STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0139

DANA LANDRY JOHNSON AND JUSTIN PELLERIN

VERSUS

JESSICA BASS, GEICO GENERAL INSURANCE COMPANY, AND GOAUTO MANAGEMENT SERVICES LLC

Judgment Rendered: DEC 2 2 2021

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Appealed from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C694941

The Honorable Timothy Kelley, Judge Presiding

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Charlotte C. McDaniel **Baton Rouge, Louisiana**	**Counsel for Plaintiffs/Appellants** **Dana Landry Johnson and Justin Pellerin**
Chase Tettleton **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellee** **GoAuto Insurance Company**

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BEFORE: LANIER, WOLFE, AND BURRIS,[1] JJ.

[1] The Honorable William J. Burris, retired, is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

LANIER, J.

This matter is before us on appeal by plaintiffs, Dana Landry Johnson and her husband Justin Pellerin, from the district court's grant of summary judgment, dismissing their claims against defendant, GoAuto Insurance Company ("GoAuto"), with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

This case arises out of a vehicular collision that occurred on November 26, 2019. Ms. Johnson was driving southbound on Airline Highway in Ascension Parish and entered the right-turn only lane. At the same time, Jessica Bass was driving northbound on the same highway and attempted to cross the highway. Ms. Bass failed to yield to Ms. Johnson's vehicle, striking Ms. Johnson's vehicle broadside. Mr. Pellerin was a passenger in Ms. Johnson's vehicle at the time of the accident.

Ms. Johnson and Mr. Pellerin (hereinafter sometimes referred to collectively as "plaintiffs") filed suit seeking to recover damages for their injuries, naming as defendants Ms. Bass, her alleged liability insurer, GEICO Casualty Company ("GEICO"),[2] and plaintiffs' underinsured/uninsured ("UM") insurer, GoAuto. Plaintiffs alleged that GoAuto "had in force and effect a policy of insurance providing ... [UM] coverage to Dana Landry Johnson to cover damages incurred by Plaintiff(s) ...."

GoAuto filed an answer, generally denying plaintiffs' allegations and further denying that GoAuto ever provided UM coverage in favor of plaintiffs. GoAuto noted that Ms. Johnson had rejected UM coverage under Policy Number 380150 by completing a UM selection form on July 17, 2015, and that Ms. Johnson renewed the policy at least eight times between the time she initially rejected UM coverage and the date of the accident at issue. GoAuto asserted that at no time between Ms.

[2] GEICO was incorrectly identified in the petition as "GEICO General Insurance Company." According to GEICO's answer, Ms. Bass had no coverage provided by GEICO on the date of the accident.

Johnson's initial rejection and the accident in question did Ms. Johnson submit a UM selection form affirmatively selecting UM coverage, nor had the limits of liability on the policy changed.

Thereafter, GoAuto filed a motion for summary judgment asserting that there was no genuine issue as to any material fact in dispute and that GoAuto was entitled to summary judgment as a matter of law because the policy in question did not provide UM coverage for plaintiffs' claims. GoAuto argued that the undisputed evidence demonstrated that Ms. Johnson validly rejected UM coverage.

Plaintiffs opposed the motion for summary judgment, arguing that there were genuine issues of material fact remaining that precluded summary judgment in this case. Plaintiffs argued that although the original GoAuto policy issued to Ms. Johnson in 2015 contained a valid UM selection form signed on July 17, 2015, this original policy was not renewed in 2018. Rather, plaintiffs asserted, on February 23, 2018, GoAuto required Ms. Johnson to sign and submit an "Application for Personal Automobile Insurance." Thus, plaintiffs maintained, the 2018 policy was not a renewal policy, but rather a new policy, and a new UM selection form was required.

Following a hearing on the motion for summary judgment, the district court signed a judgment on October 15, 2020, granting summary judgment in favor of GoAuto and dismissing, with prejudice, all claims filed by plaintiffs against GoAuto. This appeal by plaintiffs followed. The sole issue before us is whether the district court erred in in granting summary judgment in favor of GoAuto and finding that the July 17, 2015 UM selection form was valid.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Georgia-Pacific Consumer Operations, LLC v. City of Baton Rouge**, 2017-1553 (La. App. 1 Cir.

7/18/18), 255 So.3d 16, 21, writ denied, 2018-1397 (La. 12/3/18), 257 So.3d 194. The Code of Civil Procedure places the burden of proof on the party filing a motion for summary judgment. La. C.C.P. art. 966(D)(1). The mover can meet its burden by filing supporting documentary evidence consisting of pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions with its motion for summary judgment. La. C.C.P. art. 966(A)(4). Because the applicable substantive law determines materiality, whether a particular fact in dispute is material must be viewed in light of the substantive law applicable to the case. **Bryant v. Premium Food Concepts, Inc.**, 2016-0770 (La. App. 1 Cir. 4/26/17), 220 So.3d 79, 82, writ denied, 2017-0873 (La. 9/29/17), 227 So.3d 288.

Once the mover properly establishes the material facts by its supporting documents, the mover does not have to negate all of the essential elements of the adverse party's claims, actions, or defenses if he will not bear the burden of proof at trial. La. C.C.P. art. 966(D)(1); **Horrell v. Alltmont**, 2019-0945 (La. App. 1 Cir. 7/31/20), 309 So.3d 754, 758. The moving party must only point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966(D)(1); **Celotex Corp. v. Catrett**, 477 U.S. 317, 332, 106 S.Ct. 2548, 2557, 91 L.Ed.2d 265 (1986); **Mercadel v. State Through Department of Public Safety and Corrections**, 2018-0415 (La. App. 1 Cir. 5/15/19), 2019 WL 2234404, at *5-6 (unpublished).

The burden then shifts to the non-moving party to produce factual support, through the use of proper documentary evidence attached to its opposition, which establishes the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1); see also La. C.C.P. art. 966, comments-2015, comment (j). If the non-moving party fails to produce sufficient factual support in its opposition which proves the existence of a genuine

issue of material fact, article 966(D)(1) mandates the granting of the motion for summary judgment. **Babin v. Winn-Dixie Louisiana, Inc.**, 2000-0078 (La. 6/30/00), 764 So.2d 37, 40.

In reviewing the district court's decision on a motion for summary judgment, this court applies a de novo standard of review using the same criteria applied by the trial courts to determine whether summary judgment is appropriate. **Jackson v. Wise**, 2017-1062 (La. App. 1 Cir. 4/13/18), 249 So.3d 845, 850, writ denied, 2018-0785 (La. 9/21/18), 252 So.3d 914. Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing a motion for summary judgment, and all doubt must be resolved in the opponent's favor. **Thompson v. Center for Pediatric and Adolescent Medicine, L.L.C.**, 2017-1088 (La. App. 1 Cir. 3/15/18), 244 So.3d 441, 445, writ denied, 2018-0583 (La. 6/1/18), 243 So.3d 1062.

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. **Draayer v. Allen**, 2015-1150 (La. App. 1 Cir. 4/15/16), 195 So.3d 78, 81 (citing **Green v. State Farm Mut. Auto. Ins. Co.**, 2007-0094 (La. App. 1 Cir. 11/2/07), 978 So.2d 912, 914, writ denied, 2008-0074 (La. 3/7/08), 977 So.2d 917. As an insurer seeking to avoid coverage through summary judgment, GoAuto bears the burden of proving that some provision or exclusion applies to preclude coverage. **Draayer**, 195 So.3d at 81 (citing **Halphen v. Borja**, 2006-1465 (La. App. 1 Cir. 5/4/07), 961 So.2d 1201, 1204, writ denied, 2007-1198 (La. 9/21/07), 964 So.2d 338.

As the mover, GoAuto had the burden of proof on summary judgment; however, because GoAuto would not bear the burden of proof at trial, GoAuto was only required to point out to the district court the absence of factual support for one or more elements of plaintiffs' claim. See La. Code Civ. P. art. 966(D)(1). Citing

Louisiana's UM law and the jurisprudence interpreting same, GoAuto argued that although the GoAuto policy was in effect at the time of the accident, there was no UM coverage available as Ms. Johnson had validly rejected UM coverage when she applied for her policy with GoAuto.

In all automobile liability insurance policies delivered in this state covering vehicles registered in this state, Louisiana law requires UM coverage in the same amount as the bodily injury liability coverage, unless "any insured named in the policy either rejects coverage, selects lower limits, or selects economic-only coverage." La. R.S. 22:1295(1)(a)(i).[3] "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" for that purpose and be "signed by the named insured or his legal representative." La. R.S. 22:1295(1)(a)(ii). "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." *Id.*

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[3] Louisiana Revised Statutes 22:1295(1)(a)(i) provides:

> (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 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.

The provisions governing UM coverage further provide:

> 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.

La. R.S. 22:1295(1)(a)(ii) (Emphasis added.).[4]

In support of the motion for summary judgment, GoAuto submitted a copy of the petition and the affidavit of Kim McCloud, GoAuto's Underwriting Manager, along with numerous documents attached thereto. In opposition to the motion for summary judgment, plaintiffs attached the February 23, 2018 Application for Personal Automobile Insurance that was filled out by Ms. Johnson.

Citing **Alexander v. Estate of McNeal**, 2010-66 (La. App. 3 Cir. 6/30/10), 44 So.3d 338, writ denied, 2010-1807 (La. 10/29/10), 48 So.3d 1093 and **Draayer**, 195 So.3d at 87-88, plaintiffs argue that the February 23, 2018 application for

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[4] Louisiana Revised Statutes 22:1295(1)(a) (ii) provides:

> (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.** (Emphasis added.)

insurance that Ms. Johnson filled out with GoAuto has meaning and is a new application for insurance coverage requiring a new UM selection form. However, in both **Alexander** and **Draayer**, the courts were considering scenarios where there were two UM selection forms signed by the insured. In **Alexander**, the plaintiff had signed a UM selection form in April 2007, and then, at the request of the insurer, signed a second UM selection form in July 2007. Thereafter, the insurer argued that the subsequent form was "legally irrelevant" because the first form was still valid. **Alexander**, 44 So.3d at 340. The third circuit, agreeing with the district court's ruling, found that the insurer could not pick and choose which UM selection form to enforce. The court concluded that there were legal consequences flowing from signed documents, and the insurer, as the drafter and presenter of the second UM selection form, should be held to those consequences. *Id.* at 341. And in **Draayer**, this court followed the third circuit's reasoning in **Alexander**, finding that a second UM selection form signed by the insured was valid, and as signed documents, had legal consequences. **Draayer**, 195 So.3d at 87-88. We are not persuaded by plaintiffs' attempt to use these cases as support for their argument that the February 23, 2018 application for insurance must have some legal consequences as an application for a new policy, rather than a renewal.

Further arguing that a new UM selection form was required because a new vehicle and a new insured were added to the policy, plaintiffs cite **Donaghey v. Cumis Ins. Soc.**, 600 So.2d 829 (La. App. 3 Cir. 1992). In **Donaghey**, the third circuit held that the plaintiff's addition of a vehicle to his automobile insurance policy was not a renewal of the policy, and therefore required a separate rejection of UM coverage. **Donaghey**, 600 So.2d at 831. The **Donaghey** rule was based upon the premise that a waiver of UM coverage signed prior to an expansion of coverage, as in the case of adding an automobile, can no longer be valid because an individual would be rejecting coverage before the opportunity ever existed to accept it.

American Deposit Ins. Co. v. Myles, 2000-2457 (La. 4/25/01), 783 So.2d 1282, 1289. However, that rule of law as it applies to UM waivers was legislatively overruled by La. Acts 1999, No. 732, §1.[5] *Id.*

GoAuto argues that the facts of this case are more clearly aligned with two decisions from this court, **Pendarvis v. Liberty Mut. Ins. Co.**, 2007-2092 (La. App. 1 Cir. 5/2/08), 991 So.2d 505, writ denied, 2008-1184 (La. 10/3/08), 992 So.2d 1013, and **Williams v. Mosley**, 2019-0578 (La. App. 1 Cir. 1/9/20), 294 So.3d 1060. In **Pendarvis**, plaintiffs originally purchased a policy of insurance from Liberty Mutual in August 2000 with bodily injury liability limits of $10,000/$20,000 and property damage limits of $10,000 per accident. UM coverage was selected in the amount of $10,000/$20,000. Later that same month, plaintiffs increased the bodily injury liability limits to $25,000/$50,000 and property damage to $25,000 per accident. With regard to UM coverage, plaintiffs changed the coverage to economic-loss only and kept it at the $10,000/$20,000 amount. **Pendarvis**, 991 So.2d at 508. After these changes were made to the policy in August 2000, until the date of the accident on August 17, 2004, policy changes were made on a dozen different occasions, which, besides the addition of new vehicles, also included the elimination of vehicles, the substitution of vehicles, the elimination of an operator, a change of address, and yearly policy renewals. During this time, no changes were made in bodily injury liability coverage or UM coverage, and no new UM selection forms were executed. *Id.* On review, this court found that the statute was clear and unambiguous and that only changes in the "limits of liability" to an existing policy will create a new policy that requires the completion of a new UM selection form.

[5] La. Acts 1999, No. 732, §1 added the following sentence to La. R.S. 22:1406(D)(1)(a)(ii): "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." This language remained unchanged in La. R.S. 22:1295(1)(a)(ii), which was redesignated from La. R.S. 22:1406(D) by La. Acts 2003, No. 456 §3.

Id. at 509-510. Thus, this court concluded, the district court erred determining that the addition of a new vehicle to plaintiffs' insurance policy created a new policy requiring the execution of a new UM selection form. *Id.* at 510.

In **Williams**, the district court granted summary judgment in favor of Progressive, dismissing plaintiff's suit against it for UM coverage. **Williams**, 294 So.3d at 1061. On appeal to this court, plaintiff argued that his addition of seven vehicles to the Progressive policy over a period of nine months required the execution of a new UM selection form. *Id.* at 1062. On review, this court concluded:

> In this case, only Progressive's exposure changed with the additional vehicles added to the policy. The policy limits of liability did not change. Therefore, we find no genuine issue of material fact that, pursuant to La. R.S. 22:1295, the addition of new vehicles to the policy, with no change in the limits of liability, did not create a new policy and thus, did not require the completion of new UM selection forms.

Id. at 1065.

Ms. Johnson first applied for insurance with GoAuto on July 17, 2015. The Policy Number was 380150 and the liability limits for bodily injury and property damage were $15,000/$30,000/$25,000. During the initial application process, Ms. Johnson submitted a UM selection form rejecting UM coverage under the policy. Kim McCloud, GoAuto's Underwriting Manager, attested to the fact that Ms. Johnson maintained continuous and uninterrupted coverage with GoAuto under Policy Number 380150 between July 17, 2015, and the date of the accident in question. Ms. McCloud further stated that between her initial application for insurance in 2015 and the date of the accident, Ms. Johnson renewed her policy eight times.[6] With regard to the renewals, Ms. McCloud added:

> Each time [Ms. Johnson] renewed her GoAuto policy, the renewal was noted by appending an identifying number to her static policy number. For instance, when the policy was renewed for the first time a "-12" was

[6] The record reflects that in addition to these policy renewals and the changes involving her husband that are discussed more fully in this opinion, Ms. Johnson also made other policy changes over the years including the addition of a vehicle, the substitution of a vehicle, and the elimination of a vehicle.

> appended to the end of the policy number, 380150, to indicate the renewal period was the second six-month policy period. When the policy was renewed a second time, "-13" was appended to the policy to indicate the renewal period was the third six-month policy period, and so on.

According to Ms. McCloud, from the time of Ms. Johnson's initial application until the date of the accident, the liability limits under GoAuto Policy Number 380150 never changed, and Ms. Johnson never submitted a new UM selection form.

On January 17, 2018, Ms. Johnson renewed her policy for the fifth time. The renewal policy was identified as Policy Number 380150-16, and had a policy period from January 17, 2018, to July 19, 2018. However, as with previous renewals, nothing else in the policy changed. The policy liability limits remained $15,000/$30,000/$25,000 and the policy number remained the same, with the simple addition of "-16" to indicate that it was the fifth renewal of the policy. During this renewal term, Ms. Johnson added her husband (Justin Pellerin) as a driver and his vehicle (a 2006 Toyota Sequoia) to her existing policy. These changes were made to the policy on February 23, 2018, and a new declarations page was generated. Again, this renewal policy maintained the same liability limits and was identified by the same Policy Number, 380150-16. The only difference in the policy was the addition of a driver and a vehicle.

In granting GoAuto's motion for summary judgment, the district court offered the following:

> The legislature, when it passes a statute and it becomes law on the governor's signature, intends that the language they put in means what it says. In this case, [La. R.S. 22:1295(1)(a)(i)][7] does, in fact, say that any changes to an existing policy, regardless of whether those changes create a new coverage, except changes in the limits of liability, which did not occur here, do not create a new policy and do not require the completion of a new uninsured motorist selection form. This was not a totally new policy. It is the same policy; it just adds things to it.

[7] Although the district court referenced La. R.S. 22:1406 in its oral reasons for judgment, we note that the correct statute, as argued by the parties below and on appeal, is in fact La. R.S. 22:1295, which was renumbered from La. R.S. 22:680 by Acts 2008, No. 415, §1, eff. Jan. 1, 2009, and redesignated from La. R.S. 22:1406(D) by Acts 2003, No. 456, §3.

> The terms were the same as far as when it begins and when it ends. They were just changes to the existing policy to add a driver and to add that driver's vehicle to that policy.
>
> It is very clear that [La. R.S. 22:1295(1)(a)(i)] applies in this, and that it is not a new policy; it is a change to an existing policy, and therefore, I am going to grant summary judgment in favor of GoAuto and dismiss them with prejudice at [plaintiffs'] cost.

We agree with the district court. As this court previously noted in **Pendarvis**, the language of La. R.S. 22:1295 is clear and unambiguous; only changes in the "limits of liability" to an existing policy will create a new policy that requires the completion of a new UM selection form. **Pendarvis**, 991 So2d at 509-510. Only GoAuto's exposure changed with the addition of a new driver and a new vehicle. There was no change to the limits of liability. Thus, no new policy was created. **Williams**, 294 So.3d at 1065. Accordingly, we find no genuine issue of material fact that, pursuant to La. R.S. 22:1295, the addition of a new driver and a new vehicle to the policy, with no change in the limits of liability, did not create a new policy and thus, did not require the completion of new UM selection form. Summary judgment in favor of GoAuto was appropriate.

CONCLUSION

For the above and foregoing reasons, we affirm the October 15, 2020 judgment of the district court, granting summary judgment in favor of defendant, GoAuto Insurance Company, and dismissing, with prejudice, all claims filed by plaintiffs, Dana Landry Johnson and Justin Pellerin, against GoAuto Insurance Company. We assess all costs of this appeal against plaintiffs/appellants, Dana Landry Johnson and Justin Pellerin.

AFFIRMED.