NOT DESIGNATED FOR PUBLICATION

DARLENE JOHNSON WIFE OF/AND JAMES K. JOHNSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THEIR MINOR CHILD, KENDRA JOHNSON	*	**NO. 2001-CA-1267**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
GOVERNMENT EMPLOYEES INSURANCE COMPANY, CNA INSURANCE COMPANY, GALWAY INSURANCE COMPANY, RESTER COURIER SERVICES, INC., OLD REPUBLIC INSURANCE COMPANY, VALLEY FORGE INSURANCE COMPANY AND GAIL WAGUESPACK	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-10422, DIVISION "A"
Honorable Carolyn Gill-Jefferson, Judge
* * * * * *

Judge Miriam G. Waltzer

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(Court composed of Judge Miriam G. Waltzer, Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr.)

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AFFIRMED

Plaintiff/appellant, James Johnson ("plaintiff"), appeals a 23 March 2001 judgment of the trial court granting summary judgment in favor of Old Republic Insurance Company ("Old Republic") and denying plaintiff's cross-motion for summary judgment, thereby rejecting plaintiff's uninsured motorist ("UM") claims against Old Republic. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

This case arises out of a 17 July 1998 automobile accident in which the plaintiff was injured when defendant, Gail Waguespack ("Waguespack"), rear-ended the vehicle driven by him and owned by his employer, Ryder Transportation Services ("Ryder"). The Ryder vehicle was insured under a business automobile policy issued by defendant/appellant, Old Republic.

As a result of his injuries, plaintiff filed suit against, amongst others, Government Employees Insurance Company ("GEICO"), his personal UM carrier, and Old Republic. Old Republic filed a motion for summary judgment on the issue of coverage, based upon a 22 September 1997 waiver of UM coverage executed by J. Wayne Johnson ("Johnson"), Ryder's Risk Manager. A copy of that UM waiver was attached to Old Republic's motion. Plaintiff opposed Old Republic's motion and filed a cross-motion for

summary judgment contending that an additional insured had been added to the policy by way of a 29 October 1997 endorsement, thereby creating a new policy and necessitating the execution of a new UM rejection. Because no new UM rejection was executed by Ryder, plaintiff argued that UM coverage should be available to him under the Old Republic policy. Plaintiff attached to its motion a copy of a 29 October 1997 endorsement amending Ryder's policy to include The La Jolla Learning Institute, Inc. d/b/a Balboa Secondary School as an additional insured. Plaintiff also attached a copy of Old Republic's Answers to Plaintiffs' Second Set of Interrogatories, specifically numbers 3 and 4, wherein Old Republic admitted that the only UM rejection slip that it was relying upon was that signed by Johnson on 22 September 1997. GEICO filed an opposition to Old Republic's motion. Old Republic opposed plaintiff's motion for summary judgment. A flurry of supplemental memoranda in support of, in opposition to, and in reply to the two motions for summary judgment pending before the trial court then ensued.

Following a hearing on 9 March 2001, the trial court rendered judgment granting summary judgment in favor of Old Republic and denying plaintiff's motion for summary judgment. In its written judgment, the trial court stated that it was "of the opinion that the rejection form executed by Ryder is valid and that UM coverage under the policy issued by Old Republic Insurance Company was rejected." The trial court rendered its judgment on 23 March 2001, expressly stating therein that its judgments were to be final and appealable judgments within the meaning of La. C.C.P. art. 1915. Plaintiff then timely perfected this devolutive appeal.

<u>DISCUSSION</u>

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/00), 755 So. 2d 226, 230.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith 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. 966 B.

The burden of proof remains with the movant. The movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to "point out to the court that there is an absence of factual support for one or more elements essential to the adverse party’s claim, action, or defense.” La. C.C.P. art. 966C(2). A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case. La. C.C.P. art. 966E.

A dispute as to the issue of whether, as a matter of law, the language in an insurance policy provides coverage to a party can properly be resolved within the context of a motion for summary judgment. Gaspard v. Northfield Insurance Co., 94-510 (La. App. 3 Cir. 11/2/94), 649 So. 2d 979; Domingue v. Reliance Insurance Co., 619 So. 2d 1220 (La. App. 3 Cir. 1993). 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 facts shown by the evidence supporting the motion, under which coverage could be afforded.

Gaspard; Westerfield v. LaFleur, 493 So. 2d 600 (La. 1986).

At the time of the accident, 17 July 1998, the Louisiana statute governing UM insurance coverage mandated UM coverage in an amount not less than the limit of bodily injury coverage, unless the insured rejected that coverage or selected lower limits of UM coverage, in writing, using a form provided by the insurer. La. R.S. 22:1406(D)(1)(a)(i). In 1999, that statute was amended to add the following language:

> …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 purposes of this Subsection, 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. 22:1406(D)(1)(a)(ii).

The addition of the above quoted language to La. R.S. 22:1406(D)(1)(a)(ii) came about shortly after the Third Circuit's decision in Savant v. American Cent. Ins. Co., 98-542 (La. App. 3 Cir. 12/9/98), 725 So. 2d 43. In fact, Old Republic claims that the amendment was obviously enacted in response to Savant and in support of Judge Decuir's dissent therein. In Savant, the court addressed, amongst other things, the effect of adding named insureds to a business automobile policy covering a fleet of vehicles. Essentially, the court found that the addition of an insured to the policy before it had the effect of creating a new policy, because the policy, while clearly envisioning the addition of vehicles, did not envision the addition of insureds. As a result, because no new UM form had been executed upon the issuance of the new policy, the policy was deemed to provide UM coverage equal to the limit of bodily injury liability coverage. The court

noted, on several occasions, that the specific policy before it did not contemplate the addition of insureds, clearly implying that had the policy indeed contemplated the addition of insureds, a new UM rejection form would not have been needed.

Plaintiff assigns two errors in this appeal. First, he claims that the trial court erred in finding that the entity added in the 29 October 1997 endorsement, i.e., The La Jolla Learning Institute, Inc. d/b/a Balboa Secondary School, was already an insured under the policy definition of "insured," despite limiting language in that definition. That definition includes "[a]ny person or organization for whom the Named Insured is obligated by written agreement to provide liability insurance but in no event for more or broader insurance that such agreement requires, and only if such insurance is afforded under the policy without reference to such agreement." Secondly, plaintiff claims that the trial court erred in finding that the 22 September 1997 rejection of UM coverage remained valid after the addition of a new insured. Plaintiff states in his brief to this court that "in order to obtain summary judgment, Old Republic had to establish that Ryder validly rejected UM coverage, and that no new policy-including no addition of an insured-occurred after the rejection of UM coverage." For the reasons that follow, we agree with the trial court's finding that Ryder did validly reject UM coverage and that no new policy was created after that valid rejection.

Old Republic, at the 9 March 2001 hearing, submitted an affidavit of its Risk Manager, Johnson. Therein, Johnson explained that Ryder owns and operates approximately 165,000 vehicles in the United States and Canada. Attached to his affidavit was a copy of the Old Republic policy in effect at the time of plaintiff's accident, as well as a copy of an amendment to that policy, amending the definition of insured to include those persons or organizations for whom Ryder is obligated by written

agreement to provide liability insurance. Johnson stated that at the time the policy was issued, it was contemplated and envisioned by Ryder that some of its customers would be added as additional insureds to the policy. He stated that The La Jolla Learning Institute, Inc. was added as an additional insured pursuant to a 23 December 1996 endorsement, and that the 29 October 1997 endorsement adding The La Jolla Learning Institute, Inc. was done to reflect that entity's change of address. He added that the addition of The La Jolla Learning Institute, Inc. did not increase coverage or the amount of premium paid by Ryder.

Old Republic also submitted an affidavit of Stephen Parker, superintendent of The La Jolla Learning Institute, Inc. Mr. Parker stated that the Institute is a special education school located in San Diego, California and formally located in La Jolla, California. He further stated that The La Jolla Learning Institute, Inc. described on the 29 October 1997 endorsement is the same entity as T he La Jolla Learning Institute, Inc. described on the earlier 23 December 1996 endorsement.

Finally, Old Republic submitted an affidavit of Roger Strickland, Vice President of Old Republic Risk Management and the underwriting manager for Old Republic. He stated that the Business Automobile Policy in effect at the time of plaintiff's accident had an effective date of 1 October 1990, valid until canceled. He stated that, at the time the policy was issued, Old Republic contemplated and envisioned that additional insureds would be added to the policy by way of certificates of insurance or by endorsements, as reflected by the policy's definition of insured. Mr. Strickland further stated that, at the time of plaintiff's accident, the Old Republic policy did not afford UM coverage to Ryder due to the UM rejection form executed by Johnson of 22 September 1997. He echoed Johnson's statements that the addition of The La Jolla Learning Institute, Inc. as an

insured by endorsement dated 23 December 1996 did not in any way affect or increase the premium to be paid by Ryder, and that the endorsement done on 29 October 1997 was merely revising the 1996 endorsement to reflect a change of address for The La Jolla Institute, Inc.

Plaintiff asserts that a review of the two endorsements regarding The La Jolla Learning Institute, Inc. indicates that when the Institute opened the school in another city, it changed its d/b/a designation, its designated agent, and that it "quite probably resulted in insuring a new staff of employees and different risks." This argument was made at the trial court level where it was properly rejected. During the 9 March 2001 hearing, the trial court asked plaintiff's counsel for proof that the risk was increased. Although the trial judge agreed that Old Republic did have the burden of excluding the possibility of coverage, she stated that it had met that burden by bringing forth an affidavit stating that The La Jolla Learning Institute, Inc. d/b/a The Learning Institute and the La Jolla Learning Institute, Inc. d/b/a Balboa Secondary School was the same entity. Accordingly, the judge ruled that the burden had shifted back to plaintiff to show some evidence that what was said in that affidavit was not correct. Because plaintiff failed to offer any such evidence, the court implicitly found that the 1997 endorsement did not amount to the addition of a new insured. In the transcript of the 9 March 2001 hearing the trial ruled as follows:

> The court finds that the language that the court looked for in Savant is clearly put in the policy as the origination date of October 1, 1990 and that the addition of Lahoya (sic) in 1996 prior to the UM waiver does not create a new insurance policy and therefore the rejection is valid.

We have thoroughly reviewed the record and we find that the trial court's judgment granting Old Republic's motion for summary judgment and denying plaintiff's

motion for summary judgment was proper.

AFFIRMED