

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1763

AVA FONTENOT, WIFE OF/AND LINDSEY M. FONTENOT,
INDIVIDUALLY
AND ON BEHALF OF THE ESTATE OF LINDSEY R. FONTENOT

VERSUS

PROGRESSIVE PALOVERDE INSURANCE COMPANY, AND ROY BOURG
AS ADMINISTRATOR OF THE ESTATE OF RAYMOND BOURG

consolidated with

2012 CA 1764

SHAREKA MATTHEWS AND ON BEHALF OF HER MINOR DAUGHTER,
ROBRIELLE SHORT

VERSUS

ROY BOURG AS ADMINISTRATOR OF THE ESTATE OF RAYMOND
BOURG, AND PROGRESSIVE PALOVERDE INSURANCE COMPANY

Judgment Rendered: NOV 07 2013

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On Appeal from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Trial Court No. 164,095 c/w 164,219

The Honorable Randall L. Bethancourt, Judge Presiding

* * * * *

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* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

Plaintiffs, Ava Fontenot and Lindsey M. Fontenot, individually, and on behalf of the estate of Lindsey R. Fontenot, appeal the trial court's granting of summary judgment dismissing their claims against defendant, Progressive Paloverde Insurance Company (Progressive). For the reasons stated herein, the judgment of the trial court is vacated, and the case is remanded for further proceedings.

FACTS AND PROCEDURAL HISTORY

This matter arises out of an accident in which three people were killed on July 2, 2010, in Terrebonne Parish. On that date, plaintiffs' son, Lindsey R. Fontenot, was a passenger in a 2007 Toyota Tacoma truck being driven by Raymond Bourg in a southerly direction on Louisiana Highway 24. Robert Short was driving another vehicle and was also travelling in a southerly direction on the same highway when the two vehicles collided. All three occupants of the two vehicles, Lindsey R. Fontenot, Raymond Bourg, and Robert Short sustained fatal injuries.

At the time of the accident, the vehicle driven by Raymond Bourg was insured by an automobile insurance policy issued by Progressive. Plaintiffs filed suit against Roy Bourg, as the administrator of the estate of Raymond Bourg, and Progressive. Progressive filed a motion for summary judgment which alleged that the policy did not provide either liability or uninsured motorist coverage (UM) for the accident in question because the policy contained a named driver exclusion endorsement excluding coverage for Raymond Bourg. Prior to the summary judgment hearing, all claims of liability against Raymond Bourg and his estate were voluntarily dismissed.

The motion for summary judgment was opposed by plaintiffs, who argued that the named driver endorsement applied to the liability coverage of the policy

and not the UM coverage and did not act to eliminate UM coverage for a passenger occupying the vehicle. The motion for summary judgment came on for hearing on June 15, 2012, and the trial court subsequently signed a judgment granting Progressive's motion for summary judgment. Plaintiffs appealed that judgment. This court remanded the case to the trial court for the limited purpose of having the trial court sign a valid written judgment with appropriate decretal language. An amended judgment was signed on May 7, 2013, granting Progressive's motion for summary judgment and dismissing plaintiffs' claims. This appeal followed.

DISCUSSION

Recently the Louisiana Legislature amended the law on summary judgment procedure to no longer require that a mover file his exhibits into the record, provided the mover attaches the exhibits to his motion for summary judgment or memorandum. Following the 2012 legislative session, but prior to the 2013 legislative session, a motion for summary judgment would be granted "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B)(2).

The legislature amended La. C.C.P. art. 966(B) in 2013 to provide:

(2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law....

2013 La. Acts, No. 391, § 1.

Louisiana Code of Civil Procedure article 966(F)(2) was also amended and re-enacted to provide:

Evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed

admitted for purposes of the motion for summary judgment Only evidence admitted for purposes of the motion for summary judgment may be considered by the court in its ruling on the motion.

2013 La. Acts, No. 391, § 1.

These amendments to La. C.C.P. art. 966 are procedural and apply retroactively to pending litigation. *See Trahan v. Prudential Property & Cas. Ins. Co.*, 97-2470 (La. App. 1 Cir. 5/14/99), 739 So. 2d 811, 813 (determining retroactive application of La. C.C.P. art. 966 when it was amended by 1997 La. Acts, No. 483).

Summary judgment procedure is designed to secure the “just, speedy, and inexpensive determination of every action, except those disallowed by Article 969.” La. C.C.P. art. 966(A)(2); *Jones v. Estate of Santiago*, 03-1424 (La. 4/14/04), 870 So. 2d 1002, 1005. The initial burden of proof remains with the mover to show that no genuine issue of material fact exists. 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 material factual issue remains. The failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. *Id.* at 1006; *See* La. C.C.P. art. 966(C)(2). The review of the granting of a motion for summary judgment is *de novo*, under the same criteria that govern the district court’s consideration of whether summary judgment is appropriate. *Id.*

This court must first determine whether the mover, Progressive, met its burden of proof of a *prima facie* case that the motion for summary judgment should be granted. Progressive filed a motion for summary judgment with a supporting memorandum. In the memorandum, Progressive refers to exhibits labeled A through K. Our thorough review of the entire record, the trial court minutes, and the hearing transcript reveals that none of the exhibits referred to by Progressive were filed with the trial court prior to the hearing. Therefore, the trial

court could not properly consider the content of those documents in determining the motion for summary judgment. See *Guilbeau v. Custom Homes by Jim Russell, Inc.*, 06-0050 (La. App. 1 Cir. 11/3/06), 950 So. 2d 732, 735. This court is “not permitted to deviate from the procedural and evidentiary rules for summary judgment established by our legislature. As much as we or the parties might prefer, we cannot subordinate adherence to proper civil procedure to considerations of judicial efficiency and convenience.” *Id.* at 735-36. (Citation omitted).

Although La. C.C.P. art. 966(F)(2) has been amended to permit the supporting evidence to be attached to the motion for summary judgment or the supporting memorandum, no such evidence was attached in the present case by Progressive. Even if this court were to review the policy in the record, which plaintiffs filed in opposition to the motion for summary judgment, there is no writing in the record evidencing an insured’s intent to include the named driver exclusion in the policy. Louisiana law requires that a named driver exclusion must be in writing and signed by an insured. La. R.S. 32:900(L); *Gilbert v. Reynoso*, 05-418 (La. App. 3 Cir. 11/2/05), 917 So. 2d 503, 506. The insurer bears the burden of showing policy limits or exclusions. *Schafer v. Summers*, 12-0730 (La. App. 1 Cir. 2/15/13), 113 So. 3d 219, 224.

An appellate court must render its judgment upon the record on appeal. La. C.C.P. art. 2164; *Tranum v. Hebert*, 581 So. 2d 1023, 1026 (La. App. 1 Cir.), *writ denied*, 584 So. 2d 1169 (La. 1991). An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. *Id.* Progressive could have filed its exhibits with the trial court prior to the hearing. Progressive also could have attached its exhibits to the motion for summary judgment or supporting memorandum. According to the record, Progressive did none of these things. Therefore, the trial court incorrectly considered the contents

of Exhibits A through K referred to by Progressive in its motion for summary judgment. Progressive did not carry its initial burden of proof.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is vacated and this matter is remanded to the trial court. Costs of the appeal are assessed to defendant, Progressive Paloverde Insurance Company.

VACATED AND REMANDED.