NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0229

BRANDON GREER

VERSUS

XL SPECIALTY INSURANCE COMPANY

Judgment Rendered: SEP 27 2017

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Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension, Louisiana
Trial Court Number 112,011

The Honorable Jason Verdigets, Judge Presiding

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

Welch J. dissents and assigns reasons

THERIOT, J.

In this action for damages arising out of a motor vehicle accident, the plaintiff, Brandon Greer, appeals a summary judgment granted in favor of the defendant, XL Specialty Insurance Company ("XL"), which dismissed the plaintiff's uninsured/underinsured motorist ("UM") claim against XL. For reasons that follow, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

On July 18, 2014, Christopher Landry was operating a 2007 Chevrolet Silverado southbound on U.S. Highway 61 in West Feliciana Parish. The plaintiff was a guest passenger in the vehicle. At the time, both Mr. Landry and the plaintiff were in the course and scope of their employment with Team Industrial Services, Inc. The vehicle that the plaintiff and Mr. Landry were occupying was owned by Team, Inc., the parent company of Team Industrial Services, Inc. (collectively "Team"), and insured by XL.

At approximately the same time and location, Brandon Lee was operating a 2000 Lincoln Towncar and was also traveling southbound on U.S. Highway 61. According to the plaintiff, the vehicle driven by Mr. Lee suddenly and without warning struck the driver's side of the vehicle occupied by the plaintiff and Mr. Landry, causing the vehicles to collide and then causing the vehicle occupied by the plaintiff and Mr. Landry to spin several times and strike the guardrail on the left side of the highway. As a result of this accident, the plaintiff claimed that he sustained personal injuries. The liability insurer of Mr. Lee subsequently paid its policy limits, and the plaintiff settled his claims with Mr. Lee and his liability insurer.

On January 23, 2015, the plaintiff filed a petition for damages against XL, asserting that the policy limits of Mr. Lee's liability insurance did not adequately compensate him for his injuries and that XL provided UM coverage on the vehicle

occupied by the plaintiff in the accident. XL filed an answer generally denying the allegations of the petition and claiming there was no coverage under the policy because Team had rejected UM coverage.

Thereafter, XL filed a motion for summary judgment, seeking the dismissal of the plaintiff's claims against it on the basis that prior to the accident Team had knowingly and validly rejected UM bodily injury coverage by executing the form required by La. R.S. 22:1295(1)(a)(i) as prescribed by the Louisiana Commissioner of Insurance and that the rejection of UM coverage by Team was properly completed in accordance with the requirements set forth in **Duncan v. U.S.A.A. Insurance Company**, 2006-363 (La. 11/29/06), 950 So.2d 544, 547.[1] The plaintiff opposed the motion for summary judgment, essentially challenging the validity of the rejection of UM coverage on the selection form and arguing that because the XL policy contained both a UM selection form rejecting UM coverage and an endorsement specifically for providing UM coverage (in the amount of $25,000—an amount less than the policy limits of $2,000,000), the policy was ambiguous and should be construed against XL and in favor of UM coverage.

By judgment signed on September 26, 2016, the trial court granted the motion for summary judgment filed by XL and dismissed the plaintiff's suit. From this judgment, the plaintiff appeals, arguing that the trial court erred in granting XL's motion for summary judgment because the policy was ambiguous with respect to UM coverage, and thus, there were genuine issues of material fact as to whether UM coverage was knowingly rejected.

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[1] In **Duncan**, 950 So.2d at 551, our supreme court examined the UM selection form prescribed by the commissioner of insurance and found that it outlined six tasks, which are hereinafter discussed in more detail.

II. LAW AND DISCUSSION

A. Summary Judgment

A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents 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(A)(3). In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Green v. State Farm Mutual Automobile Insurance Company**, 2007-0094 (La. App. 1st Cir. 11/2/07), 978 So.2d 912, 914, writ denied, 2008-0074 (La. 3/7/08), 977 So.2d 917.

On a motion for summary judgment, if the issue before the court is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. See La. C.C.P. art. 966(D)(1); **Rider v. Ambeau**, 2011-0532 (La. App. 1st Cir. 2/1/12), 100 So.3d 849, 854. An insurer seeking to avoid coverage through summary judgment must prove some provision or exclusion applies to preclude coverage. **Halphen v. Borja**, 2006-1465 (La. App. 1st Cir. 5/4/07), 961 So.2d 1201, 1204, writ denied, 2007-1198 (La. 9/21/07), 964 So.2d 338. Thus, in this case, the burden of proof on the motion for summary judgment remained with XL.

The issue of whether an insurance policy, as a matter of law, provides or precludes coverages is a dispute that can be resolved properly within the framework of a motion for summary judgment. **Green**, 978 So.2d at 914. 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 material facts shown by the documents supporting the motion, under which coverage could be afforded. **Id.**

B. UM Coverage

Louisiana Revised Statutes 22:1295(1)(a)(i), provides that no policy of automobile liability insurance "shall be delivered or issued for delivery in this state" without UM coverage in an amount "not less than the limits of bodily injury liability provided by the policy"; however, such UM coverage "is not applicable when any insured named in the policy either rejects coverage, selects lower limits, or selects economic-only coverage, in the manner provided in [La. R.S. 22:1295(1)(a)(ii)]." Louisiana Revised Statutes 22:1295(1)(a)(ii) provides that the "rejection, selection of lower limits, or selection of economic-only [UM] coverage shall be made only on a form prescribed by the commissioner of insurance" and that "[a] properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected [UM] coverage."

Under La. R.S. 22:1295, UM coverage is an implied amendment to any automobile liability policy, even when not expressly addressed, as UM coverage will be read into the policy unless validly rejected. See **Duncan**, 950 So.2d at 547. The object of UM insurance is to provide full recovery for automobile accident victims who suffer damages caused by a tortfeasor who is not covered by adequate liability insurance. **Duncan**, 950 So.2d at 547. The UM statute is to be liberally construed, and thus, exceptions to coverage are to be interpreted strictly. *Any exclusion from coverage in an insurance policy must be clear and unmistakable*, and the insurer bears the burden of proving any insured named in the policy rejected in writing the coverage equal to bodily injury coverage or selected lower limits. **Id.**

In the instant case, XL's initial burden on the motion for summary judgment was to establish that it had a properly completed and signed UM selection form, as

prescribed by the commissioner of insurance, in which the named insured in the policy, Team, knowingly rejected coverage. According to the supporting documents submitted by XL in support of its motion for summary judgment, XL issued a commercial lines business automobile insurance policy to Team, identified as policy CAD740910102. The policy went into effect on May 31, 2014, and was in effect on July 18, 2014, the date of the accident herein.[2] On May 31, 2014, André C. Bouchard, in his capacity as the "Legal Representative" of Team, signed a UM selection form as prescribed by the commissioner of insurance. On the UM selection form, the initials "ACB" were placed next to option 4, which provided "**I do not want [UM] Coverage.** I understand that **I will not be compensated through [UM] Coverage** for losses arising from an accident caused by an uninsured/underinsured motorist." "Team[]" was typed into the blank for the printed name of the insured (or legal representative), "CAD740910102" was typed into the blank for the policy number, and "5/31/2014" was typed into the blank for the date. Both the XL policy and the UM selection form were attached to the affidavit of Mr. Bouchard and were further identified as true and correct copies kept in the normal course and scope of XL's business by the affidavit of Nancy Rummel, CRIS.[3]

According to the affidavit of Mr. Bouchard, he was employed by Team Industrial Services, Inc. as its Executive Vice President of Administration, Chief Legal Officer, and Secretary and was an officer of Team, Inc., holding the same positions. On May 31, 2014, Mr. Bouchard was employed as Senior Vice President, General Counsel, and Secretary for Team Industrial Services, Inc. and

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[2] The policy period for the policy in effect at the time of the accident was May 31, 2014, through May 31, 2015.

[3] We note that in accordance with La. C.C.P. art. 966(D)(2), the plaintiff objected to portions of the affidavits of Mr. Bouchard and Ms. Rummel and that the trial court sustained the objection. XL has neither appealed nor answered the plaintiff's appeal challenging the rulings of the trial court in this regard. Therefore, all references to Mr. Bouchard's and Ms. Rummel's affidavits are to the portions that were not stricken by the trial court.

was an officer of Team, Inc. holding the same positions. Mr. Bouchard stated that in his role with Team, he was authorized to act on behalf of Team to procure insurance coverage, that he procured the XL policy at issue, and that he signed and initialed the UM selection form on behalf of Team.

In **Duncan**, 950 So.2d at 551, our supreme court examined the UM selection form prescribed by the commissioner of insurance and found that it outlined six tasks: (1) initialing the selection or rejection of coverage chosen; (2) if limits lower than the policy limits are chosen, 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 (or binder) number (if available); and (6) filling in the date.

After carefully reviewing the UM selection form in this case, we find that there are no genuine issues of material fact that the six tasks outlined by **Duncan** were met; therefore, the UM selection form was properly completed and signed, creating a *rebuttable presumption* that Team knowingly rejected UM coverage. We further find that the plaintiff has failed to produce evidence to rebut the presumption that Team knowingly and voluntarily rejected UM coverage.

According to the documents offered on the motion for summary judgment, the XL policy with Team provided liability limits in the amount of $2,000,000 for any one accident. With respect to UM coverage, the business auto declarations sheet provided "SEE POLICY/ENDORSMENTS" and indicated that the premium for UM coverage was "Included." The policy contained an endorsement for Louisiana UM coverage, identified as CA 21 48 10 13 ("the Louisiana UM coverage endorsement"), which was effective May 31, 2014, and it provided a "Limit Of Insurance" in the amount of $25,000 for "Each 'Accident.'"

When a policy contains both a UM selection form rejecting UM coverage and an endorsement providing for UM coverage, the policy is not considered ambiguous and will not serve to rebut the presumption that the rejection of UM coverage was knowingly made. See **Robertson v. Empire Fire and Marine Ins. Co.**, 2008-2591 p. 5-6 (La. App. 1st Cir. 6/19/09) (*unpublished*). Nor do references to UM coverage in the insurance quote or other "non-boilerplate" references to UM coverage in a policy create an ambiguity when UM coverage was knowingly and validly rejected. See **Lee v. Naquin**, 2005-606 (La. App. 5th Cir. 2/3/06), 924 So.2d 250, 254. The reason being is that by operation of law, UM coverage in the amount "not less than the limits of bodily injury liability provided by the policy" is a part of all liability insurance policies, regardless of whether it is specifically included in the policy (or an endorsement), unless such coverage is knowingly and validly rejected by the insured or lower limits or economic-only coverage is specifically selected by the insured. See **Robertson**, 2008-2591 at p. 5 and **Lee** 924 So.2d at 254. Hence, when the insured exercises his legal right to knowingly reject what is provided by law—*i.e.*, UM coverage in the amount of the liability limits of the policy—or to select lower limits or economic-only coverage, there is no ambiguity in the policy. See **Robertson**, 2008-2591 at p. 5 and **Lee** 924 So.2d at 254. Given that there was a clear rejection of UM coverage, any ambiguity as to the amount of the UM coverage, which would have been provided without a valid UM rejection, does not create a genuine issue of material fact sufficient to defeat summary judgment.

III. CONCLUSION

For the above and foregoing reasons, the September 26, 2016 judgment of the trial court granting summary judgment in favor of the defendant, XL Specialty Insurance Company, and dismissing the claims of the plaintiff, Brandon Greer, is

hereby affirmed. All costs of this appeal are assessed to the appellant, Brandon Greer.

AFFIRMED.

BRANDON GREER **NUMBER: 2017 CA 0229**

COURT OF APPEAL

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FIRST CIRCUIT

XL SPECIALTY INSURANCE COMPANY **STATE OF LOUISIANA**

WELCH, J., dissents.

I respectfully disagree with the majority opinion in this case and would reverse the trial court's judgment granting XL's motion for summary judgment. I agree that *generally*, when a policy contains both a UM selection form rejecting UM coverage and an endorsement providing for UM coverage, the policy is not considered ambiguous and will not serve to rebut the presumption that the rejection of UM coverage was knowingly made and *generally,* references to UM coverage in the insurance quote or other "non-boilerplate" references to UM coverage in a policy create an ambiguity when UM coverage was knowingly and validly rejected. See **Robertson v. Empire Fire and Marine Ins. Co.**, 2008-2591 p. 5-6 (La. App. 1st Cir. 6/19/09) (*unpublished*); **Lee v. Naquin**, 2005-606 (La. App. 5th Cir. 2/3/06), 924 So.2d 250, 254. However, in this case, the Louisiana UM coverage endorsement is not a general UM endorsement relative to UM coverage—it does *not* provide for what should have been provided for by operation of law, *i.e.*, UM coverage in the amount of the bodily injury liability limit of $2,000,000. Rather, the Louisiana UM coverage endorsement provides for UM coverage in the amount of $25,000—an amount lower than the bodily injury limits, which would have required the insured to specifically take action and execute a UM selection form selecting lower limits. Further, the Louisiana UM selection form executed by the insured in this case (Team) provides for the rejection of UM coverage, rather than the selection of lower limits as indicated by the Louisiana UM coverage endorsement. Thus, the Louisiana UM selection form and the

Louisiana UM coverage endorsement are in conflict as to whether the insured, Team, rejected UM coverage in the amount of the bodily injury limits of the policy, rejected the endorsement providing for lower limits of UM coverage, or selected lower limits of UM coverage. This conflict creates an ambiguity as to UM coverage (or the lack thereof) and demonstrates an issue of fact as to whether the exclusion of UM coverage from the policy was clear and unmistakable. As such, this ambiguity with respect to UM coverage is sufficient to establish that the plaintiff could meet his evidentiary burden of rebutting the presumption that Team knowingly rejected UM coverage when its representative initialed the selection and signed the UM selection form, thereby making summary judgment inappropriate.

Furthermore, La. R.S. 22:1295 requires that an insured be provided with three options concerning UM coverage: (1) UM coverage equal to the bodily injury limits in the policy; (2) UM coverage lower than those limits, including economic-only coverage; or (3) rejecting UM coverage. See La. R.S. 22:1295(1)(i) and (ii) and **Draayer v. Allen**, 2013-0051, p.5 (La. App. 1st Cir. 4/9/14) (*unpublished*). Only the latter two options (*i.e.*, options 2 and 3) require the execution of the UM selection form. See *Id.* In this case, the Louisiana UM coverage endorsement providing for limits lower than the bodily injury limits of the policy would not be enforceable as a matter of law in the absence of a valid UM selection form executed by the insured selecting lower limits. Thus, the XL policy, as written, requires the execution of a UM selection form. A policy that requires the insured to execute a UM selection form—which is only necessary when the insured is exercising option (2) (UM coverage lower than the bodily injury limits of the policy, including economic-only coverage) or option (3) (rejection of UM coverage) indicates that the insured herein was deprived of its statutory right to exercise option (1)—to have UM coverage equal to the bodily injury limits in the policy. See generally **Draayer**, 2013-0051 at p.5 Accordingly, I find that there

are also genuine issues of material fact as to whether there was a lawful and valid rejection of UM coverage and whether Team knowingly made an informed, meaningful rejection of UM coverage.

Because I find that the plaintiff established that there were genuine issues of material fact because his evidence sufficiently established that he could carry his evidentiary burden at trial of rebutting the presumption that Team knowingly rejected UM coverage, summary judgment dismissing the plaintiff's claims against XL was inappropriate and the judgment of the trial court should be reversed.

Thus, I respectfully dissent.