

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0537

BARBARA ANN THIBODEAUX RANDO

VERSUS

**TROY D. FURR AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY AND
PROGRESSIVE SECURITY INSURANCE COMPANY**

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 556,756, Section 24
Honorable R. Michael Caldwell, Judge Presiding**

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and
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Plaintiff-Appellant
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Defendant-Appellee
Progressive Security Insurance Company**

BEFORE: PARRO, HUGHES, AND WELCH, JJ.

Judgment rendered

NOV 14 2012

PARRO, J.

Barbara Ann Thibodeaux Rando (Barbara) appeals a judgment dismissing her claims of bad faith in the handling of her uninsured/underinsured motorist (UM) insurance claims against Progressive Security Insurance Company (Progressive). For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation stems from a motorcycle/vehicle collision that occurred on July 3, 2006. Randy William Rando was riding his 2002 Harley Davidson motorcycle in an easterly direction on Louisiana Highway 3034 (Wax Road) in Central, Louisiana. As he passed the private driveway accessing a Wal-Mart store, his motorcycle was struck by a Toyota Four Runner exiting the driveway, driven by Troy D. Furr. The collision knocked the motorcycle across the opposite lane of Wax Road, and Mr. Rando was dislodged from the motorcycle, suffering serious injuries. He died several hours after the accident.

Mr. Furr's vehicle was insured by State Farm Mutual Automobile Insurance Company (State Farm). Mr. Rando's motorcycle was insured by Progressive under a policy that his wife, Barbara, had purchased in January 1999, about a year before their marriage. The Progressive policy covered her motorcycle and his and had liability limits of \$50,000 per person/\$100,000 per accident. When she obtained this policy, Barbara signed a rejection form indicating she did not want UM coverage. All subsequent renewals, including the one adding her husband as an insured, showed UM coverage as "Rejected." Shortly after the accident, Progressive was verbally informed about Mr. Rando's death. On July 6, 2006, Progressive paid her \$2,500, representing the medical payments limit of the policy. In a subsequent telephone call the following month, Progressive informed her that there was no UM coverage on her policy, due to the rejection form she had signed when she first purchased it.

On June 28, 2007, Barbara filed suit against Mr. Furr, State Farm, and

Progressive.¹ On July 2, 2007, Mr. Rando's son, Daniel, also filed a petition in this lawsuit, naming the same parties as defendants. In later amendments by both plaintiffs, the State, through the Department of Transportation and Development (DOTD), was added as a defendant for allegedly partially blocking Mr. Furr's line of sight at the intersection. In August 2008, two months after being served, Progressive tendered \$50,000 to Barbara; learning a day later about Daniel's petition, Progressive modified its tender to make the offer to both plaintiffs, leaving it to them to determine how to split this amount. The tender was conditioned on their dismissal of all claims against Progressive, including accrued interest, costs, and bad faith damages and penalties. After Barbara and Daniel returned the check to Progressive, a status conference was held with the judge, a proposed division of the funds was discussed, and a concursus proceeding was suggested as a possible solution if the parties failed to agree. They still could not agree on how to divide the funds, so on February 5, 2009, Progressive filed a petition for concursus and deposited \$50,000 into the registry of the court.² The concursus petition was later amended to deposit accrued interest of \$7,828.77.

In June 2009, Progressive filed a motion for partial summary judgment regarding the amount of UM coverage available to the plaintiffs. In a judgment signed October 2, 2009, the court granted that motion, stating that the "per person" limit of \$50,000, as opposed to the "per accident" limit of \$100,000, was the applicable limit of UM coverage available to the plaintiffs. In April 2010, Progressive filed a second motion for summary judgment, seeking dismissal of Barbara's claims under LSA-R.S. 22:1973(B)(1), for knowingly misrepresenting insurance policy provisions and under LSA-R.S. 22:1973(B)(5), for bad faith refusal to make a timely and unconditional tender

¹ Service on "Progressive Insurance Company" was requested through the Secretary of State, but could not be made, because there were too many insurance companies with the name, "Progressive." The letter advising her attorney of this was misplaced, and Progressive was not served until June 24, 2008.

² Barbara contended that the "per accident" limit of \$100,000 was applicable to her UM claims, which included wrongful death and survivorship claims. She also asserted that Daniel, who was not an insured on the Progressive contract, had no claim to the UM benefits. Daniel claimed that, as his father's heir, he was entitled to 50% of the UM benefits.

of the UM limits to her. The court granted summary judgment, dismissing her claim under Subsection (B)(1), but denied it for the claim under Subsection (B)(5), finding there was a genuine issue of material fact concerning those claims.³

While Progressive was litigating these matters with the plaintiffs, State Farm was consistently responding to all pleadings, denying liability on the part of Mr. Furr or, in the alternative, denying that he was solely at fault in causing the accident or that the limits under its policy issued to Mr. Furr were insufficient to compensate the plaintiffs for their loss. DOTD also continued to deny any liability to the plaintiffs. Eventually, the matter was scheduled for a trial on August 15, 2011, on all issues of liability among the parties and on the remaining bad faith claims against Progressive. Because the division of the funds on deposit with the registry of the court was dependent on the trial results as to liability and damages, the concursus proceeding was continued until after the trial.

On the morning of the scheduled trial, Daniel filed pleadings that indicated he had settled his claims against Mr. Furr, State Farm, and DOTD. Barbara informed the court that she had also reached settlements with those parties and that she and Daniel had resolved the issue of the allocation of the funds in the registry of the court. Thus, only her bad faith claim against Progressive was left to be tried. At the conclusion of the plaintiff's case, the attorney for Progressive moved for an involuntary dismissal on the grounds that Barbara had failed to establish several necessary elements of her claim. Following arguments, the court granted the motion and dismissed all claims

³ Louisiana Revised Statute 22:1973 (formerly LSA-R.S. 22:1200) states, in pertinent part:

A. An insurer ... owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

* * *

(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

against Progressive except those involving the funds in the concursus proceeding. In oral reasons for judgment, the court stated:

There is no testimony about who was responsible for causing this accident. There has been no proof offered during the many years that this case has been pending concerning liability. ... [U]p until last Friday, liability was still being questioned by State Farm, Mr. Furr, and [DOTD]. Progressive, as the uninsured motorist carrier[,] would only have exposure and liability if someone other than Mr. Rando was found to be at fault, and if the damages exceeded what those other at-fault defendants could pay. There has been no evidence here today as to what the underlying State Farm policy was. That has never been introduced into evidence, and I am not aware of any evidence or even know what the underlying State Farm policy was. There has been no testimony or evidence offered today concerning damages. The court can assume a wrongful death claim brought by a widow may have certain value, but that is subject to the evidence that is presented, and no evidence has been presented. So the court has no evidence concerning liability, no evidence concerning damages, no evidence that a proper written satisfactory proof of claim was ever submitted to Progressive.

A judgment dismissing her claims against Progressive was signed August 30, 2011.⁴

Barbara filed an appeal of this judgment and the judgment rendered October 2, 2009, which declared that the \$50,000 "per person" limit of Progressive's UM coverage applied to this case. At oral arguments before this court, Barbara's attorney stated that the concursus matter had been resolved and that all the funds on deposit in the registry of the court had been disbursed to Barbara and Daniel in accordance with their agreement as to the allocation of the funds between them.

ANALYSIS

Barbara assigns the following as error:

- (1) The court's holding that there was no proof that Progressive was properly notified in writing of her claims;
- (2) The court's failure to find that Progressive had not made a timely good faith unconditional tender;
- (3) The court's holding that Progressive would incur liability if it unilaterally paid one claimant to the detriment of another;
- (4) The court's dismissal after trial of her claim under LSA-R.S. 22:1973(B)(5); and

⁴ The judgment also stated, "The concursus proceeding related to this matter is not affected by this judgment."

- (5) The court's failure to award her \$50,000 plus interest from September 4, 2006 (sixty days after the adjuster's call on July 6, 2006), until paid, damages in the amount of \$50,000, damages for mental pain and anguish over threatened foreclosure on her home, double the damages for penalties, and attorney fees.⁵

Progressive responds that none of these issues need to be addressed, because, as the trial court stated, there was no evidence at trial of the basic elements required to prove Barbara's entitlement to any UM payment. Therefore, it could not be found liable for bad-faith handling of the claim for such a payment.

Barbara's attorney introduced the entire record in this case as evidence at the trial. After examining that record, we conclude that the trial court was correct. A certified copy of the Progressive policy issued to the Randos is in the record. In Part III, the policy states the following, in pertinent part, regarding UM coverage:

INSURING AGREEMENT – UNINSURED/UNDERINSURED MOTORIST BODILY INJURY COVERAGE⁶

Subject to the Limits of Liability, if **you** pay the premium for Uninsured/Underinsured Motorist Bodily Injury Coverage, **we** will pay for damages which an **insured person** is legally entitled to recover from the **owner** or operator of an **uninsured motor vehicle** because of **bodily injury**:

1. sustained by an **insured person**;
2. caused by an **accident**; and
3. arising out of the ownership, maintenance, or use of an **uninsured motor vehicle**.

* * *

ADDITIONAL DEFINITIONS

When used in this Part III:

* * *

4. "**Uninsured motor vehicle**" means a land motor vehicle or trailer of any type:

* * *

e. to which a liability bond or policy applies at the time of the **accident**, but the total automobile liability insurance coverage on the vehicle is less than the damages which an **insured person** is entitled to recover from the **owner** or operator of the vehicle.

LIMITS OF LIABILITY

* * *

If your **Declarations Page** shows a split limit:

1. the amount shown for "each person" is the most **we** will pay for all damages due to a **bodily injury** to one person.

⁵ Barbara's brief to this court contains no mention of the "per person" limit.

⁶ A similar provision provides property damage coverage to a covered vehicle under the policy.

* * *

The "each person" limit of liability includes the total of all claims made for **bodily injury** to an **insured person** and all claims of others derived from such **bodily injury**, including, but not limited to, emotional injury or mental anguish resulting from the **bodily injury** of another or from witnessing the **bodily injury** to another, loss of society, loss of companionship, loss of services, loss of consortium, and wrongful death. (Emphasis in the original).

Based on these policy provisions, UM coverage will only be paid if the insured person is "legally entitled to recover" some amount from the owner or operator of an uninsured or underinsured vehicle. Therefore, the first element that must be established is the liability of the other driver. Absent that, there is no showing that the insured person is "legally entitled to recover" anything from the other party to the accident. The record of the trial did not include any evidence concerning the liability of Mr. Furr and/or DOTD in causing the accident that resulted in Mr. Rando's death. Examining the record as a whole, there is simply no evidence as to the liability of any of the defendants.

Secondly, the insured person must establish the amount of damages attributable to bodily injury caused by the accident and that those damages exceed the amount of the total liability insurance coverage available from the other party or parties liable for the damages. In this case, there was no evidence as to the amount of damages caused by the accident. For example, there were no invoices showing the medical expenses incurred in treating Mr. Rando during the few hours that he lived following the accident. Also, although Barbara testified that she was threatened with foreclosure for failure to keep up with her mortgage payments, as well as getting behind on various other bills, she did not establish how these problems were causally related to the accident. Nor was there any evidence concerning the liability limits on Mr. Furr's policy with State Farm. The State Farm policy is not in the record, and there was no testimony or other evidence showing that the liability insurance coverage available from Mr. Furr was insufficient to cover the amount of damages attributable to the accident. There was also no evidence concerning any amounts that might have been paid by Mr. Furr, State Farm, or DOTD to Barbara, from which the court could have determined whether those

payments were or were not sufficient to cover the damages caused by the accident.

Finally, although the briefs to this court did not address the issue decided in the October 2, 2009 judgment concerning the "per person" limit, we note that the policy is very clear that the \$50,000 "each person" limit of liability includes the total of all claims made for bodily injury to the insured person, including all derivative claims of other persons. Therefore, Barbara's claims for mental anguish, loss of support, etc. that were attributable to and derived from her husband's death were subsumed within the "each person" limit of liability and did not trigger the "per accident" limits of \$100,000.

Since the evidence at trial did not establish the basic elements needed to fall within the UM provisions of Progressive's policy, Barbara did not show that she was entitled to any UM coverage under the policy. Therefore, the trial court did not err in dismissing Barbara's claims of "bad faith" or "arbitrary or capricious" handling of her UM claims by Progressive.

CONCLUSION

For the above reasons, we affirm the judgments of October 2, 2009, and August 30, 2011. All costs of this appeal are assessed to Barbara Rando.

AFFIRMED.