NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1960

KENNON CARR AND ROSALYN S. CARR, INDIVIDUALLY AND ON BEHALF OF THE MINOR CHILDREN, KENNON CARR, JR., AND TAMOZ CARR

VS.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, BRANDON M. CALDWELL, AIG NATIONAL INSURANCE COMPANY, JENNIFER JONES AND TALMADGE JONES

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JUDGMENT RENDERED: JUNE 8, 2007

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ON APPEAL FROM THE
TWENTY-FIRST JUDICIAL DISTRICT COURT
DOCKET NUMBER 97,678 DIVISION E
PARISH OF LIVINGSTON, STATE OF LOUISIANA

HONORABLE BRENDA B. RICKS, JUDGE

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BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

McDONALD, J.

State Farm Fire and Casualty Company (State Farm) appeals a trial court judgment in favor of the plaintiff, Rosalyn Carr, ordering State Farm to pay the full amount of its policy limits to Ms. Carr. We affirm.

FACTUAL AND PROCEDURAL HISTORY

This matter arises out of a multi-vehicle accident that occurred in Livingston parish on October 7, 2001. On the date of the accident, Jennifer Jones (Ms. Jones) was driving her vehicle westbound on I-12, while towing a vehicle operated by Talmadge Jones (Mr. Jones). For reasons that are not clear from the record, Ms. Jones lost control of her vehicle, causing both Jones vehicles to come to a stop on the interstate median, partially obstructing the left westbound lane of I-12.

While the Jones vehicles were still partially blocking the roadway, Brandon Caldwell was driving a truck in the left westbound lane of I-12, and Ms. Carr was driving a vehicle in the right westbound lane.[1] As Mr. Caldwell proceeded in his lane of travel, a vehicle in front of him suddenly swerved to the right to avoid the Jones vehicles. Mr. Caldwell also swerved to the right; however, as he entered the right lane, his vehicle struck the Carr vehicle and forced it off the road. Ms. Carr sustained serious injuries as a result of the accident.

Ms. Carr filed suit in the 21st Judicial District Court against Mr. Caldwell, the Joneses, and their respective automobile liability insurance companies.[2] Ms. Carr also filed suit against State Farm,[3] the company that provided uninsured motorist (UM) coverage on the vehicle she was driving at the time of the accident. Eventually, Ms. Carr settled her claims against the Joneses and their insurers for the $10,000.00 limits of their respective policies. In addition, Ms. Carr settled her

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[1] Mr. Caldwell was driving the truck with the permission of the owner, Steven Buckley, and Ms. Carr was driving a vehicle with the permission of the owner, Jackie Dillon.

[2] Ms. Carr's husband and two children were in the vehicle with her at the time of the accident and joined the suit, seeking damages for their injuries. Those claims have been settled, and they are not currently before this court.

[3] State Farm was apparently incorrectly listed as State Farm Mutual Automobile Insurance Company in the petition.

claims against Mr. Caldwell and his insurer for the $50,000.00 limits of his policy. The matter then continued as to Ms. Carr's claims against State Farm for UM benefits. The State Farm policy provided limits of $50,000.00 per person.

On August 24, 2004, the trial court conducted a bifurcated trial on the issue of apportionment of fault. In addition, because Ms. Carr was a resident of Mississippi at the time of the accident, and the State Farm policy had been issued in Mississippi in favor of a vehicle registered and garaged in Mississippi, the trial court considered the issue of whether Louisiana or Mississippi UM law applied to the interpretation of the State Farm policy.[4] On September 22, 2004, the trial court issued written reasons for judgment apportioning 50% of the fault for causing the accident to Ms. Jones, 30% to Mr. Jones, and 20% to Mr. Caldwell. The trial court further found that Mississippi UM law applied to the interpretation of the State Farm policy. On March 16, 2005, the trial court signed a judgment in accordance with those reasons. The judgment further recognized the stipulation of Ms. Carr and State Farm that the damages sustained by Ms. Carr as a result of the accident totaled $350,000.00.[5]

Subsequently, Ms. Carr and State Farm filed cross-motions for summary judgment on the issue of whether Ms. Carr was entitled to collect UM benefits under the State Farm policy. After the parties submitted the matter on briefs, the trial court issued written reasons for judgment in favor of the plaintiff. On July 5, 2006, the trial court signed a judgment ordering State Farm to pay Ms. Carr the full $50,000.00 limits of its policy. State Farm has appealed.

DISCUSSION

Mississippi courts have long held that before the UM provisions of a policy can be invoked, it must first be determined whether the tortfeasor's vehicle is an

[4] The Joneses and Mr. Caldwell were all domiciled in Louisiana.
[5] That judgment has not been appealed.

uninsured motor vehicle.[6] **Wise v. United Services Automobile Association**, 861 So.2d 308, 312 (Miss. 2003). Pursuant to Miss. Code Ann. § 83-11-103(c)(iii), an uninsured motor vehicle is defined to include:

> An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage[.]

Thus, the Mississippi statutory definition of uninsured motor vehicle, as amended to incorporate the underinsured concept, compares the limits of the tortfeasor's liability coverage to the limits applicable to the insured person provided under his uninsured motorist coverage. **Wise**, 861 So.2d at 312. The focus in determining whether the tortfeasor's vehicle is uninsured is on the respective limits of the policies, because Mississippi law defines an uninsured vehicle in terms of policy limits, rather than in terms of proceeds actually received by a particular claimant. **Wise**, 861 So.2d at 313.

On appeal, State Farm contends that it does not owe Ms. Carr any UM benefits, because Mississippi law allows it to combine the limits of the tortfeasors' liability insurance policies to determine whether a vehicle is uninsured under the law. Specifically, State Farm reasons that because the tortfeasors' combined liability policy limits total $70,000.00, which is greater than the $50,000.00 limits available to Ms. Carr under the UM policy, Ms. Carr is not entitled to recover any UM benefits. Although State Farm contends that Mississippi law supports its position, the Mississippi courts have not directly ruled on whether the liability limits available to multiple tortfeasors may be combined to determine uninsured motor vehicle status.

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[6] The State Farm policy defines an uninsured motor vehicle to include:

> (1) a land motor vehicle, the ownership, maintenance or use of which is:
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> ***
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> b. insured or bonded for bodily injury liability and property damage liability at the time of the accident; but
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> (1) the limits of liability are less than the limits of liability of this coverage under this policy[.]

In support of its argument, State Farm cites **Allstate Insurance Company v. Hilbun**, 703 F.Supp. 533 (S.D. Miss. 1988). In that case, Machel Hilbun was injured in an automobile accident involving two other vehicles. One of the vehicles was driven by Ellen Crawford and had liability insurance with per person limits of $10,000.00. The other vehicle was driven by David Richardson and had liability insurance with per person limits of $350,000.00. Hilbun made claims against Crawford, Richardson, and their respective insurers, as well as against Allstate, Hilbun's UM carrier. The Allstate policy provided UM bodily injury limits of $100,000.00 per person. **Hilbun**, 703 F.Supp. at 536.

Although the liability of Crawford and Richardson had not yet been established, Allstate sought a declaratory judgment that neither of the alleged tortfeasors' vehicles was an uninsured vehicle under Mississippi law. In applying the "limits to limits" comparison required by Mississippi law, the court concluded that the Richardson vehicle could not be an uninsured vehicle under the law, because the $350,000.00 liability limits applicable to the vehicle were greater than the $100,000.00 UM limits available to Hilbun. However, the court suggested that the Crawford vehicle could be considered uninsured, since the limits of liability applicable to that vehicle were substantially less than the limits provided by Hilbun's UM policy. **Hilbun**, 703 F.Supp. at 536-37.

Allstate contended that neither vehicle was uninsured because the combined limits of liability insurance available to Hilbun exceeded the limits of her UM policy. Allstate acknowledged that no Mississippi court had ruled on the issue, but relied on **Scharfschwerdt v. Allstate Insurance Company**, 430 So.2d 578, 579 (Fla. 1983), in which the Florida Supreme Court held:

> Where two tortfeasors are jointly and severally liable for damages caused to a third person in an automobile accident, although one tortfeasor is uninsured or underinsured, if the other tortfeasor has liability insurance with policy limits equal to, or greater than, those contained in uninsured motorist coverage possessed by the injured

third person, the injured third person cannot recover under his own uninsured motorist policy.

The **Hilbun** court acknowledged that the logic of **Scharfschwerdt** was persuasive, but declined to resolve the issue at that time because material factual issues remained unresolved. Specifically, the court stated:

> Allstate's reliance on the rule stated in **Scharfschwerdt** appears to be based on an assumption that Crawford and Richardson are joint tortfeasors and hence are jointly liable for Hilbun's damages. Under Mississippi law, two tortfeasors may be held equally liable for the entire damage sustained where their concurrent negligence produces a single indivisible injury. And, the victim of that negligence may maintain an action for that tortious conduct against and collect damages from either of the tortfeasors. Here, a determination has not yet been made that Richardson and Crawford are jointly and severally liable, or in fact that either is liable, for damages to Hilbun. It has not been established that either party was negligent, whether one party was solely responsible for the accident and if so whom, or whether, as Allstate seems to assume, both Richardson and Crawford were at fault.

Hilbun, 703 F.Supp. at 536-37 [citations omitted].

We find **Hilbun** inapplicable to the matter before us. First, the court's discussion of the persuasiveness of **Scharfschwerdt** is dicta, as the court specifically stated that it was not resolving the issue at that time. Secondly, we note that the reasoning of both **Scharfschwerdt** and **Hilbun** is predicated on the joint and several liability of the tortfeasors for the full amount of the judgment. Under Mississippi law in effect at the time **Hilbun** was rendered, two or more tortfeasors could be held equally liable for the entire damage sustained by the injured party where the tortfeasors' concurrent negligence produced a single indivisible injury.[7] **Hilbun**, 703 F.Supp. at 536; see also, **Woodfield v. Bowman**, 1995 WL 41716 (E.D. La. 1995). However, that is not the law applicable to the matter before this court.

[7] In 1989, the Mississippi Legislature enacted Miss. Code Ann. § 85-5-7, which abolished joint and several liability for any amount over 50% of the value of the judgment, but retained joint and several liability for any amount up to 50% of the value of the judgment. **Narkeeta Timber Company, Inc. v. Jenkins**, 777 So.2d 39, 42 (Miss. 2000). In 2004, the legislature amended the statute to provide for several liability for joint tortfeasors, except where the tortfeasors consciously and deliberately pursue a common plan or design to commit a tortious act.

In this matter, the trial court properly applied Louisiana law to the issue of the allocation of fault among the tortfeasors.[8] After a trial, the court allocated 50% of the fault for the accident to Ms. Jones, 30% to Mr. Jones, and 20% to Mr. Caldwell. Pursuant to La. C.C. art. 2324(B), each tortfeasor is only responsible for his or her degree of fault rather than the entire judgment. Because the individual tortfeasors do not share liability for any damages with each other, we find that the limits of liability available to each of them may not be cumulated to determine uninsured motor vehicle status. Accordingly, the limits of the liability policy applicable to each tortfeasor must be compared individually to the UM limits available to Ms. Carr. After applying such a "limits to limits" comparison, we determine that the Jones vehicles are each uninsured, as each only had applicable liability limits of $10,000.00; however, the Caldwell vehicle is not uninsured, as it had applicable liability limits of $50,000.00, which were equal to the UM limits available to Ms. Carr. We believe this result to be in accordance with the stated policies behind the Mississippi UM law, which are (1) to liberally construe the statute in favor of the insured and (2) to strictly avoid or preclude exceptions or exemptions from coverage.[9] **Wise**, 861 So.2d at 316.

State Farm next contends that, in accordance with the Mississippi Supreme Court's ruling in **Wise**, 861 So.2d at 319, the language of its policy allows it to offset any payment it is required to make under the UM portion of the policy with

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[8] Although the trial court did not specifically find that Louisiana law applied to this issue, it is clear that Louisiana choice of law rules require such a result. Louisiana Civil Code article 3544 provides, in pertinent part:

> Issues pertaining to loss distribution and financial protection are governed, as between a person injured by an offense or quasi-offense and the person who caused the injury, by the law designated in the following order:
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> ***
>
> (2) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in different states: (a) when both the injury and the conduct that caused it occurred in one of those states, by the law of that state[.]

[9] To that end, Mississippi courts have often held that an injured party may stack the limits of all UM policies available to him to determine whether the tortfeasor is an uninsured motorist. Thus, if the injured insured's UM policies add up to an aggregate dollar amount that exceeds the amount of automobile liability coverage available to the tortfeasor, UM coverage is available to the injured insured. **Meyers v. American States Insurance Company**, 914 So.2d 669, 674 (Miss. 2005). These rulings demonstrate that Mississippi courts allow stacking in favor of an injured insured; however, such a liberal interpretation of the law to promote coverage would seem to preclude a ruling authorizing a UM carrier to stack available liability policies from multiple tortfeasors with divisible liability in order to defeat an injured insured's claim for UM benefits.

any payments or settlements received by Ms. Carr from any of the tortfeasors. With regard to UM coverage, the State Farm policy provides, in pertinent part:

> **Limits of Liability – Coverages U and U1**
>
> ***
>
> 3. **Bodily Injury and Property Damage**
>
> a. The most we will pay is the lesser of:
>
> (1) the difference between the limits of liability of this coverage, and the amount payable to the insured by or for any person or organization who is or may be held legally liable for the bodily injury or property damage; or
>
> (2) the amount of the insured's damages.

In **Wise**, the plaintiffs were pedestrians who were struck by a pickup truck as they crossed the street. The plaintiffs filed suit against numerous parties, including the owner of the vehicle and the bar that had allegedly over-served alcohol to the driver of the truck before the accident. The plaintiffs had available UM coverage of $600,000.00, which they demanded from their UM insurer, United Services Automobile Association (USAA). After settling with the owner of the truck for the full $300,000.00 limits of his policy, the plaintiffs lowered their demand to USAA to $300,000.00 to reflect the settlement. The plaintiffs later settled with the owner of the bar for an undisclosed amount; however, the plaintiffs advised USAA that the amount of the settlement exceeded the available UM coverage. Nevertheless, the plaintiffs insisted that they were entitled to the remaining $300,000.00 in UM coverage because they had not been fully compensated for their damages. **Wise**, 861 So.2d at 310. Although the court found that the truck that had struck the plaintiffs was an uninsured vehicle, the court determined that no UM benefits were payable, because pursuant to the

language of the policy, USAA was entitled to offset its UM payments by any judgments and settlements paid to the insureds.[10] **Wise**, 861 So.2d at 319.

In its brief to this court, State Farm argues that the Mississippi court did not concern itself with joint and several liability or percentages of fault in rendering its decision; rather, the court merely added up the settlements received by the plaintiffs and compared them to the total UM benefits available to the plaintiffs. State Farm contends that **Wise** is dispositive of this matter before this court and urges this court to deny Ms. Carr's claim for UM benefits accordingly. We disagree.

Although the Mississippi court does not specifically address the issue of allocation of fault in its ruling, it is clear that any ruling must be rendered in light of the law in effect at the time the judgment is rendered. At the time **Wise** was decided, Mississippi law no longer provided for joint and several liability for the entire amount of the judgment; however, joint and several liability among the tortfeasors had been retained for the first 50% of the amount of the judgment. Therefore, for the first 50% of the amount of a judgment, the various tortfeasors were jointly and severally liable for the same debt.

By contrast, the law applied to this matter provides that the tortfeasors' debts are entirely divisible. Each tortfeasor is liable only for the percentage of fault allocated to him, and any payment received from, or on behalf of, one tortfeasor is not attributable to the debt of another. Furthermore, no tortfeasor may be considered legally liable for the bodily injury or damages attributable to any other tortfeasor. Accordingly, we find that any payments made by, or on behalf of, one tortfeasor in satisfaction of his debt cannot be used to offset UM benefits paid on the debt of another tortfeasor.

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[10] The USAA policy at issue provided that USAA would pay under the UM coverage "only after the limits of liability under any applicable liability bonds or policies, or deposits of cash or securities have been exhausted by payment of judgments or settlements." **Wise**, 861 So.2d at 319.

In applying the above principles, we find that Ms. Jones was an uninsured motorist under Mississippi law, and Ms. Carr is entitled to UM benefits pursuant to the State Farm policy. State Farm may offset the amount it owes Ms. Carr for payments with the $10,000.00 payment Ms. Carr received from Ms. Jones's insurer. Accordingly, Ms. Carr is entitled to receive UM benefits of $40,000.00 from State Farm as payment for the debt of Ms. Jones. We further find that Mr. Jones was an uninsured motorist under Mississippi law, and Ms. Carr is entitled to UM benefits pursuant to the State Farm policy. However, Ms. Carr had a total of $50,000.00 in UM benefits available to her. As Ms. Carr was paid $40,000.00 for the debt of Ms. Jones, she may only recover the remaining $10,000.00 in UM benefits as payment for the debt of Mr. Jones.

For the above reasons, the judgment of the trial court is affirmed. All costs of this appeal are assessed to State Farm Fire and Casualty Company.

AFFIRMED.