LINDA TANET	*	**NO. 2017-CA-0280**
VERSUS	*	
		COURT OF APPEAL
GEICO GENERAL INSURANCE COMPANY A/K/A GEICO AND RONALD TANET	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-06423, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *
Judge Regina Bartholomew-Woods
* * * * * *

(Court composed of Judge Daniel L. Dysart, Judge Regina Bartholomew-Woods, Judge Terrel J. Broussard, Pro Tempore)

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AFFIRMED
OCTOBER 25, 2017

Appellant, Linda Tanet, appeals the May 19, 2016 judgment of the district court granting the motion for summary judgment filed by Appellee, GEICO General Insurance Company (hereinafter "GEICO"). For the reasons that follow, we affirm the judgment of the district court.

PROCEDURAL AND FACTUAL BACKGROUND

On July 4, 2014, Appellant, a passenger in a vehicle operated by her husband, Ronald Tanet, was injured as a result of a single-vehicle, rollover accident. The parties agree that Mr. Tanet was solely responsible for the accident. Both Appellant and her husband owned the vehicle, and both were named insureds on the policy which was issued by GEICO.

According to the petition filed on July 6, 2015, as a result of the accident, Appellant suffered severe and life-threatening injuries. At the time of filing, Appellant's petition alleged that GEICO had, to that point, failed to make any coverage payments to Appellant. GEICO ultimately paid the full amount of the

liability policy which was $100,000, but denied Appellant's claim for underinsured coverage for damages allegedly exceeding the liability amount.

Subsequent to paying Appellant on the liability policy, GEICO moved for summary judgment, arguing "the same person cannot be insured with respect to liability coverage and also un/underinsured with respect to UM[1] coverage under the same policy[,]" relying on *Bernard v. Ellis*, 2011-2377 (La. 7/2/12), 111 So.3d 995. GEICO additionally refers to the policy language contained in the uninsured/underinsured section of the policy and the amendments thereto in arguing that the plain language of the policy specifically excludes both underinsured and uninsured motor vehicles from the definition of an insured vehicle.

In opposition to the motion, Appellant first noted this state's strong public policy in favor of providing full recovery for innocent accident victims and that any ambiguity in the policy must be construed in favor of providing coverage. Appellant also argues she is entitled to underinsured coverage according to the language of the policy and amendments thereto, as well as by virtue of her status as a first-party insured who had paid for un/underinsured coverage which attached to her as a person.

A hearing on the motion proceeded on April 1, 2016, and the district court granted summary judgment in GEICO's favor.[2] The district court signed the

[1] The acronym "UM" is often used in place of "uninsured/underinsured motorist coverage."

[2] The transcript from the district court's hearing/ruling on the motion for summary judgment was not made part of the record before this Court.

written judgment on May 18, 2016. It is from this judgment that Appellant now appeals. Appellant argues the judgment is not only substantively incorrect, but also that GEICO failed to follow local rules and statutory requirements when it filed its motion.

STANDARD OF REVIEW

The standard of review on appeal of a ruling on a motion for summary judgment is well-settled, as explained by this Court in *Pierre-Ancar v. Browne-McHardy Clinic*, 2000-2409, pp. 4-5 (La.App. 4 Cir. 1/16/02), 807 So.2d 344, 347-48:

> Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.,* 99-2181, 99-2257 (La.2/29/00), 755 So.2d 226, 230. Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. La. C.C. P. art. 966.
>
> The initial burden of proof remains on the movant to show that no genuine issue of material fact exists. However, if the movant will not bear the burden of proof at trial, his burden on the motion requires him not to negate all essential elements of the plaintiff's claim, but rather to point out that there is an absence of factual support for one or more elements essential to the claim. La. C.C.P. art. 966(C)(2); *Fairbanks v. Tulane University,* 98-1228 (La.App. 4 Cir. 3/31/99), 731 So.2d 983, 985.
>
> After the movant has met his initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2). If the non-moving party fails to meet this burden, there is no genuine issue of material fact, and the movant is entitled to summary judgment. La. C.C.P. art. 966; *Schwarz v. Administrators of Tulane Educational Fund,* 97-0222 (La.App. 4 Cir. 9/10/97), 699 So.2d 895, 897. When a motion for summary judgment is properly supported, the non-moving party may not rest on the mere allegations of his pleading, but his response, by affidavits or as

> otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967; *Townley v. City of Iowa,* 97-493 (La.App. 3 Cir. 10/29/97), 702 So.2d 323, 326.

In order for GEICO to succeed on its motion for summary judgment, therefore, it was required to show there existed no genuine issue of material fact as it applied to Appellant's claim for underinsured motorist coverage.

DISCUSSION

Assignments of Error Numbers Two and Three

We begin with Appellant's second and third assignments of error concerning alleged procedural defects which, Appellant argues, render the judgment erroneous.

Appellant first submits the district court erred in considering the motion for summary judgment despite GEICO's failure to file a "Statement of Uncontested Facts" as required by Uniform Local Rule 9.10.[3] Additionally, Appellant argues the district court erred in granting the motion for summary judgment despite GEICO's failure to file an affidavit which authenticated the insurance policy attached to GEICO's motion and, indeed contained the policy exclusions as submitted.

As to both assignments of error, Uniform Rules—Courts of Appeal, Rule 1-3, and La.C.C.P. art. 966(D)(2), are applicable. The former provides:

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[3] Rule 9.10, relative to motions for summary judgment, of the Rules for Civil Proceedings in District Courts provides, in relevant part:

> (a) A memorandum in support of a motion for summary judgment shall contain:
>
> . . .
>
> (2) A list of the material facts that the mover contends are not genuinely disputed[.]

> The scope of review in all cases within the appellate and supervisory jurisdiction of the Courts of Appeal shall be as provided by LSA-Const. Art. 5, § 10(B), and as otherwise provided by law. The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.

The Code of Civil Procedure provides, in relevant part:

> The court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made. Any objection to a document ***shall be raised in a timely filed opposition or reply memorandum***. The court shall consider all objections prior to rendering judgment. The court shall specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider.

La.C.C.P. art. 966(D)(2)(emphasis added). Appellant did not raise GEICO's alleged failure to provide a statement of uncontested facts or an affidavit in its opposition submitted to the district court—despite the opportunity to do so—and she is therefore precluded from raising this issue for the first time on appeal.[4] Further, the Code of Civil Procedure requires the district court to consider any document submitted in support of the motion to which no objection is made. Here, Appellant challenges the policy itself, for GEICO's failure to file a supporting affidavit. However, no objection to the policy was made by Appellant at the district court in her opposition to GEICO's motion. The district court therefore did not and could not address this objection prior to rendering its judgment. Accordingly, the

[4] GEICO does substantively respond to the contention that it failed to provide such a statement of uncontested facts, but based upon our ruling that the issue is not properly before this court, we need not address the merits of the argument.

district court did not err in rendering judgment having considered the policy as submitted.

Assignment of Error Number One

Appellant substantively argues the trial court erred in finding that she was not entitled to underinsured coverage under the GEICO insurance policy.

The policy in question is comprised of two documents, one entitled "Louisiana Family Automobile Insurance Policy" (hereinafter "Part I") and another entitled "Automobile Policy Amendment Louisiana" (hereinafter "Part II"). In particular, Part I of the policy includes a definitional section including separate definitions for under- and uninsured motor vehicles. Definition six, relative to underinsured vehicles, provides as follows:

> 6. ***"Underinsured motor vehicle"*** means a motor vehicle which has a liability bond or insurance policy that applies at the time of the accident but the limits of that insurance are less than the amount the ***insured*** is legally entitled to recover for damages.

Definition seven, relative to uninsured motor vehicles, provides as follows:

> 7. [***"***]***Uninsured Motor Vehicle"*** means a motor vehicle which has no bodily injury liability bond or insurance policy applicable with liability limits complying with the financial responsibility law of the ***state*** in which the ***insured auto*** is principally garaged at the time of the accident. This term also includes a motor vehicle whose insurer is or becomes insolvent within one year after the accident or denies coverage, a ***hit-and-run motor vehicle*** as defined and an ***underinsured motor vehicle*** as defined.
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> The term ***"uninsured motor vehicle"*** does not include:
>
> (a) A motor vehicle owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
> (b) A motor vehicle owned by the United States of America, any other national government, a ***state***, or a political sub-division of any such government or its agencies;

(c) A land motor vehicle or ***trailer*** operated on rails or crawler-treads or located for use as a residence or premises; and
(d) A farm-type tractor or equipment designed for use principally off public roads, except while used upon public roads.

Part II of the policy also contains a definitional section amending the definition of uninsured motor vehicle. Specifically, Part II states, in relevant part, that,

> [P]aragraph two [of definition seven] and following is replaced with the following:
>
> The term ***uninsured motor vehicle*** does not include:
>
> (a) An ***insured auto***[.]

The parties read these two provisions of the policy differently. Appellant, on the one hand, suggests definitions six and seven, contained in Part I, are "separate and distinct sections of the policy." Appellant further notes that Part II only amends the definition contained within definition seven relative to uninsured motor vehicles, and that definition six, as contained in Part I, stands on its own because it was not amended. Appellee, on the other hand, reads these definitions as part of a whole, suggesting Appellant's interpretation "is in direct conflict with the clear language of the policy."

In *Bernard v. Ellis*, 2011-2377, pp. 9-10 (La. 7/2/12), 111 So.3d 995, 1002-03, a case cited by both parties, the Louisiana Supreme Court addressed insurance policy interpretation as follows:

> Interpretation of an insurance policy ordinarily involves a legal question that can be properly resolved by a motion for summary judgment. *Id.* (citing *Bonin,* 930 So.2d at 910). An insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts set forth in the Civil Code. *Magnon,* 739 So.2d at 196 (citing *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.,* 93-0911 (La.1/14/94), 630 So.2d 759). An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond

> what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. *Id.* Absent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and to enforce reasonable conditions upon the policy obligations they contractually assume. *Id.* If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written. *Id.* at 197; La. C.C. art. 2046. When the language of an insurance policy is clear, courts lack the authority to change or alter its terms under the guise of interpretation. *Magnon,* 739 So.2d at 197 (citing *Louisiana Ins. Guar. Ass'n.,* 630 So.2d at 764). A court should only grant the motion for summary judgment when the facts are taken into account and it is clear that the provisions of the insurance policy do not afford coverage. *Supreme Services and Specialty Co., Inc. v. Sonny Greer, Inc.,* 06-1827 (La.5/22/07), 958 So.2d 634, 638 (citing *Reynolds v. Select,* 93-1480 (La.4/11/94), 634 So.2d 1180, 1183).
>
> Uninsured motorist coverage embodies a strong public policy, which is to provide full recovery for innocent automobile accident victims who suffer damages caused by a tortfeasor who has no coverage or is not adequately covered by liability insurance. *Cutsinger,* 12 So.3d at 949 (citing *Duncan v. U.S.A.A. Ins. Co.,* 06–363 (La.11/29/06), 950 So.2d 544, 547). The underlying purpose of uninsured motorist coverage "is to promote and effectuate complete reparation, no more or no less." *Id.* (citing *Hoefly v. Government Employees Ins. Co.,* 418 So.2d 575, 579 (La.1982)). To carry out the objective of providing reparation for persons injured through no fault of their own, the statute is liberally construed. *Id.* at 949-50 (citing *Taylor v. Rowell,* 98-2865 (La.5/18/99), 736 So.2d 812, 816; *Roger v. Estate of Moulton,* 513 So.2d 1126, 1130 (La.1987)). Any exclusion in uninsured motorist coverage must be clear and unmistakable. *Id.* at 950 (citing *Duncan,* 950 So.2d at 547).

Though *Bernard* addressed uninsured motorist coverage, whereas the question before us concerns underinsured motorist coverage, the analysis remains the same. That is, we must determine whether the wording of Parts I and II "is clear and unambiguously expresses the parties' intent" such that it must be enforced like any other such contract.

We find that the policy is clear and unambiguous in its inclusion of underinsured motor vehicles in the definition of uninsured vehicles, and we thus decline to alter its terms "under the guise of interpretation." As noted above, the

first paragraph of definition seven in Part I of the policy defines uninsured motor vehicle as, among other things, "an underinsured motor vehicle as defined" in definition six. Part II of the policy amending definition seven as written in Part I only applies to "paragraph two and following." Therefore, the plain language of the policy includes underinsured motor vehicles in the definition of uninsured motor vehicles. Accordingly, we find that the GEICO policy specifically excludes "underinsured motor vehicles" from the definition of "insured motor vehicles." Appellant therefore cannot claim she is entitled to underinsured coverage from a policy that specifically excludes such coverage.

To be clear, we do not hold that Appellant's policy includes a *rejection* of uninsured/underinsured coverage.[5] Indeed, as noted by Appellant, the policy in question requires payment of uninsured/underinsured premiums. We also agree with Appellant that such coverage attaches to the insured, as set forth in the Louisiana Supreme Court decision *Howell v. Balboa Ins. Co.*, 564 So.2d 298, 301-02 (La. 1990), which held:

> We expressly hold that UM coverage attaches to the person of the insured, not the vehicle, and that any provision of UM coverage purporting to limit insured status to instances involving a relationship to an insured vehicle contravenes LSA–R.S. 22:1406(D). In other words, any person who enjoys the status of insured under a Louisiana motor vehicle liability policy which includes uninsured/underinsured motorist coverage enjoys coverage protection simply by reason of having sustained injury by an uninsured/underinsured motorist.[6]

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[5] As provided in La. R.S. 22:1295, "[s]uch rejection [of uninsured/underinsured] coverage shall be made only on a form prescribed by the commissioner of insurance." Such is not the case here.

[6] While this general rule still holds, this Court recognized a "narrow exception" to the rule in *Jones v. Allstate Ins. Co.*, 2002-0638, pp. 3-4 (La.App. 4 Cir. 4/26/02), 817 So.2d 332, 334, which held:

> *Howell* has been superseded by La. R.S. 22[:]1406(D)(1)(e) [now La. R.S. 22:1295(1)(e)], which specifically states that UM coverage does not apply to injury of the insured while the insured is occupying a vehicle owned by the

Appellee does not necessarily dispute this discrete point, but argues that Appellant cannot recover underinsured coverage under the same policy by which she received liability coverage per *Bernard:*

> Under *Breaux* and its progeny, one cannot be insured with respect to liability coverage and uninsured/underinsured with respect to UM coverage under the same insurance policy. *See Lang v. Economy Fire & Casualty Co.,* 00–1634 (La.App. 3 Cir. 4/4/01), 783 So.2d 587, 589; *Leboeuf v. Lloyd's of Louisiana,* 572 So.2d 347, 350 (La.App. 1st Cir.1990).

111 So.3d at 1005. Given the language of the policy, the particular facts of this case, and the jurisprudence on this issue, we agree with GEICO that the plain language of the policy controls.

CONCLUSION

Based on the foregoing, we find no error in the trial court's judgment granting GEICO's motion for summary judgment.

AFFIRMED

> insured but not described in the policy of insurance at issue. This principle is universally understood and accepted.