this case.

[3] There were discrepancies in Kimberly Griffin's deposition and trial testimony regarding whether she stayed at the BOQ. However, this court finds the issue is not paramount, because Kimberly Griffin was clearly not a resident of Louisiana, as demonstrated by the entirety of the record.

license, had never had a Louisiana driver's license, and considered herself a Mississippi resident. The vehicle owned by Kimberly Griffin was registered in Mississippi, was insured by a policy purchased through a Mississippi agency, and issued to Kimberly Griffin in Mississippi.

Beroness Griffin testified at trial that at the time of the accident she had been living in an apartment with a friend in Baton Rouge, Louisiana for approximately eight months, even though she previously stated in deposition testimony that she had moved back to Mississippi a few months prior to the accident. Beroness Griffin explained that she was nervous at her deposition, but that she was telling the truth as to her living arrangements at the trial. She insisted that at the time of the accident, she was living in Baton Rouge and going home on weekends. Beroness Griffin also testified that at the time of the accident, she considered the Mississippi address to be her residential address, that she had a Mississippi driver's license, and that she had never had a Louisiana license. The Mississippi address used by Beroness Griffin was her parent's address.

Sabrina White, a friend of Beroness Griffin, also testified that at the time of the accident, Beroness Griffin was living with her in Baton Rouge and had been since the beginning of 2007. Ms. White further testified that Beroness Griffin started going home on weekends about four months before the accident, and about a month after the accident Beroness found a job with a temporary employment service in Louisiana.

A judgment was ultimately signed on June 20, 2012, in favor of the plaintiffs, awarding the following amounts:

| | |
|---|---|
| Kimberly Griffin: | $48,547.90 |
| Beroness Griffin: | $48,090.56 |

Lisa McDowell: $47,264.91[4]

It is from this judgment that Safeway appeals.

## ASSIGNMENTS OF ERROR

Safeway assigns numerous errors, all of which involve the trial court committing legal error, as follows:

(1) The trial court erred in failing to rule on Safeway's motion to involuntarily dismiss plaintiffs' claims since there was no evidence in the record that the tortfeasor was underinsured according to Louisiana law;

(2) The trial court erred in not applying Mississippi law;

(3) The trial court erred in not conducting a choice-of-law analysis;

(4) The trial court erred in failing to rule on Safeway's motion to involuntarily dismiss plaintiffs' claims as to penalties and attorney's fees;

(5) The trial court erred in rendering a judgment against Safeway in excess of its policy limits.

This court begins its analysis with a choice-of-law analysis and the determination of whether Mississippi or Louisiana law applies.

## STANDARD OF REVIEW

The appellate jurisdiction of courts of appeal extends to both law and facts. La. Const. art. V, § 10(B); *Arias v. Stolthaven New Orleans, L.L.C.,* 08-1111 (La. 5/5/09), 9 So. 3d 815, 818. A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that was manifestly erroneous or clearly wrong. *Id.* (citing *Stobart v. State, Dept. of Transp. and Development,* 617 So. 2d 880, 882 n.2 (La. 1993)). When the court of appeal finds that a reversible legal error or manifest error of material fact was made in the trial court, it is required to redetermine the facts *de novo* from the entire record and render a judgment on the merits. *Id.* (citing *Rosell v. ESCO,* 549 So. 2d 840, 844 (La. 1989)).

[4] The trial judge left the record open to allow the defendant to supplement the record with excerpts of certain deposition testimony, which was admitted into evidence after the trial.

We find legal error on the part of the trial judge, thus requiring that we conduct a *de novo* review on the choice-of-law issue.[5] After a *de novo* review of the record, we find that Mississippi law applies to the facts of this case and pursuant to that law, plaintiffs are not entitled to UM recovery. Therefore, we reverse the trial court and render judgment in favor of Safeway.

## LAW AND ANALYSIS

At issue in the present case is the interpretation of UM coverage afforded to the plaintiffs. Plaintiffs assert that Louisiana law applies, and Safeway asserts that Mississippi law applies. The trial court rendered a judgment, which comports with the application of Louisiana law.

> [T]he appropriate starting point in a multistate case such as the present one is to first determine that there is a difference between Louisiana's UM law and the UM law of the foreign state, and then to conduct a choice-of-law analysis, as codified in Book IV of the Civil Code, to determine which state's law applies to the interpretation of the UM policy. *Champagne v. Ward,* 03-3211 (La. 1/19/05), 893 So. 2d 773, 786.

As noted hereinafter, there is a difference between Louisiana's UM law and the UM law of Mississippi, thus, a choice-of-law analysis must be conducted. The choice-of-law methodology is codified in La. C.C. arts. 3515 and 3537. In *Champagne*, the Louisiana Supreme Court held that Louisiana law does not automatically apply to UM claims under a policy issued in another state, even though a Louisiana resident is involved in the accident and the accident occurs in Louisiana. Rather, a choice-of-law analysis is necessary. *Champagne,* 893 So. 2d at 775.

According to the conflict of laws provisions, the court must balance the competing interests between states to identify the state whose policies would be

[5] If the trial court conducted a choice-of-law analysis and made factual determinations such that it concluded, that based on those factual determinations, Louisiana law applied, those factual determinations are manifestly erroneous.

most seriously impaired if its laws were not applied to the issue at hand. *Id.* at 786. Like the present case, *Champagne* involved an automobile accident which occurred in Louisiana and a UM policy that was issued in Mississippi. The relevant facts in *Champagne* were:

(1) The accident occurred in New Orleans, Louisiana;

(2) The defendant was a Louisiana resident and the defendant's automobile liability policy was issued to the defendant in Louisiana;

(3) The plaintiff was a Mississippi resident;

(4) Mississippi was the place of negotiation and formation of the plaintiff's insurance contract;

(5) The vehicle on which plaintiff purchased coverage was garaged, and presumably registered, in Mississippi;

(6) Plaintiff's UM policy was a Mississippi contract.

The Court in *Champagne* held that under the facts, Mississippi had a more substantial interest in the uniform application of its laws governing insurance contracts than Louisiana did in providing a remedy to an out-of-state resident who was injured while transitorily within the borders of Louisiana. *Id.* at 789. The Court also noted that the plaintiff's premium for UM coverage was based on the application of Mississippi law to the contract. *Id.*

Following *Champagne,* this court applied a choice-of-law analysis to a similar set of facts in *Wendling v. Chambliss,* 09-1422 (La. App. 1 Cir. 3/26/10), 36 So. 3d 333. In that case, the plaintiff argued that, although he lived in Mississippi, he was a Louisiana resident displaced after Hurricane Katrina and had abundant connections with Louisiana. After a *de novo* review, this court determined the following:

(1) The plaintiff was a Mississippi resident with a Mississippi address and Mississippi driver's license;

(2) The plaintiff's policy providing UM coverage was a Mississippi contract, negotiated and purchased in Mississippi;

(3) The plaintiff's vehicle was registered and principally garaged in Mississippi;

(4) The tortfeasor was a Mississippi resident whose vehicle was registered in Mississippi;

(5) The accident occurred in Louisiana and the plaintiff's post-accident medical treatment was in Louisiana.

*Id.* at 338. Based upon the facts in *Wendling,* this court held that Mississippi had a more substantial interest in the uniform application of its laws governing insurance contracts than did Louisiana in providing an insurance remedy to an out-of-state resident who was injured while in Louisiana. The court noted that even though the plaintiff worked in Louisiana and was regularly in the state, he was a Mississippi resident who purchased his insurance policy in Mississippi. Furthermore, the court noted that the plaintiff's premium was based on the application of Mississippi law to the contract. Therefore, this court concluded that Mississippi law would be most seriously impaired if not applied to the contract. *Id.* at 338-339.

La. C.C. art. 3515 provides:

> Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
>
> That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

La. C.C. art. 3537 provides:

> Except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
>
> That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other.

Louisiana's conflict of law provisions, as set forth above, afford the balancing of competing interests between states. Article 3515 instructs the court to examine the relationship of each state to the parties and the dispute. Article 3537 invites analysis of the nature, type, and purpose of the contract. The objective of these provisions is to identify the state whose policies would be most seriously impaired if its laws were not applied to the issue at hand. *See* La. C.C. arts. 3515 and 3537; *see also Champagne,* 893 So. 2d at 786. In the case at bar, the law of the state applicable to the insurance contract and its UM coverage is determined by evaluating the strength and pertinence of the relevant policies of Louisiana and Mississippi in light of the factors set forth in La. C.C. arts. 3515 and 3537. *See Champagne,* 893 So. 2d at 786.

There are competing public policies and interests that exist between the states of Louisiana and Mississippi in this case. Louisiana has expressed as a public policy its intent to protect Louisiana residents and others when an accident occurs on Louisiana roads.

The relevant Louisiana law, La. R.S. 22:1295, states in pertinent part:

> **The following provisions shall govern the issuance of uninsured motorist coverage in this state:**
>
> (1)(a)(i) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle **shall be delivered or issued for delivery in this state** with respect to any motor vehicle designed for use on public highways and required to be registered in this state or as provided in this Section unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover nonpunitive damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death resulting therefrom; ...
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> * * *
>
> (iii) This Subparagraph and its requirement for uninsured motorist coverage **shall apply to any liability insurance covering any accident which occurs in this state and involves a resident of this state.** (Emphasis added).

This court has previously noted that "the statute is limited by the introductory language ... which states that the statute 'shall apply to the issuance of uninsured motorist coverage in this state.' " *Triche v. Martin,* 08-1220 (La. App. 1 Cir. 5/8/09), 13 So. 3d 649, 652, *writ denied,* 09-1284 (La. 9/25/09), 18 So. 3d 76 (quoting *Champagne,* 893 So. 2d at 786.). "The introductory language is clear and unambiguous and does not lead to absurd consequences." *Id.* (quoting *Champagne*, 893 So. 2d at 786). As in *Triche,* the policy at issue in this case was not issued for coverage in Louisiana and was not issued or delivered in Louisiana. *See Triche,* 13 So. 3d at 652. Finally, La. R.S. 22:1295(1)(a)(iii) is limited to accidents occurring in Louisiana involving a resident of Louisiana.

The purpose of Louisiana's UM legislation is to promote full recovery for innocent automobile accident victims by mandating minimum liability insurance coverage and making such coverage available when the tortfeasor is uninsured or

underinsured. *See* La. R. S. 22:1295(1)(a)(i); s*ee also Martin v. Champion Ins. Co.,* 95-0030 (La. 6/30/95), 656 So. 2d 991, 994. In Louisiana, a liability policy providing UM coverage is not implicated until the underlying liability limits insuring the tortfeasor are exhausted. *See* La. R. S. 22:1295(2)(b). In Mississippi, an uninsured motor vehicle is defined, in pertinent part, as:

> An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage... .

Mississippi Code 1972, Section 83-11-103(c)(iii). Therefore, UM coverage for the injured person pursuant to a Mississippi policy is only implicated if the bodily injury liability limits insuring the tortfeasor are less than the bodily injury limits of the injured person under his UM coverage.

The facts at trial clearly established that the tortfeasor's bodily injury liability limits issued by State Farm were $25,000 per person and $50,000 per accident. The UM coverage of the Safeway policy issued to Kimberly Griffin had policy limits of $25,000 per person and $50,000 per accident. Therefore, according to Mississippi law, plaintiffs in the present case were not entitled to UM coverage under the Safeway policy.

There are three plaintiffs involved in the present case. Our *de novo* review of the record reveals the following facts:

- The accident occurred in West Feliciana Parish, Louisiana;
- The tortfeasor, Mr. Perritt, drove a vehicle registered in Mississippi, the vehicle had a Mississippi license plate, and Mr. Perritt had a Mississippi driver's license;

- All three plaintiffs, Kimberly Griffin, Beroness Griffin, and Lisa McDowell, had Mississippi addresses and driver's licenses at the time of the accident;
- Lisa McDowell was a Mississippi resident who worked in Louisiana at the time of the accident;
- Lisa McDowell spent about two nights a month at her place of employment in Louisiana;
- Kimberly Griffin was a Mississippi resident who worked in Louisiana at the time of the accident;
- Kimberly Griffin spent some nights at her place of employment in Louisiana;
- The vehicle in which the plaintiffs were riding was purchased in Mississippi by Kimberly Griffin;
- Kimberly Griffin had a Mississippi driver's license and never had a driver's license from Louisiana;
- Kimberly Griffin had a Mississippi address and considered herself a Mississippi resident;
- Kimberly Griffin purchased the Safeway insurance policy for the vehicle involved in the accident in Mississippi through a Mississippi insurance agent;
- Prior to the accident, Beroness Griffin lived in Baton Rouge for at least eight months at a friend's apartment;
- At the trial, although Beroness Griffin denied moving back to Mississippi a few months prior to the accident as she previously testified by deposition, she testified that on the date of the accident she was living in an apartment with a friend in Baton Rouge, Louisiana;

- Beroness Griffin used a Mississippi address and had a Mississippi license at the time of the accident;
- Beroness Griffin never had a Louisiana license;
- Beroness Griffin used a cell phone issued from a Mississippi area code; and
- The address Beroness Griffin used in Mississippi was her parents' address.

At trial, plaintiffs attempted to show that their working in Louisiana and Beroness Griffin's living in an apartment in Baton Rouge gave them sufficient contacts with Louisiana to have Louisiana law applied. We agree residency is a factor to be considered in making the choice-of-law decision, but it is not determinative. *Champagne,* 893 So. 2d at 789. In the present case, Kimberly Griffin and Lisa McDowell were Mississippi residents at the time of the accident. We do not find that the Louisiana contacts of Kimberly Griffin and Lisa McDowell are sufficient to outweigh the substantial interest of Mississippi in the uniform application of its laws governing contracts. Therefore, we conclude that the Louisiana UM statute does not apply to the facts of their accident. As to Beroness Griffin, even if she were considered a Louisiana resident at the time of the accident, it would not change this court's analysis that Mississippi also has a substantial interest in the uniform application of its own laws governing insurance contracts purchased and issued in Mississippi with regard to her claim.

We agree with the result in *Collins v. Downes,* 11-1124 (La. App. 4 Cir. 1/25/12), 83 So. 3d 1177, which involved the determination of whether Louisiana law or Ohio law applied to a UM claim. The plaintiff and tortfeasor in *Collins* were Louisiana residents, the accident occurred in Louisiana, and the tortfeasor's vehicle was garaged in Louisiana. The policy providing UM coverage on the

vehicle being driven by the plaintiff was issued in Ohio. The Fourth Circuit found that Ohio had a more substantial interest in the uniform application of its laws governing insurance contracts than Louisiana, **even though the accident occurred in Louisiana and involved Louisiana residents.** *Collins,* 83 So. 3d at 1183.

Similarly, as to all plaintiffs in the present case, even if Beroness Griffin were considered to be a Louisiana resident, this court finds that Mississippi has a more substantial interest in the uniform application of its laws governing insurance contracts than Louisiana. Applying Louisiana law to the Mississippi policy would result in the impairment of Mississippi contracts. The premium charged for the UM coverage in the policy was based on the application of Mississippi law to the contract. Based on consideration of the factors listed in La. C.C. arts. 3515 and 3517, we hold that Mississippi, the state where the insurance policy was negotiated, formed, and purchased, where the insured vehicle was licensed and garaged, where the tortfeasor resided, where two of the plaintiffs were residents, and where all three plaintiffs had addresses and driver's licenses, bears the closer relationship to the parties and the dispute.

Considering that Mississippi law applies to the policy providing UM coverage issued to Kimberly Griffin, there is no UM coverage for the injuries sustained by plaintiffs. *See* Mississippi Code 1972, Section 83-11-103(c)(iii). Because we reverse the trial court judgment, which was based on the erroneous application of Louisiana law, we need not address Safeway's remaining assignments of error.

## CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court and render judgment dismissing plaintiffs' claims against Safeway Insurance

Company, with prejudice. Costs of this appeal are assessed to plaintiffs, Kimberly Griffin, Beroness Griffin, and Lisa McDowell.

**JUDGMENT REVERSED AND RENDERED.**