RENEE P. HAASE AND EDMOND C. HAASE, III

VERSUS

GEICO INSURANCE AGENCY, INC. AND CYDNEY SMITH

NO. 21-CA-31

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 769-635, DIVISION "D"
HONORABLE SCOTT U. SCHLEGEL, JUDGE PRESIDING

May 26, 2021

JOHN J. MOLAISON, JR.
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Hans J. Liljeberg, and John J. Molaison, Jr.

AFFIRMED

JJM
FHW
HJL

COUNSEL FOR PLAINTIFF/APPELLANT,
RENEE P. HAASE AND EDMOND C. HAASE, III
Clarence F. Favret, III
James C. Cronvich

COUNSEL FOR DEFENDANT/APPELLEE,
GEICO CASUALTY COMPANY
Kevin C. O'Bryon

MOLAISON, J.

Renee and Edmond Haasé appeal the September 16, 2020 judgment that granted the motion for summary judgment of their uninsured/underinsured motorist carrier, GEICO Casualty Company, and dismissed their claims. This matter arises from a motor vehicle accident and involves the appellants' claims to recover medical expenses from an economic damages-only uninsured/underinsured insurance policy ("UM-EO policy"). The appellants contend that the trial court erred by finding they failed to meet their burden to prove that medical expenses covered under the UM-EO policy were sustained. For the following reasons, we affirm the judgment.

Factual Background

On March 12, 2016, the plaintiff, Renee Haasé, was driving her Toyota Solara, which was insured under the UM-EO policy issued by the defendant, GEICO Casualty Company. The plaintiff was stopped on Veterans Boulevard near its intersection with Williams Boulevard when the rear of her vehicle was struck by a vehicle driven by Sydney Smith, who was also insured by GEICO Casualty Company.

The plaintiff, who was sixty at the time of the accident, was treated at Ochsner Medical Center for complaints of upper back and bilateral shoulder pain.[1] According to the plaintiff's affidavit, submitted in opposition to the defendant's motion for summary judgment, she participated in physical therapy shortly after the accident and her neck improved after several weeks of treatment. The plaintiff claims she then noticed "lingering pain and impairment" in her left shoulder and her therapy changed to focus on her shoulder. According to deposition testimony from the plaintiff's treating orthopedic surgeon, Dr. Ronald French, Jr., however,

[1] The medical record from the plaintiff's emergency room visit after the accident indicates that she complained of "neck pain and bilateral shoulder pain which she rates 2 out of 10."

the plaintiff had reported that her shoulder problems began three weeks prior to a July 2016 medical visit and had nothing to do with the motor vehicle accident.

The plaintiff was treated for chronic left shoulder pain by Dr. Andrew Gottschalk, an orthopedist. According to the plaintiff, he ordered an MRI on her shoulder on August 15, 2016, and identified a rotator cuff injury. A medical record from a follow-up appointment on October 11, 2016, reflects Dr. Gottschalk's treatment of chronic left shoulder pain with an assessment of tendinosis. Dr. Gottschalk presented her with several options for treatment, including watchful waiting, more physical therapy, injection therapy, or a surgery consult. The plaintiff chose a plan of continued physical therapy since she stated that prior sessions led to improvements in her shoulder.

On the day after her October 11, 2016 appointment with Dr. Gottschalk, the plaintiff was involved in another motor vehicle accident that caused her left shoulder to strike the car door. Dr. French confirmed that the plaintiff's medical records indicated that she reported an increase in her shoulder pain following the second accident and received a cortisone shot.

According to the plaintiff, after the second accident, she was busy with work duties and attempted to manage her shoulder injury with exercises she learned during physical therapy. She later switched to the care of Dr. French, whom she saw on March 29, 2018, for a thumb injury which she claimed resulted from her weakened left shoulder causing her to drop a bowl of ice on her thumb in January of 2018. She consulted with Dr. French again on May 29, 2018, to discuss her lingering shoulder symptoms.[2] On July 27, 2018, Dr. French performed surgery on a rotator cuff tear: left shoulder arthroscopy, subacromial decompression, and AC

[2] Dr. French confirmed in his deposition testimony that after receiving a cortisone injection on October 14, 2016, the next complaint regarding her shoulder that appears in the plaintiff's medical records was during a May 29, 2018 medical visit.

resection. In January of 2019, the plaintiff underwent surgery on a ligament injury on her right thumb.

Procedural History

On March 3, 2017, the plaintiff and her husband, Edmond C. Haasé, III, ("appellants") filed suit for her injuries against Sydney Smith[3] and GEICO, in its capacity as her liability insurer, for injuries caused by the March 12, 2016 car accident. The petition alleged injury to the plaintiff's neck, back, shoulder, and body as a whole. The appellants later amended the suit to add GEICO in its capacity as uninsured motorist insurer (referred to as "the defendant" in this capacity), claiming that Smith was an underinsured motorist under Louisiana law.[4] After settlement, all claims against Smith and her insurer were dismissed from the suit, reserving all rights to pursue any uninsured/underinsured motorist coverage available, by joint motion and order of dismissal on March 7, 2019. The defendant filed its answer, claiming that recovery should be limited to economic losses following the terms of the policy contract, and requested a jury trial as to the issues of fault and compensatory damages only.

On March 20, 2020, the defendant moved for summary judgment claiming that the plaintiff cannot meet her burden to prove that she sustained medical expenses for injuries from the March 12, 2016 auto accident which were not compensated by the underlying liability insurance. Attached to the motion were a certified copy of the uninsured motorist policy[5] and excerpts of the deposition of

[3] The record also refers to Ms. Smith as "Cydney" Smith in filings by the appellants.
[4] The appellants amended their petition for a third time on March 15, 2019 to add the paragraph "Plaintiffs submitted proof of loss to defendant Geico for payment under their underinsured motorist policy, but Geico has failed to respond and has denied the claim and otherwise violated the policy's terms and applicable law."
[5] The policy is for "Economic-Only Uninsured Motorist Bodily Injury Coverage" ("UM-EO") which is described as "Under this coverage, we will pay only for economic losses for bodily injury to an insured, caused by accident, which the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle [,] underinsured motor vehicle or a hit-and-run motor vehicle arising out of the ownership, maintenance or use of that motor vehicle." Economic losses are defined as "those which can be measured in specific monetary terms including but not limited to, medical costs, funeral expenses, lost wages, and out of pocket expenses."

Dr. French. The defendant asserted that the appellants conceded that the UM-EO policy only covered the plaintiff's medical expenses and sought to recover expenses incurred for alleged injuries to the plaintiff's thumb and shoulder. The defendant argued that the trial court should dismiss these claims because Dr. French, the treating physician, testified that the plaintiff's thumb and shoulder injuries were not caused by the March 12, 2016 accident.

In his December 10, 2019 deposition, Dr. French confirmed that the plaintiff's medical records from a July 2016 appointment indicated that she reported her "shoulder problems" started just three weeks prior to the visit and had nothing to do with the March 12, 2016 accident. He further testified that more probable than not, the cause of the plaintiff's shoulder injury was degeneration and not trauma. The defendant argued that this testimony from the plaintiff's treating physician made her burden to prove causation concerning her alleged injuries insurmountable.

The appellants filed an opposition to the motion for summary judgment claiming the plaintiff incurred medical expenses for injuries caused by the accident that are covered by her policy. The appellants stated the plaintiff is entitled to a presumption of causation, established by *Housley v. Cerise*, 579 So.2d 973, 979 (La. 1991), which the defendant cannot overcome because there is no evidence of any event other than the March 2016 accident to explain how the plaintiff first injured her shoulder. The appellants additionally raised the argument that GEICO's settlement of the underlying liability claim for liability policy limits was a recognition that the accident caused the plaintiff's damages so the defendant's motion raised a quantum dispute in which it failed to show that the underlying liability policy limits were less than or equal to the combined general and special damages caused by the accident.

The appellants supported the claims in the opposition with the plaintiff's affidavit wherein she provides a timeline of her symptoms and surgeries, attaching medical records from the emergency department visit on March 12, 2016, and Dr. Gottschalk's progress notes of October 11, 2016; excerpts from Dr. French's deposition; and a copy of the motion for summary judgment filed by the defendant on the same issue in a court case pending in Orleans Parish related to the October 12, 2016 accident. The appellants state that the plaintiff's affidavit, the discussion of surgical intervention with Dr. Gottschalk at the October 11, 2016 appointment, the absence of another event that could have possibly injured her left shoulder, and Dr. French's testimony acknowledging that the ice incident could have caused the thumb injury establishes a reasonable possibility of causal connection and a presumption of causation.

The defendant filed a reply memorandum arguing that the *Housley* presumption did not apply in this case because the plaintiff's shoulder and thumb injuries did not continuously manifest themselves after the accident and there is no medical evidence showing a reasonable possibility of a causal connection between the accident and disabling condition. The defendant also argued that the plaintiff could not create a genuine issue of material fact by using her self-serving affidavit, as opposed to medical testimony or evidence, to contradict her treating physician's testimony denying a causal connection between her thumb and shoulder injuries and the accident. The defendant also argued that the plaintiff's statements to her treating physician that her shoulder pain developed three weeks before the July 2016 visit and had nothing to do with the March 2016 accident, contradicted her subsequent affidavit.[6]

[6] The defendant attempted to enter some of the medical record exhibits to Dr. French's deposition to its reply memorandum to further support its argument that the shoulder and thumb injuries were not causally related to the accident. However, the trial court granted the plaintiff's objection to these records as La. C.C.P. 966(B)(3) prohibits the filing of additional documents with a reply memorandum.

At the September 1, 2020 hearing, the district court granted the defendant's motion for summary judgment, finding that "the burden has shifted to the Plaintiff; in this case, the treating physician specifically stated in his deposition that, not only is the shoulder pain not causally related to the auto accident, but also stated that it was causally related to a degenerative issue of the Plaintiff. As a result, the Court does not find there is a genuine issue of material fact, and grants the Motion for Summary Judgment."

DISCUSSION

This Court reviews summary judgments *de novo* under the same criteria governing the district court's consideration of the motion. *Smith v. Our Lady of the Lake Hosp., Inc*., 93–2512 (La. 7/5/94), 639 So.2d 730, 750. A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). The moving party's burden of proof on the motion, for issues which he will not bear the burden of proof at trial, is satisfied by pointing 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. 966(D)(1). Thereafter, the nonmoving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial; failure to do so shows that there is no genuine issue of material fact. *Id.* The party opposing summary judgment cannot rest on the mere allegations of his pleadings but must show that she has evidence that could satisfy her evidentiary burden at trial; if she does not produce such evidence, then there is no genuine issue of material fact and the mover is entitled to summary judgment. *Mbarika v. Bd. of Sup'rs of Louisiana State Univ.*, 07–1136 (La. App. 1 Cir. 6/6/08), 992 So.2d 551, 561, *writ denied*, 08–1490 (La. 10/3/08), 992 So.2d 1019.

In a personal injury suit, the plaintiff bears the burden of proving a causal relationship between an accident and claimed injuries by a preponderance of the evidence. *Lee v. Lu*, 05–899 (La. App. 5 Cir. 4/11/06), 931 So.2d 365, 370. The Louisiana Supreme Court allows a presumption that an accident caused a claimant's injuries if the person was in good health before the accident, but the symptoms of the condition appear commencing with the accident and continuously manifest afterward, provided that the medical evidence shows a reasonable possibility of a causal connection between the accident and the condition. *Housley v. Cerise*, 579 So.2d 973, 980 (La. 1991). To defeat the presumption of causation, the defendant must show that some other particular incident could have caused the injury in question. *Maranto v. Goodyear Tire & Rubber Co*., 94–2603 (La.2/20/95), 650 So.2d 757, 761.

THIRD ASSIGNMENT OF ERROR[7]

In their third assignment of error, the appellants argue that the plaintiff's affidavit is sufficient to establish the *Housley* presumption and that Dr. French's testimony merely establishes a genuine issue of material fact. For a plaintiff to benefit from the *Housley* presumption of causation, three things must be established by a preponderance of the evidence.

> First, he must prove that he was in good health prior to the accident at issue. Second, he must show that subsequent to the accident, symptoms of the alleged injury appeared and continuously manifested themselves afterwards. And third, he must demonstrate through evidence—medical, circumstantial, or common knowledge—a reasonable possibility of causation between the accident and the claimed injury.

Juneau v. Strawmyer, 94-0903 (La. App. 4 Cir. 12/15/94), 647 So.2d 1294, 1299. This circuit has found lay testimony can establish a causal relationship unless the

[7] We found it more logical to address this assignment of error first as it deals with the trial court's granting of the defendant's motion for summary judgment by finding that there were no genuine issues of material fact.

conclusion is not within common knowledge and requires expert medical testimony. *Kliebert v. Breaud*, 13-655 (La. App. 5 Cir. 1/31/14), 134 So.3d 23, 27.

The appellants claim that the *Housley* presumption applies because the plaintiff did not experience shoulder pain before the accident of March 12, 2016, and had never previously sought medical treatment for her shoulder. They further argue that the defendant did not offer evidence of another incident that could have caused her shoulder pain. While the plaintiff admits her primary injury after the accident was neck pain, to support their arguments that her shoulder injury was causally related to the accident, the appellants point to the plaintiff's report of bilateral pain in her shoulder immediately following the accident and the statements in her affidavit explaining that after her neck pain resolved with physical therapy, she noticed lingering pain and impairment in her left shoulder.

On appeal, the appellants attempt to recharacterize the plaintiff's affidavit as attesting to continuous and ongoing pain in her left shoulder. However, the plaintiff stated in her affidavit that she did not notice the pain in her left shoulder again until several weeks after she began physical therapy. She also describes the pain as "intermittent" rather than continuous. Noticeably absent from the plaintiff's affidavit is an explanation of her reports to her treating physician that the shoulder problems started just three weeks before the July 2016 medical visit and that her shoulder problems were not a result of the accident at issue. The plaintiff contends that she was treating with Dr. Gottschalk at the time she noticed the shoulder problems, but she did not provide an affidavit or deposition testimony from Dr. Gottschalk on the issue of causation, and she does not offer any medical records from the relevant time at issue – after her emergency room visit in March 2016 until her doctor's visit on October 11, 2016.[8] Finally, her affidavit does not

[8] The plaintiff's affidavit does not establish a causal relationship based on the symptoms which are common knowledge, but on her interpretation of Dr. Gottschalk's opinion offered through a copy of his progress notes of October 11, 2016, which use abbreviations and medical terms which would require

deny or contest Dr. French's opinion that her shoulder and thumb injuries are not causally related to the accident.

Although the appellants claim that Dr. French's deposition testimony that "any injury to the thumb, basically can stretch the ligaments, which eventually was the problem that she needed surgery for" raises a genuine issue of material fact, we disagree. The appellants failed to establish sufficient facts that relate her thumb injury to the car accident in question. Her thumb injuries did not commence with the accident, but Dr. French affirmed in his deposition that the plaintiff reported in an emergency room record that her thumb pain started on July 4, 2017, over a year after the accident, which contradicts the plaintiff's affidavit where she claims her shoulder caused her thumb injury in January 2018.

Considering her unchallenged reports indicating that her shoulder and thumb problems did not continually manifest and were not related to the accident, we find on *de novo* review that the trial court correctly determined that the plaintiff's vague statements regarding the reemergence of her shoulder pain months after the accident were not sufficient to establish the second prong of the *Housley* presumption requiring evidence that the condition continuously manifested itself. The plaintiff provided no medical evidence from her treating physicians or any other source to contradict her reports contained in her medical records.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In their first assignment of error, the appellants argue that the district court erred in granting summary judgment by finding that the issue of causation of the plaintiff's rotator cuff and thumb surgeries was dispositive of her *entire* claim under the policy. The appellants claim the defendant's motion was limited to whether the accident caused her thumb and rotator cuff injuries and the district

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expert medical testimony to interpret. Furthermore, the plaintiff's affidavit improperly characterizes Dr. Gottschalk's recommendation of surgery while his notes only reflect a possible treatment option of a *consultation* with a surgeon.

court did not address the neck and shoulder pain for which she treated on the date of accident and weeks of physical therapy.

In their second assignment of error, the appellants contend that the district court erred in making a factual finding that the defendant was not liable under the UM-EO policy for post-accident medical expenses when the defendant offered no evidence of the value of the plaintiff's undisputed injuries or the underlying liability policy limits. The appellants claim the defendant failed to show that the policy limits exceeded or equaled the combined general and special damages caused by the accident.

In response, the defendant argues that it is the appellants who will bear the burden at trial to prove damages in excess of the underlying liability policy before any recovery can be made under its UM-EO policy and that any failure to prove the extent of the plaintiff's alleged damages is not attributable to the defendant, but to the appellants.

A plaintiff who sues to recover underinsured motorist benefits from an insurer has the burden of establishing, by a preponderance of the evidence, that settlement received from the tortfeasor did not fully compensate her for damages. *Edmonds v. Shelter Mut. Ins. Co*., 508 So.2d 211, 213 (La. App. 3 Cir. 1987). The uninsured motorist carrier has no obligation to pay any portion of an injured insured's damages within the underinsured tortfeasor's liability policy limits, only those damages which exceed the policy limits of the motor vehicle liability policy and which are within the uninsured motorist policy limits. *Becnel v. Stein*, 98-951 (La. App. 5 Cir. 1/26/99), 726 So.2d 468, 470, *writ not considered,* 99-0581 (La. 4/23/99), 740 So.2d 646.[9] The object of the uninsured motorist statute is to promote full recovery for damages by innocent automobile accident victims by

[9] An uninsured motor vehicle includes insured motor vehicles when the liability insurance coverage is less than the amount of damages suffered by an insured at the time of an accident, as agreed to by the parties or as determined by final adjudication. La. R.S. 22:1295(2)(b).

additional or excess coverage available when a tortfeasor is inadequately insured. *Bond v. Commercial Union Assur. Co*., 407 So.2d 401, 410 (La. 1981).

After reviewing the plaintiff's affidavit and the limited medical records she attached, the only alleged injury, other than the shoulder and thumb, were the plaintiff's complaints of neck pain which she rated as "2 out of 10" following the accident. In her affidavit, the plaintiff stated that this pain resolved after several weeks of physical therapy. The appellants did not provide any further information regarding the neck pain or the physical therapy treatment referenced in the plaintiff's affidavit and did not attach any medical records, affidavits, or deposition testimony from her medical providers regarding the cost of the several weeks of physical therapy treatment. The appellants also provided no explanation as to how these alleged damages exceeded the limits of the underlying liability policy.

When the defendant's motion for summary judgment claimed that the appellants cannot prove the economic damages of the plaintiff's injuries, exceeding the limits of the liability policy, were caused by the accident, it pointed to an absence of factual support for an element of the appellants' case. The appellants bear the burden of proving damages in excess of the underlying liability insurance policy before they can recover under the UM-EO policy, and they cannot simply rely on mere allegations to meet this burden. To create a genuine issue of material fact, it was incumbent upon the appellants to present evidence of the injuries and expenses. The appellants failed to prove that their damages exceeded the limits of the liability insurance of Ms. Smith, the tortfeasor. The appellants could have provided factual support by introducing evidence of other related medical bills or expenses as well as evidence of the underlying liability policy limits, such as a copy of Smith's insurance policy, the declaration sheet, a copy of the settlement check, or the release. *See Lozano v. Brown*, 10–489 (La. App. 5th Cir.1/25/11), 60 So.3d 669, 671–72. Thus, we find no merit to this assignment of error. The trial

court did not err in granting summary judgment as to all the appellants' claims against the defendant under the UM-EO policy.

CONCLUSION

Accordingly, we affirm the decision of the trial court in granting the appellee's motion for summary judgment dismissing the appellants' claims.

AFFIRMED.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **MAY 26, 2021** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

21-CA-31

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HON. SCOTT U. SCHLEGEL (DISTRICT JUDGE)
JAMES C. CRONVICH (APPELLANT)
KEVIN C. O'BRYON (APPELLEE)

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