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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0600

STEVEN J. BAGALA AND KIM BAGALA

VERSUS

SARA KAY TREGRE, STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY AND ANPAC LOUISIANA INSURANCE
COMPANY

JUDGMENT RENDERED: DEC 30 2020

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge • State of Louisiana
Docket Number C655052 • Division 23
The Honorables Franklin Foil and Donald T. Johnson, Judges Ad Hoc Presiding

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PLAINTIFFS—Steven J. Bagala &
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BEFORE: WHIPPLE, C.J., WELCH, AND CHUTZ, JJ.

WELCH, J.

The plaintiffs, Steven J. Bagala and his wife, Kim Bagala, challenge a trial court judgment granting partial summary judgment in favor of their uninsured/underinsured motorist (“UM”) insurer, ANPAC Louisiana Insurance Company (“ANPAC”), as well as the judgment subsequently dismissing their claims against ANPAC. For reasons that follow, we reverse the partial summary judgment in favor of ANPAC and vacate the subsequent judgment dismissing the plaintiffs’ claims against ANPAC.

FACTUAL AND PROCEDURAL HISTORY

On February 22, 2016, the plaintiff, Mr. Bagala, was driving his vehicle westbound on Interstate 10 at the Louisiana Highway 1248 overpass in East Baton Rouge Parish. At the same time, the defendant, Sarah Kay Tregre was driving in the same direction directly behind Mr. Bagala’s vehicle. Suddenly and without warning, Ms. Tregre’s vehicle crashed into the rear of Mr. Bagala’s vehicle, causing Mr. Bagala’s vehicle to go from the right lane of travel to the left shoulder of the interstate. The collision caused both injuries to Mr. Bagala and damages to his vehicle.

Thereafter, on February 3, 2017, the Bagalas filed a petition for damages, naming as defendants, Ms. Tregre; State Farm Mutual Automobile Insurance Company (“State Farm”), Ms. Tregre’s automobile liability insurer; and ANPAC. ANPAC filed an answer generally denying the allegations of the plaintiffs’ petition and asserting various defenses. Thereafter, ANPAC filed a motion for partial summary judgment, asserting that in conjunction with the plaintiffs’ automobile liability insurance, on June 3, 2010, Mr. Bagala executed a UM selection form wherein he selected “Economic-Only Uninsured Motorists Bodily Injury Coverage” (“Economic-Only UMBI”) with limits of \$100,000 per person/\$300,000 per accident, which was an amount lower than the policy’s full

liability limits. ANPAC further asserted that the UM selection form executed by Mr. Bagala was express, unambiguous, and valid; therefore, ANPAC was only liable for Economic-Only UMBI benefits in the amount of \$100,000 per person/\$300,000 per accident as a result of this accident.

The plaintiffs opposed the motion, contending that the UM selection form was not valid because the policy number listed on the UM selection form was not the correct policy number for the automobile liability coverage provided by ANPAC to the plaintiffs. The plaintiffs argued that because the policy number on the UM selection form was “wrong,” the plaintiffs were entitled to UM coverage in the same amount as their liability coverage, *i.e.* \$250,000 per person/\$500,000 per accident.

Pursuant to a judgment signed by the trial court on January 29, 2018, the trial court determined that the UM selection form executed by Mr. Bagala on June 3, 2010 was valid, and accordingly, granted the motion for partial summary judgment. The January 29, 2018 judgment “further ordered, adjudged and decreed that any and all claims for [UM] benefits asserted by [the] [p]laintiffs ... against ANPAC ... [w]ere limited to Economic-Only [UMBI] benefits with policy limits of \$100,000[] per person/\$300,000[] per accident.”¹

The plaintiffs subsequently settled their claims against Ms. Tregre and State Farm, and the plaintiffs’ claims against those two defendants were dismissed. In September 2019, ANPAC filed another motion for summary judgment, seeking the dismissal of the plaintiffs’ claims against it. Therein, ANPAC contended that it had paid all requests for Economic-Only UMBI benefits that it had received from the plaintiffs and that there were no remaining issues or controversies between the plaintiffs and ANPAC as to any outstanding or unpaid claim for Economic-Only

¹ This judgment was not designated as a final judgment under La. C.C.P. art. 1915(B) for the purposes of appeal and the plaintiffs did not file an application for supervisory writ of review with this court.

UMBI benefits. Pursuant to a judgment signed on February 18, 2020, the trial court granted ANPAC's motion for summary judgment and dismissed the plaintiffs' claims against it. From this judgment, the plaintiffs have appealed.

On appeal, the plaintiffs contend that the trial court erred in granting the January 29, 2018 partial summary judgment because the UM selection form executed in conjunction with the plaintiffs' liability insurance was invalid since the policy number on the UM selection form was "different" from the policy number on ANPAC policy issued to the plaintiffs.² The plaintiffs further argued that the UM selection form was also invalid because, as to Economic-Only UMBI coverage, the form included a specific amount of coverage for both per person/per accident coverage and combined single limits coverage; however, no choice was made by the plaintiffs between the two options. Therefore, the form was incomplete and coverage was uncertain. The plaintiffs further contend that since the UM selection form was invalid, the trial court also erred in granting the February 18, 2020 summary judgment and dismissing their claims against ANPAC.

LAW AND DISCUSSION

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

² Since the January 29, 2018 partial summary judgment was not designated as a final judgment under La. C.C.P. art. 1915(B), it remained a non-appealable, interlocutory judgment that could be reviewed on an appeal of a final judgment in the matter. See **Carrollton Presbyterian Church v. Presbytery of South Louisiana of Presbyterian Church (USA)**, 2011-0205 (La. App. 1st Cir. 9/14/11), 77 So.3d 975, 978-979, writ denied, 2011-2590 (La. 2/17/12), 82 So.3d 285, cert. denied, 568 U.S. 818, 133 S.Ct. 150, 184 L.Ed.2d 32 (2012) (providing that when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse or prejudicial interlocutory judgments, in addition to the review of the final judgment).

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 (or limit) 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 the insurer herein, ANPAC.

The issue of whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can be resolved properly within the framework of a motion for summary judgment. **Green**, 978 So.2d at 914. However, 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.*

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)].” (Emphasis added). 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, selected a lower limit, or selected economic-only 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 or lower limits are specifically selected by the insured. See **Duncan v. U.S.A.A. Insurance Company**, 2006-0363 (La. 11/29/06), 950 So.2d 544, 547; **Lee v. Naquin**, 2005-606 (La. App. 5th Cir. 2/3/06), 924 So.2d 250, 252. 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. *Id.* Any exclusion from coverage in an insurance policy must be clear and unmistakable. *Id.* In accordance with this strict construction requirement, 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 this case, ANPAC’s initial burden on the motion for summary judgment was to establish that there were no genuine issues of material fact as to whether it had a properly completed and signed UM selection form, as prescribed by the commissioner of insurance, in which a named insured in the policy knowingly selected economic-only UM coverage in the amount of \$100,000.00 per person/\$300,000.00 per accident. 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; (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);³ and (6) filling in the date. Since that time, the Commissioner of Insurance published Louisiana Department of Insurance Bulletin No. 08-02, which provides that the policy information does not have to be included on the UM selection form in order for the UM selection form to be properly completed. See Chicas v. Doe, 2015-0147 (La. 5/1/15), 166 So.3d 238; Clark v. Savoy, 2014-0308 p. 5 (La. App. 1st Cir. 10/15/14)(*unpublished*). 2014 WL 5305887, *3, writ denied, 2014-2388 (La. 2/6/15), 158 So.3d 821. In addition, the UM selection form promulgated with Louisiana Department of Insurance Bulletin No. 08-02 “now provides an option for combined single limits.”

Pursuant to Louisiana Department of Insurance Bulletin No. 08-02, “[t]he following tasks must be completed by the insured:” “[h]is/[h]er signature”; “[h]is/[h]er printed name to identify his/her signature”; “[t]he date the form is completed”; and “[i]nitials to select/reject UMBI coverage prior to signing the

³ Following Duncan, 950 So.2d at 551, the supreme court concluded that filling in the policy number was 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, 2007-1294 (La. 10/5/07), 964 So.2d 375, 376; see also Hingle v. Scottsdale Insurance Company, 2009-2234 (La. 1/22/10), 25 So.3d 143). In Carter, the supreme court factually distinguished Duncan, noting that the commissioner of insurance’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 the requirement set forth in La. R.S. 22:1295(l)(a)(ii) that “an insured’s rejection of UM coverage shall be made only on a form prescribed by the commissioner of insurance,” based its decisions regarding the validity of the UM selection forms at issue on the commissioner of insurance’s then applicable forms and regulations.

Notably, according to the commissioner of insurance’s current regulation, Louisiana Department of Insurance Bulletin No. 08-02, the inclusion of the policy number on the UM selection form is not necessary in order for the UM selection form to be properly completed.

form[.]” Further, “[i]f the insured selects lower limits (available in options 1 and 3 of the revised UM [selection] form, *the exact amount of coverage must be printed on the appropriate line* on the revised UM form prior to the insured signing the form.” (Emphasis added).

According to the documents submitted by ANPAC in support of its motion for summary judgment, ANPAC issued an automobile liability insurance policy to the plaintiffs identified as policy number 17-V-V12-973-9, with a policy term of January 14, 2016 to July 14, 2016. On June 3, 2010, Mr. Bagala signed a UM selection form as prescribed by the commissioner of insurance. On the UM selection form, the initials “SB” were placed next to option 3 that stated “**I select Economic-Only UMBI Coverage** which provides compensation for economic losses **with limits lower** than the Bodily Injury Liability Coverage limits indicated on the policy.” Immediately below option 3 were two columns, separated by “**OR**” that contained the two available Economic-Only UMBI coverage options. The first column/option provided for per person/per accident coverage and “\$100,000” was typed into the blank for “each person” and “\$300,000” was typed into the blank for “each accident/occurrence.” The second column/option provided for the alternative combined single limits coverage and “\$300,000” was typed into the blank for “each accident/occurrence.” “Bagala, Steve” was typed into the blank for the printed name of the insured (or legal representative), “17VV12973” was typed into the blank for the policy number, and “6/3/2010” was typed into the blank for the date. Both the policy and the UM selection form were attached to the affidavit of Caryn Berry, an Underwriting Support Services Supervisor for ANPAC and were further identified as true and complete copies of the Bagalas policy that was in effect on February 22, 2016, the date of the accident herein.⁴

⁴ In opposition to the motion for summary judgment, the plaintiffs, though acknowledging that it was no longer necessary to have a policy number set forth on the UM selection form, argued that the discrepancy between the policy number set forth on the policy itself (“17-V-V12-973-

After carefully reviewing the documents in support of ANPAC's motion for summary judgment, we find that ANPAC failed to establish there were no genuine issues of material fact as to whether it had a properly completed and signed UM selection form, as prescribed by the commissioner of insurance, in which a named insured in the policy knowingly selected economic-only UM coverage in the amount of \$100,000.00 per person/\$300,000.00 per accident. While the UM selection form offered by ANPAC contains Mr. Bagala's signature, Mr. Bagala's printed name to identify his signature, the date the form was completed, and Mr. Bagala's initials selecting Economic-Only UMBI coverage, the UM selection form is unclear and ambiguous as to Mr. Bagala's choice regarding the exact amount of Economic-Only UMBI coverage. With regard to Economic-Only UMBI coverage, the UM selection form executed by Mr. Bagala contained two alternative coverage options: \$100,000 per person/\$300,000 per accident **OR** \$300,000 combined single

9")(emphasis added) and the policy number listed on the UM selection form ("17VV12973") was a disputed issue of material fact and rendered the UM selection form invalid.

We note that in anticipation of this argument, ANPAC also offered the affidavit of Clint Stephenson, the Underwriting Manager for the Southern Region of ANPAC. (R79-80) According to Mr. Stephenson's affidavit, he has served as an Underwriter for ANPAC since 1997 and had personal knowledge of ANPAC's underwriting practices and procedures, and that as Underwriting Manager and as Underwriter, he has personal knowledge of ANPAC's policy numbering system. Mr. Stephenson stated that he had reviewed the ANPAC policy issued to the Bagalas for the policy period of January 14, 2016 to July 14, 2016, as well as the UM selection form signed by Mr. Bagala on June 3, 2010 and that the policy number of "17VV12973" on the UM selection form was the correct policy number for the Bagalas' policy. Mr. Stephenson also stated that although the policy itself contained a "-9" immediately following the policy number, the "-9" is referred to by ANPAC as a "check digit," does not make up part of the policy number, and is used by ANPAC for internal purposes only relative to payment documentation purposes.

The plaintiffs objected to the admissibility of Mr. Stephenson's affidavit, arguing that he lacked personal knowledge of the matters stated in his affidavit because he was unable to explain in his deposition why some of the ANPAC policy documents contained the "-9" and other documents did not. The trial court did not address the plaintiffs' objection either at the hearing on the motion for summary judgment or in its judgment. Therefore, it is presumed that the trial court denied the relief sought. See Schoolhouse, Inc. v. Fanguy, 2010-2238 (La. App. 1st Cir. 6/10/11), 69 So.3d 658, 664 (providing that generally, silence in a judgment of the trial court as to any issue, claim or demand placed before the court is deemed a rejection of the claim and the relief sought is presumed to be denied).

Because we find, for reasons detailed herein, that there are genuine issues of material fact as to whether the UM selection form was properly completed and signed, we need not address the plaintiffs' arguments relative to the discrepancy in the policy number or the trial court's implicit ruling admitting the affidavit of Mr. Stephenson.

limits, and no choice was made on the UM selection form between the two amounts of coverage.⁵ Stated differently, rather than having the *exact amount of coverage printed on the appropriate line* for Economic-Only UMBI, as required by Louisiana Department of Insurance Bulletin No. 08-02, the lines for both per person/per accident coverage and combined single limits coverage were filled out and no selection between the two amounts of coverage was made. Thus, there is a genuine issue of material fact as to whether the plaintiffs knowingly selected Economic-Only UMBI coverage. Since all of the tasks necessary for a completed and signed UM selection form were not performed, ANPAC was not entitled to the rebuttable presumption that the plaintiffs knowingly selected Economic-Only UMBI benefits.⁶ Therefore, ANPAC failed to carry its initial burden on its motion for partial summary judgment,⁷ and the trial court erred in granting partial summary judgment and in declaring that any and all UM benefits asserted by the plaintiffs would be limited to Economic-Only UMBI benefits in the amount \$100,000 per person/\$300,000 per accident. Accordingly, the January 29, 2018 judgment of the trial court granting partial summary judgment is reversed.⁸

⁵ We note that on appeal, ANPAC contends that \$300,000 in combined single limits coverage would not have been an option available to the plaintiffs because the per person liability limits for the policy was \$250,000, and thus \$300,000 in combined single limits would afford higher per person limits than the per person policy limits, which would have been impermissible under La. R.S. 22:1295(1)(b). However, this is precisely why the UM selection form at issue is unclear and ambiguous as to whether a knowing selection was made.

⁶ Although not part of the supporting documents submitted by ANPAC on its motion for partial summary judgment, we note that the record before us contains prior UM selection forms executed by Mr. Bagala for the policy at issue. However, these earlier UM selection forms were superseded by the June 3, 2010 UM selection form and therefore, are no longer pertinent. See **Draayer v. Allen**, 2015-1150 (La. App. 1st Cir. 4/15/16), 195 So.3d 78, 86-88.

⁷ Since ANPAC failed to meet its initial burden on the motion for summary judgment, the burden never shifted to the plaintiffs to establish that there were genuine issues of material fact sufficient to defeat summary judgment.

⁸ By our ruling herein, we express no determination as to the validity of the UM selection form or the amount of UM coverage. Rather, our holding is limited to the determination that ANPAC failed to meet its initial burden on the motion for summary judgment because there are genuine issues of material fact as to whether ANPAC had a properly completed and signed UM selection form in which a named insured knowingly selected Economic-Only UMBI coverage.

Furthermore, we recognize that the February 18, 2020 judgment dismissing the plaintiffs' claims against ANPAC was based on the January 29, 2018 partial summary judgment. Having determined that the trial court improvidently granted the January 29, 2018 partial summary judgment, the February 18, 2020 judgment rendered in furtherance of that judgment must be set aside. Accordingly, we hereby vacate the February 18, 2020 judgment dismissing the plaintiffs' claims against ANPAC.

CONCLUSION

For the above and foregoing reasons, the January 29, 2018 judgment of the trial court granting partial summary judgment in favor of the defendant, ANPAC Louisiana Insurance Company, is reversed, and the February 18, 2020 judgment of the trial court dismissing the claims of the plaintiffs, Steven J. and Kim Bagala, against ANPAC Louisiana Insurance Company is vacated.

All costs of this appeal are assessed to the defendant/appellee, ANPAC Louisiana Insurance Company

JANUARY 29, 2018 JUDGMENT REVERSED; FEBRUARY 18, 2020 JUDGMENT VACATED.