NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0051

JERRY P. DRAAYER, LEAH D. MCDOWELL,
SARAH D. MILLIGAN AND MARTHA D. DUNCAN

VERSUS

RUSSELL G. ALLEN, PROGRESSIVE INSURANCE COMPANY,
XYZ INSURANCE, GEICO GENERAL INSURANCE COMPANY,
AND STATE FARM FIRE AND CASUALTY COMPANY

Judgment Rendered: APR - 9 2014

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 2010-0004506

Honorable Elizabeth P. Wolfe, Judge

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BEFORE: WHIPPLE, C.J., PARRO, PETTIGREW, WELCH, AND CRAIN, JJ.

Pettigrew, J. concurs with Results

Parro, J., concurs.

Crain, J. dissents and assigns reasons.

WELCH, J.

In this action for damages arising out of a fatal automobile accident, the plaintiffs appeal a summary judgment granted in favor of the defendant, State Farm Fire and Casualty Company ("State Farm"), which dismissed the plaintiffs' uninsured/underinsured motorist ("UM") claims against State Farm. For reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On November 19, 2009, an automobile accident occurred involving a 2007 Dodge Caravan owned by Jerry Draayer and driven by his wife, Lois V. Draayer, and a 2006 Yukon Denali owned by Melvin D. Allen and driven by Russell G. Allen. The accident occurred when the Allen vehicle, which was traveling northbound on Interstate 55 in Pike County, Mississippi, crossed the median and collided head-on with the Draayer vehicle, which was traveling southbound on the interstate. As a result of the injuries sustained in this accident, Lois Draayer died.

The plaintiffs are Jerry Draayer, the surviving spouse of Lois Draayer, and Leah D. McDowell, Sarah D. Milligan, and Martha D. Duncan, the surviving children of Lois Draayer. On November 17, 2010, the plaintiffs filed a petition for damages, naming as defendants: Russell Allen; Progressive Insurance Company, Russell Allen's automobile liability insurer; and State Farm, which allegedly provided UM coverage to Lois Draayer through their personal liability umbrella policy ("PLUP").

On April 11, 2011, State Farm filed a motion for summary judgment, contending that it was entitled to be dismissed from the plaintiffs' lawsuit, because Lois Draayer had rejected UM coverage under the PLUP. After a hearing, the trial court granted the motion and dismissed the plaintiffs' claims against State Farm.

A judgment in conformity with the trial court's ruling was signed on April 15, 2013, and it is from this judgment that the plaintiffs have appealed.[1]

On appeal, the plaintiffs contend that the trial court erred in finding that UM coverage was knowingly rejected by Lois Draayer, where the evidence and testimony submitted in opposition to the motion for summary judgment revealed: (1) that a State Farm employee printed Lois Draayer's name on the UM selection form and dated the form; (2) that State Farm summoned Lois Draayer into State Farm's office in the middle of a policy period and represented to her that her coverage would not be renewed if she failed to sign the UM selection form; and (3) that Lois Draayer did not knowingly reject UM coverage, thereby rebutting the presumption arising from a signed UM selection form.

LAW AND DISCUSSION

Summary Judgment

A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits admitted for purposes of the motion for summary judgment, show there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2). In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that governs the trial court's determination of whether summary judgment is appropriate. **Green v. State Farm Mutual Automobile Insurance Company**,

[1] The April 15, 2013 judgment was an amended judgment. The original judgment was signed by the trial court on September 14, 2012; however, that judgment did not contain appropriate decretal language because it failed to identify the relief granted. Following a rule to show cause why the appeal should not be dismissed, which was issued *ex proprio motu* by this court, the record was supplemented with the April 15, 2013 amended judgment and the appeal was maintained. See **Jerry P. Draayer, et al. v. Russell G. Allen, et al.**, 2013-0051 (La. App. 1st Cir. 5/31/13) (*unpublished action*). We also note that both judgments were designated as final judgments for the purpose of an immediate appeal after an express determination that there was no just reason for delay. See La. C.C.P. art. 1915(B). However, as the judgment dismissed State Farm from this suit, certification of the judgment as final under La. C.C.P. art. 1915(B) was unnecessary. See La. C.C.P. art. 1915(A)(1); **Motorola, Inc. v. Associated Indemnity Corporation**, 2002-0716 (La. App. 1st Cir. 4/30/03), 867 So.2d 715, 721.

2007-0094 (La. App. 1st Cir. 11/2/07), 978 So.2d 912, 914, writ denied, 2008-0074 (La. 3/7/08), 977 So.2d 917.

On a motion for summary judgment, if the issue before the court is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. La. C.C.P. art. 966(C)(2); **Buck's Run Enterprises Inc. v. MAPP Construction, Inc.**, 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. An insurer seeking to avoid coverage through summary judgment must prove some provision or exclusion applies to preclude coverage. **Halphen v. Borja**, 2006-1465 (La. App. 1st Cir. 5/4/07), 961 So.2d 1201, 1204, writ denied, 2007-1198 (La. 9/21/07), 964 So.2d 338. Therefore, in this case, the burden of proof on the motion for summary judgment was with State Farm.

The issue of whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can be resolved properly within the framework of a motion for summary judgment. **Green**, 978 So.2d at 914. Summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. *Id.*

Rejection of UM Coverage

Louisiana Revised Statutes 22:1295, provides, in pertinent part, as follows:

> 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; however, the coverage required under this Section is not applicable when any insured named in the policy either rejects coverage, selects lower limits, or selects economic-only coverage, in the manner provided in Item (1)(a)(ii) of this Section. In no event shall the policy limits of an uninsured motorist policy be less than the minimum liability limits required under [La.] R.S. 32:900, unless economic-only coverage is selected as authorized in this Section. Such coverage need not be provided in or supplemental to a renewal, reinstatement, or substitute policy when the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer or any of its affiliates. The coverage provided under this Section may exclude coverage for punitive or exemplary damages by the terms of the policy or contract. Insurers may also make available, at a reduced premium, the coverage provided under this Section with an exclusion for all noneconomic loss. This coverage shall be known as "economic-only" uninsured motorist coverage. Noneconomic loss means any loss other than economic loss and includes but is not limited to pain, suffering, inconvenience, mental anguish, and other noneconomic damages otherwise recoverable under the laws of this state.

(ii) Such rejection, selection of lower limits, or selection of economic-only coverage shall be made only on a form prescribed by the commissioner of insurance. The prescribed form shall be provided by the insurer and signed by the named insured or his legal representative. The form signed by the named insured or his legal representative which initially rejects such coverage, selects lower limits, or selects economic-only coverage shall be conclusively presumed to become a part of the policy or contract when issued and delivered, irrespective of whether physically attached thereto. *A properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected coverage, selected a lower limit, or selected economic-only coverage.* The form signed by the insured or his legal representative which initially rejects coverage, selects lower limits, or selects economic-only coverage shall remain valid for the life of the policy and shall not require the completion of a new selection form when a renewal, reinstatement, substitute, or amended policy is issued to the same named insured by the same insurer or any of its affiliates. An insured may change the original uninsured motorist selection or rejection on a policy at any time during the life of the policy by submitting a new uninsured motorist selection form to the insurer on the form prescribed by the commissioner of insurance. Any changes to an existing policy, regardless of whether these changes create new coverage, except changes in the limits of liability, do not create a new policy and do not require the completion of new uninsured motorist selection forms. For the purpose of this Section, a new policy shall mean an original contract of insurance which an insured enters into through the completion of an application on the form required by the insurer.

(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.)

Under this statute, UM coverage is an implied amendment to any automobile liability policy, even when not expressly addressed, as UM coverage will be read into the policy unless validly rejected.[2] See **Duncan v. U.S.A.A. Insurance Company**, 2006-363 (La. 11/29/06), 950 So.2d 544, 547. The object of UM insurance is to provide full recovery for automobile accident victims who suffer damages caused by a tortfeasor who is not covered by adequate liability insurance. *Id.* The UM statute is to be liberally construed, and thus, exceptions to coverage are to be interpreted strictly. Any exclusion from coverage in an insurance policy must be clear and unmistakable, and the insurer bears the burden of proving any insured named in the policy rejected in writing the coverage equal to bodily injury coverage or selected lower limits. *Id.*

Thus, in this case, State Farm's burden was to establish that it had a properly completed and signed UM coverage selection form, as prescribed by the commissioner of insurance, in which the named insured in the policy knowingly rejected such coverage. According to the evidence submitted by State Farm in support of its motion for summary judgment, State Farm issued a PLUP to Jerry and Lois Draayer, identified as policy number 18-EM-9574-8. The policy was first issued in June 2004, was renewed each year thereafter, and was in effect on November 19, 2009, the date of Lois Draayer's fatal accident.[3] A UM form for the PLUP was signed by Lois Draayer on March 23, 2009. On the UM form, the

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[2] The UM statute is applicable to umbrella policies. See **Southern American Ins. Co. v. Dobson**, 441 So.2d 1185, 1190 (La. 1983) (*on rehearing*); **Tugwell v. State Farm Ins. Co.**, 609 So.2d 195, 199 (La. 1992).

[3] The policy period for the policy in effect at the time of the accident was June 21, 2009, through June 21, 2010. However, the policy was apparently cancelled on June 10, 2010, by Jerry Draayer following the death of Lois Draayer.

initials "LVD" were placed next to option 4, which provided "**I do not want [UM] Coverage**. I understand that **I will not be compensated through [UM] coverage** for losses arising from an accident caused by an uninsured/underinsured motorist." The signature "Lois V. Draayer" was placed on the line for "Signature of Named Insured or Legal Representative," and "Lois V. Draayer" was handwritten in the line for "Print Name[.]" "18-EM-9574-8" was handwritten into the box for "Personal Liability Umbrella Policy" and "3-23-09" was handwritten on the line for the "Date[.]"

State Farm also offered part of the deposition testimony of Barbara Faircloth, an employee of the Draayers' State Farm Agent, James ("Jim") Crane, who testified that she personally recalled Lois Draayer coming to their office to execute the UM form on March 23, 2009, and that the form was completed and then signed by Lois Draayer.

In **Duncan**, 950 So.2d at 551, our supreme court examined the UM form prescribed by the commissioner of insurance and found that it outlined six tasks: (1) initialing the selection or rejection of coverage chosen; (2) if limits lower than the policy limits are chosen, then filling in the amount of coverage selected for each person and each accident; (3) printing the name of the named insured or legal representative; (4) signing the name of the named insured or legal representative; (5) filling in the policy number; and (6) filling in the date.

Furthermore, compliance with the UM form prescribed by the commissioner of insurance involves more than the rote completion of the six tasks identified in **Duncan** by someone at sometime. **Gray v. American National Property & Casualty Co.**, 2007-1670 (La. 2/26/08), 977 So.2d 839, 849. Instead, in order for the form to be valid, the six tasks outlined by **Duncan** must be completed before the UM form is signed by the insured, such that the signature of the insured or the insured's representative signifies an acceptance of an agreement with all of the

information contained on the form. *Id.* An insurer who is unable to prove that the UM form was completed before it was signed by the insured simply cannot meet its burden of proving by clear and unmistakable evidence that the UM form is valid. *Id.*

After carefully reviewing the UM form in this case, we find that State Farm met its initial burden of proving that the six tasks outlined by **Duncan** were met and that those tasks were met before Ms. Draayer executed the UM selection form; therefore, the UM form was properly completed and signed, creating a rebuttable presumption that Lois Draayer knowingly rejected coverage.

In opposition to State Farm's motion for summary judgment, the plaintiffs first contend that the PLUP provided UM coverage because the policy number was not on the UM selection form at the time Lois Draayer signed it. However, the plaintiffs offered no evidence to support this contention. While Barbara Faircloth testified that she wrote the policy number in the UM selection form, she never testified that this was done after Lois Draayer executed the form.[4] Rather, her testimony, when read as a whole, establishes that the form was properly completed and then signed by Lois Draayer.

The plaintiffs further contend that even if the UM form was properly executed, they offered evidence in opposition to the motion for summary judgment sufficient to establish that they could rebut the presumption that Lois Draayer knowingly rejected UM coverage when she signed the form and initialed her selection. We agree.

The testimony of Barbara Faircloth and Jim Crane indicate that in the middle of the policy period, Jim Crane's State Farm agency sent Lois Draayer a UM form

[4] The law does not require that the insured perform the clerical tasks of filling in numbers on the form; however, it must be the named insured (or his legal representative) who makes the selection and signs the forms. See **Taylor v. U.S. Agencies Casualty Insurance Company**, 2009-1599 (La. App. 1st Cir. 4/7/10), 38 So.3d 433, 437; **Ware v. Gemini Ins. Co**; 2010-594 (La. App. 3rd Cir. 11/24/10), 51 So.3d 179, 183, writs denied, 2010-2834, 2011-0286 (La. 4/29/11), 62 So.3d 108, 112.

in the mail. According to Barbara Faircloth's testimony, "everybody" that had a State Farm umbrella policy from State Farm agent Jim Crane, including Lois Draayer, was told that their umbrella policy would not be renewed unless a new UM form was submitted. Thus, the evidence offered by the plaintiffs established that Lois Draayer was given a choice to either execute the UM form sent to her or lose her coverage under the PLUP.

Based on our review of the record and applicable law, the information provided by Barbara Faircloth to Lois Draayer was incorrect and contrary to Louisiana law. As previously set forth, La. R.S. 22:1295 requires that an insured be provided with three options concerning UM coverage: (1) UM coverage equal to the bodily injury liability limits in the policy; (2) UM coverage lower than those limits, including "economic-only" coverage; or (3) rejecting UM coverage. By statute, these provisions "shall govern the issuance of [UM] coverage in this state" and are applicable to any "automobile liability insurance" absent a lawful and valid rejection of such coverage pursuant to the procedures set forth in the statute. See La. R.S. 22:1295 (1)(i) and (ii). The UM form that Lois Draayer was told she must sign in order to maintain coverage under her PLUP only provided her with two options—the selection of lower UM limits (including "economic-only" UM coverage) or the rejection of UM coverage. The form specifically provided that the UM form *only* had to be completed and signed if the insured wanted to either reject UM coverage or select lower UM limits, including "economic-only" UM coverage.

An insurer has an affirmative duty to place the insured in a position to make an informed decision. **Gray**, 977 So.2d at 848. The evidence offered by the plaintiffs established that State Farm breached this duty by requiring Lois Draayer to sign the UM form as a condition of maintaining coverage under the PLUP, thereby depriving its insured of her statutory right to have UM coverage equal to

the bodily injury liability limits in her insurance policy. Accordingly, we find that there are genuine issues of material fact as to whether there was a lawful and valid rejection and whether Lois Draayer knowingly made an informed, meaningful rejection of UM coverage. See **Cotton v. Credit General Ins. Co.**, 97-2674 (La. App. 1st Cir. 12/28/98), 723 So.2d 1083, 1084-1085 (the actions of the insurer's agent resulted in misinformation to the insured that foreclosed an informed, meaningful selection by the insured); **Ware**, 51 So.3d 179, 183-184 (acquiescence to the insurance agent's selection of UM coverage is not the same as the named insured making the selection and casts doubt on the voluntariness of the insured's choice).

Because we find that plaintiffs established that there were genuine issues of material fact and presented evidence sufficient to establish that they could carry their evidentiary burden at trial of rebutting the presumption that Lois Draayer knowingly rejected UM coverage, summary judgment dismissing the plaintiffs' claims against State Farm was inappropriate.

CONCLUSION

For all of the above and foregoing reasons, the April 15, 2013 judgment of the trial court granting summary judgment in favor of State Farm Fire and Casualty Company and dismissing the plaintiffs' claims against it is hereby reversed, and this matter is remanded for further proceedings. All costs of this appeal are assessed to the defendant/appellee, State Farm Fire and Casualty Company.

REVERSED AND REMANDED.

JERRY P. DRAAYER, LEAH McDOWELL, SARAH D. MILLIGAN AND MARTHA D. DUNCAN	**STATE OF LOUISIANA**
VERSUS	**COURT OF APPEAL**
RUSSELL G. ALLEN, PROGRESSIVE INSURANCE COMPANY, XYZ INSURANCE, GEICO GENERAL INSURANCE COMPANY, AND STATE FARM FIRE AND CASUALTY COMPANY	**FIRST CIRCUIT**
	2012 CA 1678

CRAIN, J., dissenting.

I disagree that there are genuine issues of material fact as to whether Mrs. Draayer knowingly made an informed, meaningful rejection of UM coverage. Specifically, I disagree with the majority's conclusion that the evidence offered by the plaintiffs created a material issue of fact as to whether State Farm breached its affirmative duty to place the insured in a position to make an informed decision by requiring Mrs. Draayer to sign the UM form as a condition of maintaining coverage under the PLUP, thereby depriving her of her statutory right to have UM coverage equal to the bodily injury limits of her policy.

The uncontradicted evidence establishes that State Farm gave Mrs. Draayer all options required under the law, including purchasing the coverage at different levels, and she rejected it. Barbara Faircloth testified in her deposition that she remembered meeting with Mrs. Draayer and going over the original UM form. Faircloth then explained each of the selection options, stating:

> We would have gone through each one. This one says that you want the same limits as your liability. And then you have a choice of a lower Uninsured Motorist coverage than your liability limits. And then you have a choice of economic only for the lower limits.

Mrs. Draayer did not ask about premium differentials because that had been discussed when the PLUP was first issued in June 2004, and Mrs. Draayer "was not concerned about wanting Uninsured Motorist coverage." After the coverage

options were explained, Mrs. Draayer made the same decision that she made in 2004, that is, to reject UM coverage for the PLUP. She completed and signed the UM form accordingly. Again, this evidence was uncontradicted.

So long as Mrs. Draayer was given the option of purchasing UM coverage, I see no reason why the timing of that option during a policy period should undermine the validity of the selection. The evidence shows that the Department of Insurance required use of a new UM form. To the extent that this was in response to the old UM form having been determined to be flawed, State Farm potentially had an uncompensated risk relative to any waivers that used the old UM form. I know of no reason under the law why an insurer is required to bear that risk once the insurer becomes aware of it. While State Farm could not require that Mrs. Draayer reject UM coverage, it could allow her to either select coverage or reject it; and if she chose neither, it could choose to not renew her policy. Holding otherwise denies the parties the ability to contract as they choose.

I agree that if the facts were in conflict as to whether State Farm only gave Mrs. Draayer the option to reject UM coverage, and not to purchase it, then a genuine issue of material fact as to whether Mrs. Draayer knowingly made an informed, meaningful rejection of UM coverage would preclude summary judgment. However, the uncontradicted evidence is that State Farm gave Mrs. Draayer all options required under the law, including purchasing the coverage at different levels, and she rejected it. There are no genuine issues of material fact that preclude summary judgment in favor of State Farm. I dissent.