

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0875

DANA LEE

VERSUS

ZURICH AMERICAN INSURANCE COMPANY

Judgment Rendered: December 21, 2011.

On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. C571139

The Honorable Wilson Fields, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

BFL
TMK
RHB

CARTER, C.J.

This is an appeal from a summary judgment granted in favor of defendant, Zurich American Insurance Company (Zurich), dismissing plaintiff's case after finding a valid waiver of uninsured/underinsured motorist (UM) coverage. We affirm.

FACTS AND PROCEDURAL HISTORY

Dana Lee instituted suit against Zurich as the UM carrier of her employer, Washington Inventory Services, Inc. (WIS). Lee contended that she was involved in an accident while operating a vehicle owned by her employer and that the policy limits of the other driver's vehicle were inadequate to cover her damages. It is undisputed that an authorized agent of WIS executed a UM selection form purporting to reject UM insurance on WIS's behalf.

Zurich filed a motion for summary judgment, seeking dismissal of Lee's claims on the grounds that Lee's employer had validly rejected UM coverage. Zurich supported its motion with the UM selection form as well as Kandra Olsen's affidavit, wherein she attested that she had been WIS's risk manager and in that capacity, had signed the UM selection form with the knowledge that she was rejecting UM coverage on behalf of WIS. Lee opposed the motion, arguing that the UM selection form is invalid, because four of the five blanks next to the UM selection options were marked "N/A" in type, with only the fifth line next to the UM rejection option initialed by WIS's representative. The trial court rejected Lee's argument, granted Zurich's motion for summary judgment, and dismissed Lee's case against Zurich. Lee now appeals.

DISCUSSION

Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Bozarth v. State LSU Medical Center/Chabert Medical Center*, 09-1393 (La. App. 1 Cir. 2/12/10), 35 So. 3d 316, 323. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. Ann. art. 966B. Whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can properly be resolved within the framework of a motion for summary judgment. *Reno v. Travelers Home and Marine Ins. Co.*, 02-2637 (La. App. 1 Cir. 11/7/03), 867 So. 2d 751, 753.

The burden of submitting evidence for the hearing on the motion for summary judgment is placed initially on the mover, who can ordinarily meet that burden by submitting depositions or affidavits or by pointing out the lack of factual support for an essential element in the opponent's case. *See* La. Code Civ. Proc. Ann. art. 966C(2); *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*, 09-1633 (La. 4/23/10), 35 So. 3d 1053, 1059. At that point, the party who bears the burden of persuasion at trial must come forth with evidence that demonstrates he will be able to meet his burden at trial. *Cheremie*, 35 So. 3d at 1059; *see* La. Code Civ. Proc. Ann. art. 966C(2). Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the

motion. *Cheramie*, 35 So. 3d at 1059; *see* La. Code Civ. Proc. Ann. art. 966C(2). A fact is material when its existence or nonexistence may be essential to a plaintiff's cause of action under the applicable theory of recovery. *Cheramie*, 35 So. 3d at 1059. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. *Id.*

An insurer has the burden of proving by clear and unmistakable evidence that a UM selection form is valid. *See Gray v. American Nat. Property & Cas. Co.*, 07-1670 (La. 2/26/08), 977 So. 2d 839, 845. An enforceable UM selection form must comply with the six factors outlined by the Louisiana Supreme Court in *Duncan v. U.S.A.A. Ins. Co.*, 06-363 (La. 11/29/06), 950 So. 2d 544, 551:

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

However, rote compliance of these tasks by someone at sometime is insufficient. *Gray*, 977 So. 2d at 849. “[T]he six tasks must be completed before the UM selection form is signed by the insured, such that the signature of the insured or the insured’s representative signifies an acceptance of and agreement with all of the information contained on the form.” *Id.* 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. Rev. Stat. Ann. § 22:1295(1)(a)(ii).

In this case, Zurich supported its motion for summary judgment with the UM selection form. The form directs that only one option should be initialed. Kandra Olsen, WIS's authorized representative, initialed the line next to the option rejecting UM coverage. She also printed and signed the form in the appropriate places. The policy number is indicated on the form and the form is appropriately dated.

In her affidavit, Olsen indicated that when she signed the form she understood that she was rejecting UM coverage on behalf of WIS. Olsen further indicated that prior to signing the form, she discussed it with the insurance broker and fully understood the nature of rejecting UM coverage.

We find that Zurich met its initial burden on the motion for summary judgment. The burden then shifted to Lee to produce evidence of a material factual dispute. Lee contends that the UM selection form is invalid because "N/A" was typed into the spaces next to four of the five options on the form (all except the line on which Olsen placed her initials). Specifically, Lee contends the inclusion of the type-written "N/A" on the four lines amounts to a violation of *Duncan's* first factor, which is "initialing the selection or rejection of coverage chosen."

Zurich established that Olsen initialed on the line indicating she was rejecting UM coverage on behalf of WIS, printed and signed her name, and dated the form, meeting the requirements of both *Duncan* and *Gray*. The inclusion of "N/A" in type on the other lines does not create a genuine issue of material fact regarding the validity of the form. There has been no indication that WIS's choices with regard to UM coverage were in any way

limited.¹ Thus, we conclude that Zurich has shown by clear and unmistakable evidence that the UM selection form was valid. Thereafter, Lee failed to rebut the presumption that WIS knowingly rejected UM coverage. Summary judgment was properly granted.

CONCLUSION

For the foregoing reasons, the judgment of the trial court granting summary judgment in Zurich's favor and dismissing plaintiff's petition is affirmed. Costs of this appeal are assessed to Dana Lee.

AFFIRMED.

¹ We note that this court has recently upheld the validity of a UM selection form in a case where the summary judgment evidence established that, after discussions between the insurer and the company representative, the form was presented to the company representative for completion with "N/A" already typed on all blanks except the one indicating rejection of UM coverage. See *Walker v. Walker*, 10-1865 (La. App. 1 Cir. 5/6/11) (unpublished). In this case, Olsen did not indicate that the form was presented to her with "N/A" already typed on it.