NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 2591

LOUISE K. ROBERTSON, RHYNELL ROBERTSON, EDITH ROBERTSON, ROMA HENDERSON, AMANDA ROBERTSON, ROXANNE ROBERTSON, CHICQUITA ROBERTSON, BARBARA EDMOND AND BELINDA ROBERTSON

VERSUS

EMPIRE FIRE AND MARINE INSURANCE COMPANY AND EMPIRE INDEMNITY INSURANCE COMPANY

Judgment Rendered: JUN 19 2009

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 524,560

Honorable Kay Bates, Judge

* * * * * * *

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

WELCH, J.

In this action for damages arising out of a tragic motor vehicle accident, the plaintiffs appeal a summary judgment granted in favor of the defendants, Empire Fire and Marine Insurance Company and Empire Indemnity Insurance Company (collectively referred to as "Empire"), which dismissed the plaintiffs' uninsured/underinsured motorist ("UM") claims against Empire. For reasons that follow, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

On September 20, 2002, Aaron Robertson, Jr. was operating an eighteen-wheel tractor-trailer owned by Taylor Propane Gas, Inc. ("Taylor Propane") southbound on U.S. Highway 90 in Henderson, Louisiana, near its intersection with Louisiana Highway 92, when Chyrl L. Savoy, who was operating a Dodge Caravan, pulled out onto U.S. Highway 90 in front of Mr. Robertson and caused a collision. As a result of the collision, the tractor-trailer driven by Mr. Robertson caught fire. Mr. Robertson was unable to escape from the burning vehicle and died.

The plaintiffs are Louise K. Robertson, the surviving spouse of Mr. Robertson, and Rhynell Robertson, Edith Robertson, Belinda Robertson, Amanda Robertson, Chicquita Robertson, Barbara Edmond, Roxanne Robertson, and Roma Henderson, the surviving children of Mr. Robertson. On September 27, 2004, the plaintiffs filed a petition for damages against Empire, Taylor Propane's liability insurer, alleging that Empire provided UM coverage to Taylor Propane on the vehicle driven by Mr. Robertson.[1] Thereafter, Empire filed a motion for summary judgment, seeking the dismissal of the plaintiffs' claims against it on the basis that James Ballengee, the Vice-President of Taylor Propane, had executed a rejection of

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[1] Ms. Savoy had a policy of liability insurance issued by State Farm Mutual Automobile Insurance Company ("State Farm"). At the time the petition for damages was filed in this matter, State Farm had already paid its policy limits to the plaintiffs.

UM coverage form on behalf of its named insured, Taylor Propane, prior to the date of the accident. The plaintiffs filed a cross motion for partial summary judgment on the issue of UM coverage.

By judgment signed on September 17, 2008, the trial court granted the motion for summary judgment filed by Empire, dismissed the plaintiffs' suit, and denied the motion for partial summary judgment filed by the plaintiffs. From this judgment, the plaintiffs appeal.

II. ASSIGNMENTS OF ERROR

On appeal, the plaintiffs assert that the trial court erred in granting Empire's motion for summary judgment because: (1) the policy that was issued after the execution of the UM rejection form contained an endorsement specifically providing UM coverage and did not list the UM rejection form as part of the policy or attach it to the policy, thereby creating an ambiguous policy that is to be construed in favor of the insured and against the insurer; (2) the policy provided UM coverage to certain vehicles, but not the vehicle driven by Mr. Robertson at the time of the accident, thereby violating the requirement that UM coverage attaches to a person, not to a vehicle; and (3) there were genuine issues of material fact as to whether the UM rejection form contained Taylor Propane's name and the policy number at the time it was executed.[2]

III. LAW AND DISCUSSION

A. Summary Judgment Law

A motion for summary judgment should be granted only if the pleadings,

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[2] On appeal, the plaintiffs also asserted that the trial court erred in granting the defendants motion for summary judgment because the UM rejection form did not contain the printed name of Taylor Propane's vice-president, James Ballengee, citing **Harper v. Direct General Insurance Company of Louisiana**, 2008-31 (La. App. 3rd Cir. 11/5/08), 998 So.2d 783, and this court's decision in **Banquer v. Guidroz**, 2008-0356 (La. App. 1st Cir. 12/23/08), 5 So.3d 206. However, in light of the Louisiana Supreme Court's recent decision in **Harper v. Direct General Ins. Co. of La.**, 2008-2874 (La. 2/13/09), 2 So.3d 418 (per curiam), which was rendered after the briefs in this matter were filed, the plaintiffs withdrew this assignment of error at oral arguments. See also **Banquer v. Guidroz**, 2009-0466 (La. 5/15/09), ___ So.3d ___ (per curiam).

depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). In determining whether summary judgment is appropriate, conduct a *de novo* review under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Green v. State Farm Mutual Automobile Insurance Company**, 2007-0094, p. 3 (La. App. 1st Cir. 11/2/07), 978 So.2d 912, 914, writ denied, 2008-0074 (La. 3/7/08), 977 So.2d 917.

On a motion for summary judgment, if the issue before the court is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. La. C.C.P. art. 966(C)(2); **Buck's Run Enterprises, Inc. v. MAPP Construction, Inc.**, 99-3054, p. 4 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. An insurer seeking to avoid coverage through summary judgment must prove some provision or exclusion applies to preclude coverage. **Halphen v. Borja**, 2006-1465, p. 5 (La. App. 1st Cir. 5/4/07), 961 So.2d 1201, 1205, writ denied, 2007-1198 (La. 9/21/07), 964 So.2d 338. Therefore, in this case, the burden of proof on the motion for summary judgment remains with Empire.

The issue of whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can be resolved properly within the framework of a motion for summary judgment. **Green**, 2007-0094 at p. 3, 978 So.2d at 914. Summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. *Id.*

B. Rejection of UM Coverage

At the applicable time period herein, La. R.S. 22:1406(D) provided, in

pertinent part, as follows:[3]

> D. The following provisions shall govern the issuance of uninsured motorist coverage in this state:
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> (1)(a)(i) 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 Subsection 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; however, the coverage required under this Subsection is not applicable when any insured named in the policy either rejects coverage, selects lower limits, or selects economic-only coverage, in the manner provided in Item D(1)(a)(ii) of this Subsection. In no event shall the policy limits of an uninsured motorist policy be less than the minimum liability limits required under [La.] R.S. 32:900, unless economic-only coverage is selected as authorized herein. Such coverage need not be provided in or supplemental to a renewal, reinstatement, or substitute policy when the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer or any of its affiliates. The coverage provided under this Subsection may exclude coverage for punitive or exemplary damages by the terms of the policy or contract. Insurers may also make available, at a reduced premium, the coverage provided under this Subsection with an exclusion for all noneconomic loss. This coverage shall be known as "economic-only" uninsured motorist coverage. Noneconomic loss means any loss other than economic loss and includes but is not limited to pain, suffering, inconvenience, mental anguish, and other noneconomic damages otherwise recoverable under the laws of this state.
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> (ii) After September 1, 1987, such rejection, selection of lower limits, or selection of economic-only coverage shall be made only on a form prescribed by the commissioner of insurance. The prescribed form shall be provided by the insurer and signed by the named insured or his legal representative. *The form signed by the named insured or his legal representative which initially rejects such coverage, selects lower limits, or selects economic-only coverage shall be conclusively presumed to become a part of the policy or contract when issued and delivered, irrespective of whether physically attached thereto. A properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected coverage, selected a lower limit,*

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[3] Louisiana Revised Statutes 22:1406(D) was redesignated La. R.S. 22:680 by 2003 La. Acts, No. 456, § 3. Additionally, pursuant to 2008 La. Acts, No. 415, § 1, effective January 1, 2009, La. R.S. 22:680 was redesignated La. R.S. 22:1295(1)(a). However, former La. R.S. 22:1406(D) was the applicable statute in effect at the time of the accident.

or selected economic-only coverage. 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 and shall not require the completion of a new selection form when a renewal, reinstatement, substitute, or amended policy is issued to the same named insured by the same insurer or any of its affiliates. 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. Any changes to an existing policy, regardless of whether these changes create new coverage, except changes in the limits of liability, do not create a new policy and do not require the completion of new uninsured motorist selection forms. For the purpose of this Subsection, a new policy shall mean an original contract of insurance which an insured enters into through the completion of an application on the form required by the insurer. Any form executed prior to September 6, 1998 shall be valid only until the policy renewal date; thereafter, the rejection, selection of lower limits, or selection of economic-only coverage shall be on a form prescribed by the commissioner as provided in this Subsection.

(iii) This Subparagraph and its requirement for uninsured motorist coverage shall apply to any liability insurance covering any accident which occurs in this state and involves a resident of this state. (Emphasis added.)

Under this statute, UM coverage is an implied amendment to any automobile liability policy, even when not expressly addressed, as UM coverage will be read into the policy unless validly rejected. See **Duncan v. U.S.A.A. Insurance Company**, 2006-363, p. 4 (La. 11/29/06), 950 So.2d 544, 547. The object of UM insurance is to provide full recovery for automobile accident victims who suffer damages caused by a tortfeasor who is not covered by adequate liability insurance. *Id.* The UM statute is to be liberally construed, and thus, exceptions to coverage are to be interpreted strictly. Any exclusion from coverage in an insurance policy must be clear and unmistakable, and the insurer bears the burden of proving any insured named in the policy rejected in writing the coverage equal to bodily injury coverage or selected lower limits. **Duncan**, 2006-363 at pp. 4-5, 950 So.2d at 547.

Thus, in this case, the determination of whether Empire was entitled to summary judgment depends on whether it had a properly completed and signed

UM coverage selection form, as prescribed by the commissioner of insurance, in which the named insured in the policy, Taylor Propane, clearly rejected such coverage.

According to the evidence submitted by Empire in support of its motion for summary judgment, Empire issued a policy of liability insurance to Taylor Propane, identified as policy CL 770698, which went into effect on November 3, 2001. Thereafter, Mr. Ballengee, in his capacity as the legal representative of Taylor Propane, signed a UM coverage selection form, as prescribed by the commissioner of insurance, identified as endorsement EM 10 04 (09-98). On the selection form, the initials "JB" were placed next to option 5, which provided "**I do not want [UM] Coverage.** I understand that **I will not be compensated through [UM] coverage** for losses arising from an accident caused by an uninsured/underinsured motorist." "Taylor Propane Gas, Inc. Taylor Gas Liquids Inc." was typed into the blank for the named insured, "CL770698" was typed into the blank for the policy number, and "11/6/01" was handwritten into the blank for the date.

In **Duncan**, 2006-363 at pp. 11-12, 950 So. 2d at 551, our supreme court examined the UM selection form prescribed by the commissioner of insurance and found that it outlined six tasks: (1) initialing the selection or rejection of coverage chosen; (2) if limits lower than the policy limits are chosen (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.

After carefully reviewing the UM selection form in this case, we find that the six tasks outlined by **Duncan** have been met; therefore, the UM rejection form was properly completed and signed, creating a rebuttable presumption that Taylor

Propane knowingly rejected UM coverage.

In opposition to Empire's motion for summary judgment, the plaintiffs contend that Empire's policy provided UM coverage, because there was insufficient evidence establishing the existence of Taylor Propane's name or Empire's policy number on the form at the time Taylor Propane executed the form; the policy issued by Empire, particularly the UM portion of the policy, was ambiguous because of absent and/or conflicting endorsements; and the policy issued by Empire provided UM coverage to certain vehicles, but not the vehicle driven by Mr. Robertson, in contravention of the prohibition against coverage attaching to the vehicle, as opposed to the person of the insured.

With regard to the plaintiffs' contention that there was insufficient evidence establishing the existence of Taylor Propane's name or Empire's policy number at the time Mr. Ballengee executed the form, the plaintiffs point to the deposition testimony of Mr. Ballengee wherein he was unable to specifically recall, due to the passage of time, whether that information was on the form when he signed it. The plaintiffs contend that, because Mr. Ballengee was unable to testify from his personal knowledge that the information was on the form when he signed it, the rejection was invalid. However, we do not find Mr. Ballengee's inability to specifically recall whether the information was on the form when he signed it sufficient to rebut the statutory presumption that the rejection of UM coverage by Mr. Ballengee was knowingly made, nor does it establish a genuine issue of material fact with regard to the rejection of UM coverage. Rather, a review of Mr. Ballengee's testimony reveals that he signed the UM selection form and that he knew he had to sign the form if he wanted to reject UM coverage on behalf of Taylor Propane. Thus, his testimony supports the statutory presumption that he knowingly rejected UM coverage.

The plaintiffs further contend that UM coverage exists, because the policy

issued by Empire provided UM coverage for certain vehicles, such as a 1991 Volvo tractor/trailer, but not for the vehicle driven by Mr. Robertson, which is in contravention of the prohibition against coverage attaching to the vehicle, as opposed to the person of the insured. In support of the plaintiffs' argument in this regard, they cite **Howell v. Balboa Insurance Company**, 564 So.2d 298, 301-302 (La. 1990), wherein the supreme court stated:

> 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 [La. 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.

However, we note that **Howell** was legislatively "overruled" by 1988 La. Acts, No. 203, § 1, when La. R.S. 22:1406 was amended to add subparagraph (D)(1)(e) to provide:

> The uninsured motorist coverage does not apply to bodily injury, sickness, or disease, including death of an insured resulting therefrom, while occupying a motor vehicle owned by the insured if such motor vehicle is not described in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy. This provision shall not apply to uninsured motorist coverage provided in a policy that does not describe specific motor vehicles.

See **Dardar v. Prudential Property & Casualty Insurance Co.**, 98-1363, p. 7 (La. App. 1st Cir. 6/25/99), 739 So.2d 330, 335, writ denied, 99-2196 (La. 11/12/99), 750 So.2d 195.

Lastly, the plaintiffs contend that the UM portion of the policy is ambiguous because of absent and/or conflicting endorsements, and therefore, any ambiguity in the policy is to be construed in favor of the insured and in favor of UM coverage. Specifically, the plaintiffs point to the fact that the policy, as issued by Empire in January 2002 (after the rejection of UM coverage by Mr. Ballengee on November 6, 2001) contained a UM coverage endorsement CA 21 48 12 97 and contained

endorsement IL 12 01 11 85, which listed all of the scheduled forms making up the policy, including UM coverage endorsement CA 21 48 12 97, but failed to identify or include the UM rejection form signed by Mr. Ballengee, EM 10 04 (09-98).

Regarding the fact that the policy, as initially issued, contained a UM endorsement, we note that UM coverage is part of all liability insurance policies, regardless of whether it is specifically included in the policy, unless it is specifically rejected. In this case, Taylor Propane specifically rejected UM coverage on the form prescribed by the commissioner of insurance. Therefore, the presence of endorsement CA 21 48 12 97 or its inclusion among the listed endorsements in IL 12 01 11 85 did not create an ambiguity and does not rebut the presumption that the rejection of UM coverage was knowingly made.

Furthermore, according to the evidence offered by Empire, Empire reissued the policy to Taylor Propane without the UM endorsement in April 2002, almost five months before the accident at issue, thereby removing any purported ambiguity in the policy. Since Taylor Propane had already rejected UM coverage, when Empire reissued the policy, there was no change in the limits of liability; therefore, it was not necessary for Taylor Propane to execute another UM selection form. See La. R.S. 22:1406(D)(1)(a)(ii).

Concerning the fact that the UM selection form rejecting UM coverage was not listed or attached to the policy, we also note that La. R.S. 22:1406(D)(1)(a)(ii) specifically provides that a UM selection form signed by the named insured or his legal representative is conclusively presumed to become part of the policy, "irrespective of whether physically attached" to the policy. Accordingly, we do not find the policy issued by Empire was ambiguous because of absent and/or conflicting UM endorsements, such that the policy is to be construed in favor of UM coverage.

Therefore, based upon our *de novo* review of the record in this matter, we

find that Empire met its burden of proving there were no genuine issues of material fact that the legal representative of Taylor Propane, the named insured under the policy, clearly and unmistakably rejected UM coverage on the form prescribed by the commissioner of insurance and that this rejection was valid. Because the plaintiffs presented insufficient evidence to rebut the presumption that the rejection of UM coverage was knowingly made, we conclude, as the trial court did, that there are no genuine issues of material fact and that Empire was entitled to judgment as a matter of law, dismissing the plaintiffs' claims against it.

IV. CONCLUSION

For the above and foregoing reasons, the September 17, 2008 judgment of the trial court granting summary judgment in favor of Empire Fire and Marine Insurance Company and Empire Indemnity Insurance Company and dismissing the plaintiffs' claims is hereby affirmed. All costs of this appeal are assessed to the plaintiffs/appellants, Louise K. Robertson, Rhynell Robertson, Edith Robertson, Roma Henderson, Amanda Robertson, Roxanne Robertson, Chicquita Robertson, Barbara Edmond, and Belinda Robertson.

AFFIRMED.