NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0308

BEN CLARK AND MICHAEL TAYLOR

VERSUS

DAVASKA SAVOY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AND NATIONAL FIRE & MARINE INSURANCE COMPANY

Judgment Rendered: OCT 15 2014

JMM RHP (by JMM)

* * * * * * *

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER C621342, SECTION 24
HONORABLE R. MICHAEL CALDWELL, JUDGE

* * * * * * *

Steve Adams
Baton Rouge, Louisiana

Attorney for Plaintiffs/Appellants
Ben Clark and Michael Taylor

Samuel M. Rosamond, III
Angela J. O'Brien
Adam D. deMahy
New Orleans, Louisiana

Attorneys for Defendant/Appellee
National Fire & Marine Insurance Company

BEFORE: PARRO, McDONALD, AND CRAIN, JJ.

Crain, J. concurs. (by JMM)

McDONALD, J.,

In this appeal, the trial court granted summary judgment in favor of an uninsured/underinsured (UM) insurance carrier, finding the policy at issue did not provide UM coverage to the insured's employee, because the insured had previously rejected UM coverage. The insured's employee appeals from the adverse judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

National Fire & Marine Insurance Company (National) initially issued business automobile insurance policy number 72 APS 035098 to Harmony Center, Inc. (Harmony) some time prior to April 2012.[1] When Harmony renewed the policy, with an effective date of April 16, 2012, through April 16, 2013, it executed a selection form rejecting UM coverage. The UM selection form did not state the policy number, because a Louisiana Department of Insurance (LDOI) bulletin in effect at the time, LDOI Bulletin 08-02, and the UM selection form prescribed pursuant to that bulletin, stated that inclusion of the policy number on the form was optional.[2]

On May 11, 2012, Harmony's employee, Ben Clark, and a guest passenger, Michael Taylor, were injured when the Harmony-owned truck Mr. Clark was driving was struck by a vehicle being driven by Davaska Savoy. Mr. Clark and Mr. Taylor timely filed a petition for damages against Ms. Savoy; State Farm Mutual Automobile Insurance Company (State Farm), as Ms. Savoy's automobile insurer; and National, as Harmony's automobile insurer. State Farm was eventually dismissed from the suit. National answered the plaintiffs' petition, admitting that it had issued policy number 72

---

[1] National represents that April 16, 2012, through April 16, 2013, was the "initial policy period" for Policy 72 APS 035098. However, the policy declaration page National submitted in support of its motion for summary judgment, effective those dates, indicates that it is a renewal of Policy 72 APS 029978. The record does not demonstrate whether Harmony had rejected UM coverage under any previous National policy. Had National submitted evidence showing that Harmony completed a valid UM selection form in connection with the issuance of the first policy between the parties, that rejection would have remained in effect for the life of the policy and would not have required the completion of a new UM selection form when a renewal was issued. See LSA-R.S. 22:1295(1)(a)(ii); also see **Hughes v. Zurich American Insurance Company**, 13-2167 (La. App. 1 Cir. 8/20/14), 2014 WL 4099417, 2-3 (unpublished opinion).

[2] Insurers have been required to use the waiver form promulgated by the Commissioner of Insurance since September 6, 1998. The first form was published in Bulletin LIRC 98-01 with instructions for its proper completion. Subsequent Bulletin LIRC 98-03 modified the instructions. LDOI Bulletin 08-02 revised the Commissioner's waiver form. Insurers were authorized to use the revised form beginning September 1, 2008, and its use became mandatory on January 1, 2010. McKenzie and Johnson, **Louisiana Civil Law Treatise, Insurance Law and Practice** §4:8 (4th ed. 2013).

APS 035098 to Harmony, but stating that the policy did not provide UM coverage for the plaintiffs' claims, because Harmony did not purchase, and had validly rejected, such coverage.

In due course, National filed a motion for summary judgment, seeking dismissal of the plaintiffs' claims against it. In support of its motion, National filed a copy of policy number 72 APS 035098; the declaration page for Harmony's April 2012 renewal of the policy; affidavits of National and Harmony representatives in which both testified that Harmony had rejected UM coverage for the applicable period and to which a copy of the UM selection form was attached; and a copy of LDOI Bulletin 08-02, pursuant to which the UM selection form signed by Harmony had been issued. National pointed out that in LDOI Bulletin 08-02, issued in 2008, the Commissioner of Insurance (Commissioner) specifically stated that the inclusion of the policy number on a UM coverage form was optional.

The plaintiffs opposed National's motion for summary judgment, arguing that the UM selection form signed by Harmony for the April 2012 renewal of its National policy was not valid, because the form did not state the policy number. According to the plaintiffs, the Commissioner did not have the authority to make inclusion of the policy number on a UM selection form optional, in light of **Duncan v. USAA Insurance Company**, 06-363 (La. 11/29/06), 950 So.2d 544, in which the Louisiana Supreme Court indicated that a known policy number on a UM selection form prescribed by the Commissioner was required.

After a hearing, the trial court signed a judgment on November 20, 2013, granting National's motion for summary judgment and dismissing the plaintiffs' claims against National with prejudice. In oral reasons for judgment, the trial court indicated that the UM selection form at issue complied with LDOI Bulletin 08-02 and was therefore valid. The trial court noted that **Duncan** pertained to one of the Commissioner's older forms and declined to conclude that the Commissioner's new form, issued pursuant to LDOI Bulletin 08-02, had to comply with the **Duncan** requirements.

The plaintiffs devolutively appealed from the November 20, 2013 judgment. In a single assignment of error, they essentially argue that the trial court erred in determining that the UM selection form signed by Harmony, which did not state the policy number, was valid.

DISCUSSION

An appellate court reviews a trial court's decision to grant a motion for summary judgment de novo, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. See **Gray v. American National Property & Casualty Company**, 07-1670 (La. 2/26/08), 977 So.2d 839, 849. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions, 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. LSA-C.C.P. art. 966(B)(2);[3] **George S. May International Company v. Arrowpoint Capital Corporation**, 11-1865 (La. App. 1 Cir. 8/10/12), 97 So.3d 1167, 1171. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material, for purposes of summary judgment, can be seen only in light of the substantive law applicable to the case. **Gaspard v. Graves**, 05-1042 (La. App. 1 Cir. 3/29/06), 934 So.2d 158, 160, writs denied, 06-0882 and 06-0958 (La. 6/16/06), 929 So.2d 1286 and 1289.

Louisiana Revised Statute 22:1295[4] addresses UM coverage in Louisiana, and the statute is to be liberally construed. See LSA-R.S. 22:1295(1)(a)(1). Given the liberal construction, any statutory exceptions to coverage must be strictly interpreted. **Duncan**, 950 So.2d at 547. Insurers in Louisiana are required to include UM coverage unless specifically rejected by the insured. See LSA-R.S. 22:1295(1)(a)(i). Unless the insured's expression of his desire to reject UM coverage meets the formal requirements

---

[3] The summary judgment in this case was heard and the judgment was signed in November 2013. Thus it is governed by the version of Article 966 in effect after its amendment by 2012 La. Acts, No. 257, §1. See **Clark v. J-H-J Inc.**, 13-0432 (La. App. 1 Cir. 11/1/13), 136 So.3d 815, 817 n.2, writ denied, 13-2780 (La. 2/14/14), 132 So.3d 964. Article 966 was amended in 2013 and again in 2014. The amendments are not implicated in the issues presented in this appeal. See 2013 La. Acts, No. 391, §1, effective August 1, 2013, and 2014 La. Acts, No. 187, §1, effective August 1, 2014.

[4] Effective January 1, 2009, former LSA-R.S. 22:680 was renumbered as LSA-R.S. 22:1295, by 2008 La. Acts, No. 415, §1. Act No. 415 made no substantive changes to the language of the provision.

of law, the expression does not constitute a valid rejection. See **Duncan**, 950 So.2d at 553. Under LSA-R.S. 22:1295(1)(a)(ii), an insured's rejection of UM coverage shall be made only on a form prescribed by the Commissioner. A properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected coverage. **Id.** The insurer bears the burden of proving a valid rejection of UM coverage. See **Gray**, 977 So.2d at 849.

In **Duncan**, 950 So.2d at 551, the supreme court examined a UM form prescribed by the Commissioner and found that it outlined six tasks, the completion of which were necessary for a valid UM selection form:

> (1) initialing the selection or rejection of coverage chosen; (2) if limits lower than the policy limits are chosen (available in options 2 and 4), then filling in the amount of coverage selected for each person and each accident; (3) printing the name of the named insured or legal representative; (4) signing the name of the named insured or legal representative; (5) filling in the policy number; and (6) filling in the date.[5]

As National points out, however, LDOI Bulletin 08-02, the Commissioner's current regulation, specifically states that inclusion of the policy number on a UM selection form is optional. LDOI Bulletin 08-02 provides, in pertinent part:

> **Important Form Changes**
>
> * * * *
>
> **Policy number and other policy identification information** – The revised UM form includes two boxes on the lower right hand corner of the form.
>
> - The upper box contains an area that the insurer may use for policy information purposes (e.g. policy number, binder number ..., application number, etc.). This box does not need to be filled in for the form to be properly completed.
>
> - The lower box must contain one of the following: the individual company name, the group name, or the insurer's logo.

[5] Following **Duncan**, the supreme court concluded that filling in the policy number is not essential to a valid UM rejection where the evidence establishes that no policy number was available at the time the UM selection form was executed. See **Carter v. State Farm Mutual Automobile Insurance Company**, 07-1294 (La. 10/5/07), 964 So.2d 375, 376; see also **Hingle v. Scottsdale Insurance Company**, 09-2234 (La. 1/22/10), 25 So.3d 143). In **Carter**, the supreme court factually distinguished **Duncan**, noting that the Commissioner's then current regulations specifically allowed for the omission of the policy number if it did not exist at the time the UM selection form was completed. Thus, it appears that in both **Duncan** and **Carter**, the supreme court, following LSA-R.S. 22:1295(1)(a)(ii) requirement that "an insured's rejection of UM coverage shall be made only on a form prescribed by the Commissioner," based its decision regarding the validity of the UM selection form at issue on the Commissioner's then applicable forms and regulations.

With the publication of LDOI Bulletin 08-02, the Commissioner no longer requires that the policy number be present on the UM selection form for the form to be considered valid.

In the present case, when Harmony renewed its automobile insurance policy with National, with the effective date of April 16, 2012, through April 16, 2013, it executed a form intending to express its rejection of UM coverage. That form did not include the policy number, as it was made optional under LDOI Bulletin 08-02. However, the form did contain all other necessary requirements of the bulletin (the initials of the insured or his legal representative next to the chosen level of coverage, the signature of the insured or his legal representative, the printed name of the insured or his legal representative, the date, and the stamped name of the insurer). Thus, under the Commissioner's current requirements, the UM selection form executed between Harmony and National is valid, despite the lack of a policy number.

The plaintiffs argue the Commissioner did not have the authority to make inclusion of the policy number on a UM selection form optional, because one of the six tasks required in **Duncan** was, in fact, inclusion of the policy number. However, we note that the only reason inclusion of the policy number was one of the six tasks required in **Duncan** was because the Commissioner's then applicable form required inclusion of the policy number. **Duncan**, 950 So.2d at 552. Thus, we interpret the holding of **Duncan** to require compliance with the Commissioner's current regulations and forms, not to require compliance with the exact six tasks set forth in **Duncan**. See **Duncan**, 950 So.2d at 551 ("In directing the commissioner of insurance to prescribe a form, the legislature gave the commissioner the authority to determine what the form would require.")[6]

In reaching this conclusion, we distinguish two cases handed down by the Louisiana Supreme Court after **Duncan**. In **Gingles v. Dardenne**, 08-2995 (La. 3/13/09), 4 So.3d 799 (per curiam), and in **Lynch v. Kennard**, 09-282 (La. 5/15/09),

[6] Cf. **Fontenot v. American Home Assurance Company**, 12-0243, 2012 WL 5830581, 2 (La. App. 1 Cir. 11/15/12) (unpublished opinion), writ denied, 12-2704 (La. 2/8/13), 108 So.3d 90, where another panel of this court, in dicta, took the position that the guidelines published in bulletins issued by the Commissioner are advisory only, and not the law.

12 So.3d 944 n.4 (per curiam), the supreme court rendered summary judgments in favor of insurers, because the UM selection forms at issue complied with the **Duncan** requirements, even though they did not comply with the Commissioner's LIRC Bulletin 98-01, requiring the insurer's name on the UM selection form. This court, as well as the Third and Fifth Circuit courts of appeal, has followed **Gingles** and **Lynch** by similarly upholding the validity of UM selection forms that complied with the **Duncan** requirements, even though they did not properly bear the insurer's name as required by the Commissioner's then applicable bulletin and form. See **Dixon v. Direct General Insurance Company of Louisiana**, 08-0907 (La. App. 1 Cir. 3/27/09), 12 So.3d 357, 362 (UM selection form was valid, because it complied with the **Duncan** requirements, even though it did not bear the insurer's name, as required by LIRC Bulletin 98-01); **Flores v. Doe**, 08-1259 (La. App. 5 Cir. 6/23/09), 19 So.3d 1196, 1200, writ denied, 09-1628 (La. 10/16/09), 19 So.3d 481 (although disagreeing with **Gingles'** result, UM selection form that complied with **Duncan** requirements upheld as valid, even though the form did not comply with the Commissioner's then applicable bulletin, because the form did not indicate which of two named insurers would issue the policy); **Ashmore v. McBride**, 09-80 (La. App. 3 Cir. 6/3/09), 11 So.3d 720, 723-24 (insurer's failure to place its name on UM selection form did not invalidate insured's rejection of UM coverage, even though LIRC Bulletin 98-03 required insurer's name on form). However, we note that the task at issue in **Gingles** and **Lynch** (inclusion of the insurer's name) was not one of the original six tasks required in **Duncan**. Thus, these two cases, and the appellate cases that follow, do not apply to cases, like the present one, in which one of the six original **Duncan** requirements (inclusion of the policy number) is at issue. Instead, the court must return to **Duncan's** reasoning to decide the current case.

In **Duncan,** the Louisiana Supreme Court considered whether a UM selection form was valid, despite the fact that it did not have the policy number to which it applied on the form. The **Duncan** court held that the UM statute required that the blank on the UM selection form designated for the policy number be filled in as

prescribed by the Commissioner to effectuate a valid waiver of UM coverage. **Duncan**, 950 So.2d at 554. To solve this problem, the court turned directly to the governing statute, LSA-R.S. 22:680,[7] to determine what the requirements were for a valid UM rejection. **Id.** at 550. The language in the statute upon which the court focused was "[s]uch rejection, selection of lower limits, or selection of economic-only coverage shall be made only on a form prescribed by the commissioner of insurance[.]" We note that this language remains in the statute today. See LSA-R.S. 22:1295(1)(a)(ii). The appellant in **Duncan** argued that the only factors that were required for a valid form were the requirements that were specifically required in the statute itself. **Id.** at 551. The **Duncan** court, 950 So.2d at 552, rejected this theory, stating:

> If the statute requires only these bare essentials, then it seems unnecessary for it to direct the commissioner of insurance to prescribe a form. The legislature could have simply prescribed the form itself within the statute. . . . In directing the commissioner of insurance to prescribe a form, the legislature gave the commissioner the authority to determine what the form would require. (Citations omitted.)

The **Duncan** court then noted that "the legislature states if the insurer uses the form prescribed by the commissioner of insurance and makes certain that it is properly completed and signed," then the insurer has the presumption that the UM coverage is waived. **Id.** at 552. Pursuant to that mandate, the court determined that compliance with the form prescribed by the Commissioner was necessary for the UM waiver to be valid. **Id.** at 553. The court then looked to what the then prescribed form required and listed the six factors the form listed as necessary for a valid form. **Id.** at 551. The court then held that the policy number was necessary only because the Commissioner required it at that time. See **Id.** at 554. Thus, when determining the validity of a UM selection form, the Commissioner's then current requirements govern.

As earlier stated, since **Duncan**, the Commissioner has changed the requirements for a valid UM selection form. As noted above, the Commissioner no longer requires a policy number to be present on a UM selection form. Thus, the UM

---

[7] The **Duncan** court considered the 2003 version of the UM statute, which was designated as LSA-R.S. 22:680. As earlier noted, the statute was redesignated as LSA-R.S. 22:1295 in 2008.

selection form executed by Harmony is valid, despite the fact that it does not bear the policy number.

CONCLUSION

For the foregoing reasons, we affirm the November 20, 2013 judgment, granting National Fire & Marine Insurance Company's motion for summary judgment, and dismissing the claims of Ben Clark and Michael Taylor with prejudice. Costs of this appeal are assessed to Ben Cark and Michael Taylor.

AFFIRMED.