

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0345

DEIDRA JONES AND STEVE JONES

VERSUS

LIBERTY MUTUAL FIRE INSURANCE COMPANY AND
STEVEN ST. ROMAIN

DATE OF JUDGMENT: NOV 01 2013

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2009-14408, DIVISION "F", PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE MARTIN E. COADY, JUDGE

Mark W. Smith
New Orleans, Louisiana

Counsel for Plaintiffs-Appellants
Deidra Jones and Steve Jones

Steven B. Witman
Valerie Theng Matherne
Metairie, Louisiana

Counsel for Defendant-Appellee
ANPAC Louisiana Insurance
Company

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: REVERSED AND RENDERED; REMANDED.

KUHN, J.,

Plaintiffs, Deidra and Steve Jones, appeal a summary judgment dismissing their suit against defendant, ANPAC Louisiana Insurance Company (ANPAC). Finding that an unresolved issue of material fact exists, we reverse the trial court judgment and render judgment denying ANPAC's motion for summary judgment.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs filed this personal injury suit as a result of a vehicular accident that occurred on December 20, 2008, when their vehicle was struck in the rear by a vehicle driven by Steven St. Romain. Mr. St. Romain and his automobile insurer, Liberty Mutual Fire Insurance Company, were named as defendants. Plaintiffs later amended the suit to add their insurer, ANPAC, as an additional defendant, alleging that Mr. St. Romain was underinsured and the policy¹ issued by ANPAC included uninsured/underinsured motorist (UM) coverage. In answer to the suit, ANPAC alleged that plaintiffs had rejected UM coverage by virtue of a rejection form executed by Ms. Jones on June 1, 2001, which was effective as to all subsequent policy renewals.

After settling with Mr. St. Romain and Liberty Mutual, plaintiffs filed a motion for partial summary judgment on the issue of UM coverage. ANPAC responded with a cross motion for summary judgment on the same issue. Relying on the June 1, 2001 rejection form, ANPAC asserted the policy did not include UM coverage. In further support of its motion, ANPAC filed a copy of the policy in effect on the date of the accident; the declarations page of the policy indicated that UM coverage was rejected.

In opposition to ANPAC's motion and in support of their own motion for partial summary judgment, plaintiffs filed a memorandum in which they denied that

¹ The policy was issued in the name of Steve Jones, with Deidra Jones listed as an additional driver.

Ms. Jones signed the UM rejection form relied upon by ANPAC, contending her signature on that form was a forgery. In support of this contention, Ms. Jones executed an affidavit attesting that she had “examined the document dated June 1, 2001, that allegedly bears my signature” and that “[t]he signature contained thereon is, in fact, not mine and that signature is a forgery.”

The trial court ultimately denied plaintiff’s motion for partial summary judgment and granted ANPAC’s motion for summary judgment, dismissing plaintiffs’ claims against ANPAC with prejudice. On appeal, plaintiffs argue that: (1) the trial court erred in granting summary judgment in favor of ANPAC when Ms. Jones’ affidavit raised an issue of material fact as to the genuineness of the signature on the rejection form; and (2) the rejection form was defective because the name (Steve Jones) printed above the form’s signature line was different from the purported signature (Deidra Jones) on the form.

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. *All Crane Rental of Georgia, Inc. v. Vincent*, 10-0116 (La. App. 1st Cir. 9/10/10), 47 So.3d 1024, 1027, writ denied, 10-2227 (La. 11/19/10), 49 So.3d 387. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that 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). The mover bears the burden of proof on a motion for summary judgment. La. C.C.P. art. 966(C)(2); *All Crane Rental of Georgia, Inc. v. Vincent*, 47 So.3d at 1027.

The trial court’s role in ruling on a motion for summary judgment is not to evaluate the weight of the evidence or to determine the truth of the matter, but rather to determine whether there is a genuine issue of triable fact. Because a trial

court cannot make credibility decisions on a motion for summary judgment, the trial court must assume that all affiants are credible. See *Independent Fire Insurance Company v. Sunbeam Corporation*, 99-2181 (La. 2/29/00), 755 So.2d 226, 236; *Pumphrey v. Harris*, 12-0405 (La. App. 1st Cir. 11/2/12), 111 So.3d 86, 91.

In determining whether summary judgment was proper, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate, i.e., whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law. *All Crane Rental of Georgia, Inc. v. Vincent*, 47 So.3d at 1027.

DISCUSSION

The insurer bears the burden of proving a valid rejection of UM coverage. See *Gray v. American National Property & Casualty Company*, 07-1670 (La. 2/26/08), 977 So.2d 839, 845-46. The trial court concluded ANPAC met this burden and rejected plaintiffs' argument that the rejection form was invalid, finding that Ms. Jones was authorized as her husband's legal representative to execute the form and that the discrepancy between the printed name and the signature did not invalidate the form.² However, the trial court did not address the issue raised by Ms. Jones' affidavit concerning whether the signature was a forgery. ANPAC contends the affidavit was insufficient to raise a genuine issue of material fact regarding this issue, because the affidavit was inconsistent with Ms. Jones' prior deposition testimony. In support of this contention, it cites *Wheelock v. Winn Dixie Louisiana, Inc.*, 01-1584 (La. App. 1st Cir. 6/21/02), 822 So.2d 94, 97, in which this Court held that where there is an unexplained

² See *Harper v. Direct General Insurance Company*, 08-2874 (La. 2/13/09), 2 So.3d 418, 419-20 (per curiam) (the fact that the named insured's name was printed on a rejection form while it was signed by a legal representative of the named insured did not invalidate the form).

inconsistency between a witness' deposition testimony and his subsequent affidavit, the affidavit is insufficient to create a genuine issue of material fact in order to defeat a motion for summary judgment.

However, our review reveals no inconsistencies between Ms. Jones' affidavit and her deposition. In her deposition, Ms. Jones admitted that UM coverage was not included in the original policy, which was issued with liability limits of 10,000/20,000, but testified that she did not know whether it was included later after the liability limits were increased to 100,000/300,000.³ Ms. Jones further admitted that she signed "papers" when plaintiffs "first" obtained their ANPAC policy and decided they did not want UM coverage. Yet, the deposition excerpts provided by ANPAC contain no testimony regarding whether Ms. Jones signed the June 1, 2001 rejection form when the liability limits were increased or at any time thereafter. Furthermore, in her affidavit, Ms. Jones stated that she did not sign a rejection form after liability coverage was increased. Additionally, she specifically stated that the signature on the June 1, 2001 rejection form was a forgery.

Based on our examination, we find no inconsistency between Ms. Jones' affidavit and her deposition testimony with respect to the signature on the June 1, 2001 rejection form. ANPAC presented no evidence that Ms. Jones was ever questioned about the June 1, 2001 rejection form during her deposition. Moreover, the fact that she admitted in her deposition that she signed "papers" when plaintiffs first obtained a policy from ANPAC is neither relevant to nor inconsistent with her assertion that she did not sign the June 1, 2001 rejection form.

³ Changes to the liability limits of an automobile liability policy create a new policy and require the completion of a new UM selection form, in the absence of which La. R.S. 22:1295(1)(a)(i) mandates UM coverage in an amount equal to the liability coverage. See La. R.S. 22:1295(1)(a)(ii); *Taylor v. U.S. Agencies Casualty Insurance Company*, 09-1599 (La. App. 1st Cir. 4/7/10), 38 So.3d 433, 436.

Since no inconsistencies existed between the deposition testimony provided by ANPAC and Ms. Jones' affidavit, the trial court was required to accept the affidavit as credible for purposes of the motion for summary judgment. It appears the trial court did not do so, but instead improperly weighed the credibility of the affidavit.

Based on our *de novo* review, accepting Ms. Jones' affidavit as credible, we find it was sufficient to raise an issue of material fact regarding the validity of the June 1, 2001 rejection form, based on her contention that the signature on the form was a forgery. This issue of material fact precluded summary judgment. Accordingly, the trial court erred in granting summary judgment in favor of ANPAC.

CONCLUSION

For the reasons outlined, the summary judgment granted by the trial court in favor of ANPAC dismissing plaintiffs' claims with prejudice is reversed, and judgment is hereby entered denying ANPAC's motion for summary judgment. This matter is remanded to the trial court for further proceedings consistent with this opinion. All costs of this appeal are to be paid by ANPAC.

REVERSED AND RENDERED; REMANDED.