Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **30th day of June, 2021** are as follows:

BY Griffin, J.:

2020-C-01054
c/w
2020-C-01117

MARTIN BAACK AND BRENDA BAACK VS. MICHAEL MCINTOSH, ET AL. (Parish of Natchitoches)

AFFIRMED. SEE OPINION.

Weimer, C.J., additionally concurs and assigns reasons.

Crichton, J., dissents for the reasons assigned by Justice McCallum.

Crain, J., dissents and assigns reasons.

McCallum, J., dissents and assigns reasons.

06/30/2021

SUPREME COURT OF LOUISIANA

No. 2020-C-01054

C/W

No. 2020-C-1117

MARTIN BAACK AND BRENDA BAACK

VS.

MICHAEL MCINTOSH, ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit,
Parish of Natchitoches

GRIFFIN, J.

We granted these consolidated writs to determine whether an insured's initial uninsured/underinsured bodily injury ("UM") coverage waiver remains valid where, upon consecutive renewals, the insured submitted new signed and dated UM forms without initialing the blanks provided to reject UM coverage. Based on our interpretation of the UM statute, we find such a subsequently submitted form changes the prior rejection and operates to provide UM coverage. Additionally, finding no error in the quantum of damages and denial of penalties and attorney fees by the court of appeal, we affirm.

FACTS AND PROCEDURAL HISTORY

This dispute over UM coverage arises from a motor vehicle accident on Louisiana Highway 6 near Natchitoches. Martin Baack, an employee of Pilgrim's Pride Corporation ("Pilgrim's Pride"), was driving his work vehicle when he was struck by a vehicle driven by Michael McIntosh. The vehicle Mr. Baack was driving belonged to PPC Transportation Company ("PPC Transportation"). Both Pilgrim's Pride and PPC Transportation are subsidiaries of JBS USA Holdings, Inc. ("JBS").

Mr. McIntosh was determined to be solely at fault for the accident and pled guilty to improper lane usage.

Mr. Baack and his wife filed suit individually and on behalf of their minor daughter naming as defendants Mr. McIntosh, his insurer, and Zurich American Insurance Company ("Zurich") in its capacity as the UM provider for PPC Transportation's vehicle. In JBS's policy with Zurich, PPC Transportation is listed as a Broad Named Insured. The Baacks sought damages under Zurich's UM coverage as well as penalties and attorney fees based on Zurich's failure to timely settle the claim. Following a tender of the full $15,000 policy limits of Mr. McIntosh's policy, the Baacks dismissed their claims against him and his insurer.

The Zurich policy at issue was initially procured in 2002 by Swift Foods Company ("Swift"), the predecessor of JBS. At that time, Swift properly rejected UM coverage via a UM form initialed and signed by its corporate controller, William Trupkiewicz. The policy was renewed on an annual basis and Zurich sent new UM forms to Swift, and subsequently its successor JBS, every year. In 2011, JBS increased its liability limits from $3,000,000 to $5,000,000 necessitating a new UM form. Mr. Trupkiewicz initialed and signed a new form properly rejecting UM coverage.

In 2012, 2013, and 2014, JBS's risk manager, Stephany A. Rockwell, submitted new signed and dated UM forms without initialing the blanks provided to reject UM coverage or select UM coverage with limits lower than the policy's bodily injury liability limits. The 2014 form was attached to the policy which was in effect at the time of Mr. Baack's accident.

Zurich filed a motion for summary judgment wherein it argued the failure to initial an option rejecting UM coverage on the UM form for a renewal policy does not constitute a selection of UM coverage. It maintained the initial rejection by Mr. Trupkiewicz remained valid for the life of the policy, including the 2014 renewal in

effect at the time of the accident. The Baacks opposed but did not file a cross-motion for summary judgment. The trial court denied Zurich's motion for summary judgment and subsequent writs to the court of appeal and this Court were also denied.

The matter proceeded to a five-day jury trial. Although the Baacks moved for a directed verdict on the issue of UM coverage, it was denied. Following deliberations, the jury found the Zurich policy did not provide UM coverage because JBS had rejected it. A judgment in conformance with the jury's verdict was rendered dismissing the Baacks' claims against Zurich with prejudice and cast them with all costs. The Baacks moved for a judgment notwithstanding the verdict or, in the alternative, for new trial on the issues of UM coverage and damages. Both motions were denied and the Baacks appealed.[1]

Reversing, the court of appeal observed that "[p]roof of an insured's rejection of UM coverage … is satisfied solely by the existence of a properly completed and signed UM form, and the insured's intent is irrelevant in this determination." *Baack v. McIntosh*, 19-0657, p. 11 (La.App. 3 Cir. 7/29/20), 304 So.3d 881, 893 (citing *Duncan v. U.S.A.A. Ins. Co.*, 06-0363, p. 3 (La. 11/29/06), 950 So.2d 544, 547). Relying on a plain reading of Bulletin No. 08-02 promulgated by the Commissioner of Insurance, the court of appeal ruled that the 2014 form was properly completed and that Zurich bore the consequences of JBS's failure to initial the form signifying its rejection of UM coverage. *Id.*, 19-0657, pp. 19-20, 304 So.3d at 897-98. Finding the jury legally erred in its determination of no UM coverage, the court of appeal performed a *de novo* review of the facts and awarded Mr. Baack $425,000 in general damages, $354,026.02 in loss of future earnings, and $27,890.83 in future medical expenses. *Id.*, 19-0657, pp. 24-39, 304 So.3d at 899-907. It further awarded Mrs. Baack and the couple's minor daughter $35,000 and $7,500 in loss of consortium

[1] $15,606.05 in court costs were taxed to the Baacks in a separate judgment which the Baacks also appealed.

damages, respectively. *Id.*, 19-0657, pp. 39-40, 304 So.3d at 907. The Baacks' request for penalties and attorney fees was denied. *Id.*, 19-0657, pp. 41-44, 304 So.3d at 907-08. In a separate appeal pertaining to costs, the court of appeal reversed the trial court and rendered judgment assessing Zurich with all court costs.

Both parties filed writ applications to this Court, which we granted. *Baack v. McIntosh*, 20-1054, 20-1117 (La. 11/24/20), 304 So.3d 857.

DISCUSSION

The primary issue presented is whether the 2012, 2013, and 2014 UM forms operate to provide UM coverage during the time of the subject accident. We also address Zurich's arguments of excessive damage awards and the Baacks' contention that the court of appeal erred by failing to award them statutory penalties and attorney fees.

UM COVERAGE

Zurich avers the court of appeal erred in finding UM coverage exists under the 2014 policy. In Louisiana, "UM coverage is determined not only by contractual provisions, but also by applicable statutes." *Duncan*, 06-0363, p. 4, 950 So.2d at 547. Thus, whether coverage exists turns on the interpretation of the policy and UM statute. "The determination of whether a contract is clear or ambiguous is a question of law." *Cadwallader v. Allstate Ins. Co.*, 02-1637, p. 4 (La. 6/27/03), 848 So.2d 577, 580. Whether an insurance policy unambiguously excludes coverage is a question of law to be decided from the four corners of the policy. *Burmaster v. Plaquemines Parish Gov't*, 10-1543, p. 13 (La.App. 4 Cir. 3/30/11), 64 So.3d 312, 231. Statutory interpretation is a question of law subject to *de novo* review. *Benjamin v. Zeichner*, 12-1763, p. 5 (La. 4/5/13), 113 So.3d 197, 201.

"No automobile liability insurance [policy] … shall be delivered or issued in … [Louisiana] unless [UM] coverage is provided." La. R.S. 22:1295(1)(a)(i).[2] However, UM coverage is not required "if any insured named in the policy either rejects coverage, selects lower limits, or selects economic-only coverage, in the manner provided in Item 1(a)(ii) of this Section." *Id.* "Such rejection … shall be made on a form prescribed by the commissioner of insurance" that is "provided by the insurer and signed by the named insured or his legal representative." La. R.S. 22:1295(1)(a)(ii). Accordingly, "the requirement of UM coverage is an implied amendment to any automobile liability policy … as UM coverage will be read into the policy unless validly rejected." *Duncan*, 06-0363, p. 4, 950 So.2d at 547. The UM statute is liberally construed such that "[a]ny exclusion from coverage must be clear and unmistakable." *Id.*, 06-0363, pp. 4-5, 950 So.2d at 547. Exclusions are strictly construed and the insurer bears the burden of proving any insured named in the policy rejected, in writing, the UM coverage. *Id.*, 06-0363, p. 5, 950 So.2d at 547.

Zurich specifically argues that the 2012, 2013, and 2014 UM forms submitted by JBS are without legal effect because the absence of initials in the blanks provided rendered them incomplete and there was no intent on the part of JBS to alter the prior rejection of coverage indicated in the 2011 UM form. *See Hughes v. Zurich American Ins. Co.*, 13-2167, p. 6 (La.App. 1 Cir. 8/20/14), 153 So.3d 477, 480-81 (failure to initial UM form does not equate to a selection of UM coverage where trial

[2] In relevant part, La. R.S. 22:1295(1)(a)(i) provides:

> No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle designed for use on public highways and required to be registered in this state or as provided in this Section unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover nonpunitive damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death resulting therefrom[.]

court found prior rejection was sufficient to show intent to reject coverage on renewal policies). Zurich similarly asserts that, based on its interpretation of La. R.S. 22:1295(1)(b), the only way to effectuate such a change in coverage is the submission of a separate "written request." We disagree.

A proper rejection of UM coverage remains valid for the life of the policy and does not require the completion of a new form when a policy is renewed.[3] However, an "*insured may change the original uninsured motorist* selection or *rejection* on a policy at any time during the life of the policy *by submitting a new uninsured motorist selection form to the insurer on the form prescribed by the commissioner of insurance*." La. R.S. 22:1295(1)(a)(ii) (emphasis added). The fact that a UM form rejecting coverage was properly executed by JBS in 2011 did not prevent JBS from changing that rejection by submitting a new form to Zurich.

The required form provided by the Commissioner of Insurance states: "By law, your policy will include UMBI coverage at the same limits as your Bodily Injury Liability Coverage unless you request otherwise. If you wish to reject UMBI Coverage … you must complete this form and return it to your insurance agent or insurance company." The form allows for the insured to initial one of only four selections: UMBI coverage at lower limits than liability coverage; economic-only coverage with same limits; economic-only UMBI coverage at lower limits; or no UMBI coverage. Critically, the insured is not able to actively select UM coverage on the form. This is further explained in Insurance Commissioner's Bulletin No. 08-02, which was sent to all insurers relative to the revised UM form in 2008. In explaining "Important Form Changes," the Commissioner stated:

> **Option to "select" UMBI coverage** – The revised UM form removes the option to "select" UMBI coverage with the same bodily injury liability limits set forth in the policy. An insured is not required to "select" UMBI coverage at the same limit as the bodily injury liability coverage set forth in the policy under La. R.S. 22:680 (now La. R.S.

[3] A new UM form is only required for "changes in limits of liability." La. R.S. 22:1295(1)(a)(ii).

> 22:1295), because such coverage is statutorily presumed absent a properly completed and signed UM form indicating a different choice.

Thus, the *only* way to "select" UM coverage on the form is to not initial any of the provided choices. Under the statute, a signed and dated UM form with no selection equates to a selection of UM coverage.

Zurich's reliance on La. R.S. 22:1295(1)(b) is similarly inapposite. That provision of the statute states:

> Any insurer delivering or issuing an automobile liability insurance policy referred to herein shall also permit the insured, at his written request, to increase the coverage applicable to uninsured motor vehicles provided for herein to any available limit up to the bodily injury liability coverage limits afforded under the policy.

We read this language simply to allow the insured to increase its UM limits ("up to the bodily injury liability limits") by written request to the insurer. It does not override the language of La. R.S. 22:1295(1)(a)(ii) that explicitly provides the method to change an initial rejection of UM coverage "by submitting a new uninsured motorist selection form to the insurer on the form prescribed by the commissioner of insurance." Thus, Zurich's argument that there is no UM coverage because JBS failed to submit a written request to Zurich to revoke its previous UM waiver is contrary to the clear wording of La. R.S. 22:1295(1)(a)(ii).

As the Commissioner explained in LIC Bulletin No. 08-02, "[w]hen properly completed and signed by the named insured or his legal representative, this UM form shall be conclusively presumed to become part of the policy or insurance contract when issued and delivered." Zurich sent UM forms to JBS yearly even though they were not legally required. Following the 2011 rejection of UM coverage, Ms. Rockwell executed UM forms three times (2012, 2013, and 2014) before the accident without making a selection rejecting UM coverage and each time Zurich issued the insurance policies without objection, request for clarification, or comment. Zurich was therefore aware JBS signed and returned these forms every

year and should have known that signing and submitting these forms could have specific legal consequences.[4] If Zurich believed the failure to make a selection on the forms was a mistake, it was incumbent on Zurich to follow up with JBS to make any necessary corrections. *See Gray v. American Nat. Propery & Cas. Co.*, 07-1670, pp. 15-16 (La. 2/26/08), 977 So.2d 839, 849-50 ("the insurer [has] both the authority and the opportunity to assure that the UM selection form [is] completed properly …. The insurer, not the insured, has the responsibility of assuring that the form is completed properly."); *see also Morrison v. USAA Cas. Ins. Co.*, 12-2334, pp. 1-2 (La. 1/11/12), 106 So.3d 95, 95-96.

The plain language of the UM statute dictates that the failure to initial any of the options available on the UM form necessarily results in statutory UM coverage. "In directing the commissioner of insurance to prescribe a form, the legislature gave the commissioner the authority to determine what the form would require." *Duncan*, 06-0363, pp. 12-13, 950 So.2d at 552. "Pursuant to that mandate, compliance with the form prescribed by the commissioner of insurance is necessary for the UM waiver to be valid. The insurer cannot rely on the insured's intent to waive UM

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[4] As aptly explained by the dissenting judge in *Hughes*, 13-2167, p. 1, 153 So.3d at 481 (Pettigrew, J., dissenting):

> An uninsured/underinsured motorist coverage rejection form is a legal document that has legal consequences if properly executed. Though Zurich did not need, nor were they obligated, to get its insured to execute another uninsured/underinsured coverage rejection form for the renewal period of October 1, 2009, through October 1, 2010, the uncontested facts of this case establish that Zurich did get its insured to execute another form. By doing so, that document had legal consequences. The requirements to properly reject uninsured motorist coverage are set out in *Duncan v. USAA Ins. Co.*, 950 So.2d 544 (La.2006), at 551–552. The fact is, the insured through its authorized officer, Coussan, did not reject uninsured motorist or underinsured motorist coverage on the form submitted to him by Zurich. Since, he did not reject uninsured motorist coverage, by law, he has uninsured motorist coverage or underinsured motorist coverage under the Zurich policy at issue in this case. *Dixon v. Direct General Ins. Co. of Louisiana*, 2008–0907 (La.App. 1 Cir. 3/27/09), 12 So.3d 357. See also La. R.S. 22:1295 1A(ii),
>
> > ... An insured may change the original uninsured motorist selection or rejection on a policy at any time during the life of the policy by submitting a new uninsured motorist selection form to the insurer on the form prescribed by the Commissioner of Insurance....
>
> This is exactly what happened in this case.

coverage to cure a defect in the form of the waiver." *Id.*, 06-0363, p. 14, 950 So.2d at 553; *Cadwallader*, 02-1637, p. 4, 848 So.2d at 580 ("Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation when the policy's provisions are couched in unambiguous terms."); *see also Washington v. Savoie*, 92-2957, pp. 6-7 (La. 4/11/94), 634 So.2d 1176, 1180 ("public policy precludes reformation of … UM coverage when the change adversely affects the rights of third persons insured under the policy to recover damages under the UM coverage provisions before the change"). This is not a case where a minor mistake or omission on the UM form occurred. Rather, the forms signed by Ms. Rockwell in 2012, 2013, and, specifically, 2014 demonstrate that JBS did exactly what is statutorily required to change its prior rejection of UM coverage.

Ms. Rockwell's 2014 form was part of the Zurich policy in effect at the time of the accident and clearly meets all the statutory requirements to change JBS's 2011 rejection of UM coverage. We therefore affirm the court of appeal's determination that UM coverage exists at the time of the accident. Accordingly, because Zurich is the party cast in judgment, we also affirm the court of appeal's assessment of costs to Zurich. *See* La. C.C.P. art. 1920.

DAMAGES

Having decided the case on the issue of coverage, the jury made no award of damages.[5] This required the court of appeal to perform a *de novo* review and "make an award that is just and fair for the damages revealed by the record." *LeBlanc v. Stevenson*, 00-0157, p. 6 (La. 10/17/00), 770 So.2d 766, 771-72; La. C.C.P. art. 2164 ("appellate court shall render any judgment which is just, legal, and proper upon the record on appeal"). Zurich avers various damages awarded by the court of appeal

[5] Based on its review of the record, the court of appeal found liability and causation was uncontested. *Baack*, 19-0657, pp. 23-24, 304 So.3d at 899. Zurich did not challenge this finding in its writ application to this Court.

are excessive in light of the record. It is well settled that reviewing courts afford great discretion to a factfinder's determination of both general and special damages.[6] *Guillory v. Lee*, 09-0075, p. 14 (La. 6/26/09), 16 So.3d 1104, 1116. In light of this principle, we address Zurich's specific assertions below.

General Damages

Zurich avers that the court of appeal erred in awarding Mr. Baack $425,000 in general damages and suggests an appropriate award would be no greater than $115,000. General damages are inherently speculative, cannot be calculated with mathematical certainty, and include pain and suffering (both physical and mental), physical impairment and disability, and loss of enjoyment of life. *McGee v. A C & S, Inc.*, 05-1036, pp. 3-5 (La. 7/10/06), 933 So.2d 770, 774-75. In reviewing an award of general damages, the "initial inquiry is whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the 'much discretion' of the trier of fact." *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1260 (discouraging the "use of a scale of prior awards in cases with generically similar medical injuries" until an abuse of discretion has been determined). Thus, only when an award, in either direction, is beyond that which a reasonable trier of fact could assess for the effects under the specific circumstances of the case should a reviewing court increase or reduce the award. *Id.*, 623 So.2d at 1261. Stated alternatively, "the award or apportionment must be so high or so low in proportion to the injury or fault that it shocks the conscience." *Riley v. Maison Orleans II, Inc.*, 01-0498, p. 11 (La.App. 4 Cir. 9/25/02), 829 So.2d 479, 487.

[6] This applies equally where a court of appeal acts as the factfinder. *See Shephard on Behalf of Shephard v. Scheeler*, 96-1690, pp. 13-15 (La. 10/21/97), 701 So.2d 1308, 1315-17 (observing manifest error review of factual findings applies to documentary evidence and is based not just on ability to evaluate live witness testimony but also a proper allocation between fact finding and appellate review functions) (citing *Virgil v. American Guar. & Liab. Ins. Co.*, 507 So.2d 825 (La. 1987) (per curiam)).

Zurich contends that Mr. Baack continued to work for a year after the accident and attributed his post-accident back pain to bending and lifting objects. The court of appeal observed that "Mr. Baack endured approximately thirty-nine months of constant severe pain in his left lower back, hip, thigh, and leg prior to November 6, 2017 surgery" and that he still experienced pain in the ten months prior to trial. *Baack*, 19-0657, p. 25, 304 So.3d at 900. A review of the record shows that Dr. John Hogg, Mr. Baack's primary care physician of twelve years, acknowledged that while Mr. Baack had previous instances with pain in his leg and back, he testified that he didn't "think [Mr. Baack] ever had pain that was similar to the pain he had when I saw him" in October 2014, three months after the accident. Mr. Baack's orthopedic surgeon, Dr. Eubulus Kerr, acknowledged that although Mr. Baack had some pre-existing degenerative conditions, his injuries and requisite surgical fusion of his L4-5 and L5-S1 discs would cause significant increased degeneration in the future. This was corroborated by physical medicine and rehabilitation specialist Dr. Gerald LeGlue who opined Mr. Baack faced a downhill trajectory in his overall condition. The court of appeal further considered Mr. Baack's testimony that the resulting pain caused him to detrimentally alter his lifestyle including a decrease in sexual activity with his wife, disruptions in sleep, inability to play with his six-year old daughter, reduced social activities, and an inability to visit his camp where he would hunt, fish, and ride his ATV. Mr. Baack also testified that he has diabetes which, prior to the accident, he was able to manage but has since regained weight and is now required to take medication again. In light of the record evidence, we find the court of appeal did not abuse its discretion in its award of $425,000 in general damages.

Loss of Future Earnings

Zurich avers that the court of appeal erred in awarding Mr. Baack loss of future earnings totaling $354,026.02 because the testimony of Nancy Favaloro, its vocational rehabilitation expert, and Dr. Kerr indicated that Mr. Baack could have

completed sedentary or light duty work after the accident. Zurich expert, Dan Cliffe, projected Mr. Baack's future loss of earnings would be between $125,000 and $137,000. "Special damages are those which have a 'ready market value,' such that the amount of damages theoretically may be determined with relative certainty, including medical expenses and lost wages" and are reviewed under the manifest error standard. *Guillory*, 09-0075, p. 16, 16 So.3d at 1117-18. The court of appeal observed that the testimony of both parties' vocational rehabilitation experts revealed that Mr. Baack is functionally illiterate, reading and comprehending at a first grade level. *Baack*, 19-0657, pp. 37-38, 304 So.3d at 906. Plaintiff's vocational rehabilitation expert, Mr. Ted Deshotel, opined that these intellectual limitations, combined with Mr. Baack's physical limitations make it probable that he will never be employable again. Where the factfinder's determination is based on the evaluation and resolution of conflicts in expert testimony, it can virtually never be manifestly erroneous. *See Bellard v. American Cent. Ins. Co.*, 07-1335, p. 27 (La. 4/18/08), 980 So.2d 654, 672. Favoring the testimony of Mr. Deshotel, the court of appeal found Mr. Baack was unemployable and awarded him $354,026.02 in special damages for loss of future earnings based on his prior $52,618.28 salary as a driver and 6.9 years of work-life expectancy.[7] *Baack*, 19-0657, pp. 38-39, 304 So.3d at 906. Our review of the record confirms the court of appeal did not err in awarding this amount.

[7] In making its award of loss of future earnings, the court of appeal relied on a series of factors that originated in *Unbehagen v. Bollinger Workover, Inc.*, 411 So.2d 507, 508-509 (La.App. 1st Cir. 1982) (internal citations omitted):

> Essentially what a Court must do in a case of this type is to exercise sound judicial discretion and award an amount that, considering all of the facts and circumstances, seems just and fair to both litigants and is not unduly oppressive to either. The following factors are primarily relied upon by the Courts in determining what is fair and equitable in each case: age, life expectancy, work life expectancy, appropriate discount rate (also known as the investment income factor), the annual wage rate increase or productivity increase, prospects for rehabilitation, probable future earning capacity, loss of future earning capacity, loss of earning ability, and the inflation factor or decreasing purchasing power of the applicable currency.

Future Medical Expenses

Zurich avers that the court of appeal's award of $27,890.83 for future medical expenses is overly speculative and not supported by the record. "The proper standard for determining whether a plaintiff is entitled to future medical expenses is proof by a preponderance of the evidence the future medical expense will be medically necessary." *Menard v. Lafayette Ins. Co.*, 09-1869, p. 13 (La. 3/16/10), 31 So.3d 996, 1006. Although an award for future medical expenses must be established with some degree of certainty, such awards "generally do not involve determining the amounts, but turn on questions of credibility and inference" therefore much discretion is accorded to the factfinder's evaluation of expert testimony. *Id.* (quotation omitted). Relying on the testimony of Dr. Kerr, the court of appeal found that Mr. Baack proved by a preponderance of the evidence that he will require annual follow-up visits, sixteen weeks of physical therapy, and two sacroiliac joint injections within the next two years. The court of appeal also found that additional physical therapy and two steroid injections would be required a further ten years out due to further anticipated degeneration at the L3-4 disc. After finding insufficient evidence established the need for future surgery, the court of appeal awarded $27,980.93 in future medical expenses. *Baack*, 19-0657, pp. 33-34, 304 So.3d at 904. Based on the evidence presented, we find no error in this award. *See Bellard*, 07-1335, p. 27, 980 So.2d at 672.

Loss of Consortium

Zurich avers the awards for loss of consortium, $35,000 to Mrs. Baack and $7,500 to the couple's minor daughter, are not supported by the record. Loss of consortium claims encompass the loss of love and affection, loss of companionship, loss of material services, loss of support, impairment of sexual relations, loss of aid and assistance, and loss of felicity. *Ferrell v. Fireman's Fund Ins. Co.*, 96-3028, p. 6 n. 4 (La. 7/1/97), 696 So.2d 569, 573 n. 4. The same considerations apply to a

child, absent the sexual component. An award for loss of consortium damages is reviewed under an abuse of discretion standard. *Plaia v. Stewart Enterprises, Inc.*, 14-0159, p. 19 (La.App. 4 Cir. 10/26/16), 229 So.3d 480, 494-95. In awarding loss of consortium damages, the court of appeal relied on Mrs. Baack's testimony as to the lack of sexual activity, that Mr. Baack no longer hunts or fishes with her or their daughter, and that Mr. Baack is unable to do much of anything at home resulting in an overall withdrawal from society. *Baack*, 19-0657, p. 40, 304 So.3d at 907. As to their daughter, Mrs. Baack testified her husband "can't play with our daughter anymore. He used to pick her up, tickle her, all the time." Mrs. Baack also testified their daughter expressed frustration at this and questions why Mr. Baack is unable to play. Based on our review of the record, we find the court of appeal did not abuse its discretion in the amounts awarded for loss of consortium.

PENALTIES AND ATTORNEY FEES

The court of appeal declined to award statutory penalties and attorney fees under La. R.S. 22:1892 and La. R.S. 22:1973, finding the Baacks failed to establish satisfactory proof of loss. *Baack*, 19-0657, p. 42, 304 So.3d at 908. Specifically, the court of appeal found that Mr. Baack's medical expenses had been paid by Zurich in its capacity as workers' compensation insurer to his employer. The Baacks argue the court of appeal legally erred in looking only to past medical expenses and not the remaining elements of their claims including general damages as those were clearly in excess of the $15,000 limit on Mr. McIntosh's policy. However, we need not reach this issue.

Louisiana law provides for the imposition of penalties against insurance companies who act in bad faith under La. R.S. 22:1892 and La. R.S. 22:1973. *Jones v. Gov't Employees Ins. Co.*, 16-1168, p. 7 (La.App. 4 Cir. 6/14/17), 220 So.3d 915, 921. These statutes are penal in nature and should be strictly construed. *Id.*, 16-1168, p. 7, 220 So.3d at 921-22 (citing *Guillory*, 09-0075, p. 37, 16 So.3d at 1130);

Louisiana Bag Co., Inc. v. Audubon Indem. Co., 08-0453, p. 25 (La. 12/2/08), 999 So.2d 1104, 1120. The sanctions of penalties and attorney fees are not assessed unless a plaintiff's proof is clear that an insurer's failure to pay is arbitrary, capricious, or without probable cause. *Louisiana Bag Co.*, 08-0453, pp. 12-13, 999 So.2d at 1113. "The phrase 'arbitrary, capricious, or without probable cause' is synonymous with 'vexatious,' and a 'vexatious refusal to pay' means 'unjustified, without reasonable or probable cause or excuse.'" *Id.*, 08-0453, p. 14, 999 So.2d at 1114 (citing *Reed v. State Farm Auto. Ins. Co.*, 03-0107, pp. 13-14 (La. 10/21/03), 857 So.2d 1012, 1021). Accordingly, "[t]he statutory penalties are inappropriate when the insurer has a reasonable basis to defend the claim and acts in good-faith reliance on that defense." *Reed*, 03-107, p. 13, 857 So.2d at 1021. Given Zurich's reliance on prior appellate jurisprudence, we find it had a reasonable basis to dispute the issue of UM coverage. *See Higgins v. Louisiana Farm Bureau Cas. Ins. Co.*, 20-1094, pp. 12-13 (La. 3/24/21), --- So.3d ---, 2021 WL 1115393 at *6.

DECREE

For the foregoing reasons, the judgment of the court of appeal is affirmed.

AFFIRMED

SUPREME COURT OF LOUISIANA

No. 2020-C-01054

CONSOLIDATED WITH

No. 2020-C-1117

MARTIN BAACK AND BRENDA BAACK

VS.

MICHAEL MCINTOSH, ET AL

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF NATCHITOCHES

WEIMER, C.J., additionally concurring.

I am in full agreement with the excellent majority opinion. I write separately to point out that my position in this case is not inconsistent with my prior dissent in **Duncan v. U.S.A.A. Ins. Co.**, 06-363 (La. 11/29/06), 950 So.2d 544. In **Duncan**, there was no question the UM form was signed rejecting UM coverage, and the only issue was the consequence of failing to include the insurance policy number in the blank provided on the UM form. The majority of this court found UM coverage was not validly waived because the line for the insurance policy number was left blank. ***Id.*** 06-363 at 1, 950 So.2d at 545. However, I found the majority elevated form over substance and did not agree, as a matter of law, that UM coverage was mandated merely because the line for the policy number was left blank on the form. Rather, I would have applied the consequence established by the statute–if the form is not properly completed, the insurer does not benefit from the rebuttable presumption that the insured rejected UM coverage. ***Id.*** 06-363 at 2-3, 950 So.2d at 545-55 (Weimer, J., dissenting). Unlike **Duncan**, this is not a case where the intent to waive UM coverage is obvious and an insignificant omission on the UM form occurred. Instead,

the UM forms signed by JBS's representative in 2012, 2013, and 2014 satisfied the statutory requirements to change its prior rejection of UM coverage.

In Louisiana, UM coverage is provided for by statute and embodies a strong public policy, and the UM statute must be liberally construed in favor of coverage. **Roger v. Estate of Moulton**, 513 So.2d 1126, 1130 (La. 1987). Applying the clear language of the UM statute, I agree with the majority that the failure to initial any of the options available on the UM form necessarily results in statutory UM coverage.

06/30/2021

SUPREME COURT OF LOUISIANA

No. 2020-C-01054

MARTIN BAACK AND BRENDA BAACK

VS.

MICHAEL MCINTOSH, ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Natchitoches

CRAIN, J., dissents and assigns reasons.

If the legislature had enacted conflicting statutes, this court would be required to reconcile them. Here, however, the statutes are not in conflict. Rather, the interpretation of the statutory scheme in the majority opinion allows the Insurance Commissioner's form to conflict with the statute.

The context for the current analysis is a "change" relative to previously rejected UM coverage. But, the signed and dated (and otherwise blank) form is treated as though it were selection of coverage for an initial policy. In doing so, no legal meaning is given to the 2011 rejection, which remains valid for the life of the policy. La. R.S. 22:1295(1)(a)(ii). The starting point of the analysis should be that 2011 rejection, not the subsequent incomplete UM form.

The 2011 rejection is undisputedly valid. The next question is whether the insured, who previously rejected coverage, now wants coverage. In that context, to find UM coverage equal to liability limits, the statute requires a "written request." La. R.S. 22:1295(1)(b). In the presence of a valid rejection of UM coverage, as here, the Commissioner's UM form can still be used to effectuate a change pursuant to La. R.S. 22:1295(1)(a)(ii), *but only to select one of the options listed on the form* (i.e., reject coverage,[1] select lower limits, or select economic-only coverage). Given

[1] When a previous rejection has occurred, a selection on the form of "rejection" is unnecessary but, nonetheless, it is an option available when an insured is making a "change" via the form pursuant to La. R.S. 22:1295(1)(a)(ii).

the design of the UM form, selection of full UM coverage is no longer an available option. Thus, once coverage has previously been validly rejected or where coverage less than liability limits was previously selected, selection of full UM coverage must be done by a written request. This gives meaning to both the requirement of "written request" to "increase coverage" under La. R.S. 22:1295(1)(b) and the ability to "submit a new uninsured motorist selection form" to "change the original uninsured motorist selection or rejection on a policy" under La. R.S. 22:1295(1)(a)(ii). We must presume each word was enacted for a useful purpose. *See Sultana Corp.v. Jewelers Mut. Ins. Co.*, 2003-0360 (La. 12/3/03), 860 So.2d 1112, 1119. Further, it is logical for the legislature to have intended for an insured to affirmatively request in writing his wish to make a selection that is not on the UM form, rather than supply such wish only by a statutory presumption. The majority opinion allows an incomplete form, which is not a "written request," to be used to select full UM coverage after a previous valid rejection was made. Thus, the form is interpreted so as to violate the statute. I respectfully dissent.

SUPREME COURT OF LOUISIANA

No. 2020-C-1054

CONSOLIDATED WITH

No. 2020-C-1117

MARTIN BAACK AND BRENDA BAACK

VERSUS

MICHAEL MCINTOSH, ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit,
Parish of Natchitoches

McCallum, J., Dissents with reasons.

I respectfully dissent from the majority opinion because I disagree with its conclusion that under the UM statute a signed and dated UM form with no selection equates to a selection of UM coverage.

The revised UM form prescribed by the commissioner of insurance as per LDOI Bulletin 08-02 provides no option for the insured to select UM coverage with limits equal to the bodily injury liability limits of the policy. Thus, the issue is whether the failure of the insured to initial an option on the signed and dated 2012, 2013, and 2014 forms constitutes a valid, effective election of UM coverage in amounts equal to the bodily injury liability limits of the policy. After a close examination of the UM coverage statute in conjunction with the UM form prescribed by the commissioner of insurance, I find it does not.

Louisiana R.S. 22:1295(1)(a)(i) provides that UM coverage in amounts not less than the limits of bodily injury liability coverage is provided in a policy, unless the insured "either rejects coverage, selects lower limits, or selects economic-only coverage, in the manner provided in Item (1)(a)(ii) of this Section." Item (1)(a)(ii) provides that "[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. . . . A properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected coverage, selected a lower limit, or selected economic-only coverage." La. R.S. 22:1295(1)(a)(ii).[1] Thus, the purpose of the UM form is to allow the insured to reject UM coverage, select lower limits, or select economic-only UM coverage. The purpose is expressed on the form, which provides, in pertinent part:

> *By law*, your policy will include UMBI Coverage at the same limits as your Bodily Injury Liability Coverage unless you request otherwise. *If you wish to reject UMBI Coverage, select lower limits of UMBI Coverage, or select Economic-Only UMBI Coverage, you must complete this form* and return it to your insurance agent or insurance company. [Emphasis added].

When a liability policy is initially purchased or the bodily injury liability limits of the policy are changed, UM coverage in amounts equal to the bodily injury liability limits is read into the policy in the absence of a differing selection. See La. R.S. 22:1295(1)(a)(i). Thus, when a policy is initially purchased or its liability limits are changed, a UM form submitted by the insured which is signed and dated with no option initialed (blank) is not properly completed as required by the UM statute, because it does not fully comply with the instructions set forth in LDOI Bulletin 08-02. Thus, the incomplete form has no practical effect and results in UM coverage in amounts equal to the policy bodily injury liability limits being read into the policy.

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[1]LDOI Bulletin 08-02, which was admitted into evidence over Zurich's objection, included the instructions for properly completing the newly revised UM form. It provides, in pertinent part:

> **Other Information and Instructions**
>
> The following tasked must be completed by the insured:
>
> -His/Her signature
> -His/Her printed name to identify his/her signature
> -The date the form is completed
> -Initials to select/reject UMBI coverage prior to signing the form.
>
> If the insured selects lower limits (available in options 1 and 3 of the revised UM form) the exact amount of coverage must be printed on the appropriate line of the revised UM form prior to the insured signing the form.

However, upon renewal of a policy, a UM form submitted by the insured which is signed and dated with no option initialed, likewise, has no effect and results in the prior, valid rejection of UM coverage in the policy remaining in effect. See La. R.S. 22:1295(1)(a)(ii) ("The form signed by the insured or his legal representative which initially rejects coverage, selects lower limits, or selects economic-only coverage shall remain valid for the life of the policy.").

The UM form includes no option for an insured to select UM coverage equal to the bodily injury liability limits of the policy. The UM statute, however, at §1295(1)(b) provides that an insurer "s*hall also* permit the insured, *at his written request*, to increase the coverage applicable to uninsured motor vehicles . . . to any available limit up to the bodily injury liability coverage limits afforded under the policy." (Emphasis added). Thus, the statute provides a means by which an insured, whose existing policy contains no UM coverage due to a prior valid rejection (such as in this case), or whose policy contains UM coverage less than the bodily injury liability limits of the policy due to a prior selection, can obtain UM coverage up to the liability limits of the policy. Although the UM statute does not define the term "written request," that term is referred to in the UM form immediately above the insured's or its legal representative's signature line. The provision reads:

> The choice indicated and initialed on this form will apply to all persons and/or entities insured under this policy. This choice shall apply to the motor vehicles described in this policy and to any replacement vehicles, to all renewals of this policy, and to all reinstatement, substitute or amended policies *until a written request is made for a change in the Bodily Injury Liability Limits, the UMBI limits or UMBI Coverage*. [Emphasis added].

"When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit." La. R.S. 1:4. "Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the language. …The word 'shall' is mandatory and the word 'may' is permissive." La. R.S. 1:3. While the prescribed UM form

may function as a written request to change UM coverage or UM limits in some instances, I cannot say the legislature intended for the UM form and a written request, as construed in §1295(1)(b), to always be one and the same; to do so would render §1295(1)(b) superfluous. As the UM form no longer includes an option to select UM coverage with the same bodily injury liability limits indicated on the policy, the only way to reconcile §1295(1)(a)(ii) and §1295(1)(b) is to allow an insured to use the UM form to add UM coverage when: a) the insured is selecting greater coverage than it had but not equal to liability limits (*i.e.*, UM coverage with limits lower than the policy liability limits); or b) selecting economic-only coverage. A written request, then, is to be used when an insured who previously rejected UM coverage or selected coverage with limits less than the policy liability limits wants to elect UM coverage equal to the liability limits. Otherwise, §1295(1)(b) is not required.

Given the UM statute allows an insured, who has an existing policy with no UM coverage due to a valid rejection, to elect UM coverage up to the bodily injury liability limits of the policy (a change in its original rejection) by submitting a written request to the insurer, I find the majority erred in determining that "[t]he plain language of the UM statute dictates that the failure to initial any of the options available on the UM form necessarily results in statutory UM coverage." *Baack v. McIntosh*, 20-1054, 20-1117, slip op. at 8 (La. __/__/__). Likewise, I find the majority erred in concluding the signed and dated UM form with no selection initialed by Ms. Rockwell in 2014 equates to a selection of UM coverage. Whether JBS changed its valid 2011 UM rejection with the signed and dated UM form with no selection initialed in 2014 was for the jury to determine.

Under the manifest error standard of review, a court of appeal may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Snider v. Louisiana Med. Mut. Ins. Co*., 2013-0579, p. 20 (La.

12/10/13), 130 So. 3d 922, 938, citing *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). There is a two-part test for the reversal of the fact-finder's determinations: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record established that the finding is clearly wrong or manifestly erroneous. *Stobart v. State, Department of Transportation and Development*, 617 So. 2d 880, 882 (La. 1993). Thus, the issue to be resolved by a reviewing court is not whether the trier-of-fact was right or wrong, but whether the fact-finder's conclusion was a reasonable one. *Id*.

The parties stipulated at trial that Mr. Trupkiewicz executed a valid UM form rejecting UM coverage in November 2002 at the inception of the policy and a new, valid UM rejection form in June 2011 when JBS increased its business automobile policy bodily injury liability limits from $3,000,000.00 to $5,000,000.00. Regarding the insurance coverage issue, the evidence presented to the jury included the business automobile insurance policies; the UM forms executed by Mr. Trupkiewicz in 2002 and 2011; those executed by Ms. Rockwell in 2012, 2013 and 2014; the LDOI Bulletin 08-02, including the instructions for completing the form properly; Mr. Margis' trial deposition; and Mr. Margis' affidavit averring that "[a]t no time from June 2011 through the date of plaintiff Mr. Baack's accident, did JBS make a written request to change its rejection of UMBI coverage."

Based on the aforementioned evidence, I find it was reasonable for the jury to conclude that the Zurich policy did not provide UM coverage for Mr. Baack's accident because: (1) the signed and dated blank UM forms submitted by Ms. Rockwell in 2012, 2013 and 2014 were not properly completed and thus had no effect on the existing policy with no UM coverage, or (2) the insured never submitted a written request to the insurer to change or revoke its existing UM waiver under the policy. I find no support in the record for the court of appeal's conclusion that

"Zurich clearly required JBS to submit a new selection form every year when it renewed its policy …[t]hus, if Zurich requires its insured to execute a new UM selection form at each policy renewal, contrary to La. R.S. 22:1295(1)(a)(ii), it bears the consequences of the form being completed, as it was in this matter, in accordance with [LDOI] Bulletin 08-02." *Baack v. McIntosh,* 19-657, p. 20 (La. App. 3 Cir. 7/29/20), 304 So. 3d at 897-98. The record contains no evidence that Zurich required its insured to submit a new UM form every year upon renewal of a policy. Rather, Mr. Margis, the Zurich underwriter who handled the Swift Foods/JBS account for nearly 16 years, testified the UM coverage form "is a standard form that would go out annually," with no elaboration. The record contains no testimony or affidavit from Ms. Rockwell who could have explained why she submitted the signed and dated blank UM forms to Zurich upon renewing the business automobile policy in 2012, 2013 and 2014. Without such evidence, I cannot say the jury's finding is clearly wrong or manifestly erroneous. Therefore, I would reverse the court of appeal and reinstate the trial court judgments rendered in accord with the jury's verdict.