

NEIL SHIREY, INDIVIDUALLY AND ON
BEHALF OF HIS MINOR CHILDREN,
BRIDGETTE SHIREY, CHRISTOPHER
SHIREY, KRISTEN SHIREY, AND TRACIE
SHIREY

VERSUS

TRAVIS D. BARTON, AMAREE H.
BARTON, AND USAA CASUALTY
INSURANCE COMPANY

NO. 2005-CA-1192

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
PARISH OF LIVINGSTON, STATE OF LOUISIANA
NO. 103-452, DIVISION "F"
HONORABLE ELIZABETH P. WOLF, JUDGE PRESIDING

June 9, 2006

FREDERICKA HOMBERG WICKER
AD HOC JUDGE

Panel composed of Ad Hoc Judges James L. Cannella,
Susan M. Chehardy, and Fredericka Homberg Wicker

WILLIAM H. "WICK" COOPER, III
Attorney at Law
1075 Government Street
Baton Rouge, Louisiana 70802
COUNSEL FOR PLAINTIFF/APPELLEE

JEFF W. WATSON
Attorney at Law
4354 South Sherwood Forest Boulevard
Suite 200
Baton Rouge, Louisiana 70816
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

2/12/04
JHC
SMC
Defendant Progressive Security Insurance Company ("Progressive") appeals the summary judgment granted in favor of plaintiffs, Neil and Tracie Shirey.

On September 24, 2003, Neil Shirey was involved in a motorcycle accident, from which he suffered bodily injuries. Thereafter, Neil Shirey and his wife Tracie Shirey, individually and on behalf of their minor children ("Plaintiffs"), filed suit against the other driver and his liability insurer. Subsequently, Plaintiffs amended their petition and named Progressive as Neil Shirey's alleged UM carrier. In its answer Progressive concedes that it issued a liability insurance policy on Neil Shirey's 1997 Yamaha VMAX motorcycle. However, Progressive asserts that Plaintiffs validly rejected UM coverage on the policy. On October 28, 2004, Plaintiffs filed a Motion for Summary Judgment on the validity of the UM rejection form. Progressive filed an opposition asserting again that Plaintiffs

rejected UM coverage. After a hearing on the motion, the trial court granted summary judgment in favor of Plaintiffs, finding that the UM rejection form was invalid; the trial court designated the judgment as a final judgment.

The record reflects that Neil and Tracie Shirey went to Tharpe Insurance Agency to obtain liability insurance on three separate vehicles, a 1991 Mazda MPV, a 1999 Dodge Intrepid, and a 1997 Yamaha VMAX motorcycle. The agency issued two separate policies, one covering the two automobiles and the other covering the motorcycle. Neil Shirey is the named insured on the automobile policy and Tracie Shirey is listed as an insured driver. Tracie Shirey validly rejected UM coverage on the policy covering the two automobiles; this fact is not in dispute. On the motorcycle policy, Neil Shirey is the named insured and there are no additional insured drivers. Neil Shirey completed and signed the policy application form covering the motorcycle. However, Plaintiffs assert that the UM rejection form on the motorcycle policy is invalid because Neil Shirey, the named insured, did not select rejection of UM coverage.

Tharpe Insurance Agency provided the UM rejection form in dispute.¹ The form listed 5 options: (1) UM coverage with the full policy limits, (2) UM coverage with certain limits lower than policy limits, (3) Economic-Only UM coverage with the full policy limits, (4) Economic-Only UM coverage with certain limits lower than policy limits, or (5) rejection of UM coverage.

In the form at issue, Neil Shirey printed his name and provided his signature at the bottom of the form. However, the initials “TS” are placed next to option number 5, rejecting UM coverage. In their depositions, Tracie Shirey denied placing the initials on the form and Neil Shirey stated the initials were not present

¹ The form is the prescribed form provided by the Commissioner of insurance, pursuant to La. R.S.22:1406(D). The Commissioner promulgated the UM rejection form on April 28, 1998, in La. Bulletin LIRC 98-01.

at the time he signed the form. Neil Shirey stated he thought he was accepting UM coverage simply by signing the form. It is not alleged that Neil Shirey placed the initials “TS” in the blank rejecting UM coverage.

In her deposition Sadie Tharpe, the insurance agent, stated that the initials selecting the rejection of UM coverage belonged to Tracie Shirey. She stated that Tracie and Neil Shirey came in to her office to complete some paperwork for the automobile and motorcycle policies. She further stated that Tracie Shirey began initialing all of the paperwork and thereafter Sadie Tharpe took the policy application and the UM rejection form for the motorcycle policy and gave it to Neil Shirey, the only insured, to complete.

The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of actions. La. C.C.P. art. 966(A)(2). Appellate review of a summary judgment is on a *de novo* basis. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); Richardson v. Lott, 03-0189 (La. App. 1 Cir. 11/7/03), 868 So.2d 64, 69. The issue of whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can be properly resolved within the framework of a motion for summary judgment. Id.

The validity of a form rejecting UM coverage is determined by the law in effect at the time the form was executed. Dyess v. American National Property and Casualty Company, 04-1971 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451; Reno v. Travelers Home and Marine Ins. Co., 02-1714 (La. App. 1 Cir. 11/7/2003), 867 So.2d 751. The form in dispute was executed on August 1, 2003. At that time, Louisiana Revised Statutes 22:1406(D) provided in pertinent part:

D. The following provisions shall govern the issuance of uninsured motorist coverage in this state:

(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... 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...**

(ii)... 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... 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...

(emphasis added)²

The mandatory UM coverage provisions of La. R.S. 22:1406(D) embody strong public policy. Dyess, 886 So.2d at 453. The purpose of UM coverage is to provide full recovery for victims of an automobile accident who suffer damages caused by a tortfeasor who is not adequately covered by liability insurance. Id. However, pursuant to statutory guidelines, such coverage may be specifically rejected. Id. The provisions of La. R.S. 22:1406(D) are to be liberally construed in favor of coverage. Id.

Therefore, insurers in Louisiana are required to include UM coverage unless it is specifically rejected by the insured. It is the rejection of the UM coverage, not the acceptance, that must be an affirmative act of the insured or his legal representative. If the rejection of UM coverage is ambiguous, it is ineffective, regardless of the parties intent. Richardson, 868 So.2d at 71. If the rejection is

² Pursuant to Acts 2003, No. 456, § 3, Louisiana Revised Statute 22:1406(D) was amended and redesignated as La. R.S. 22:680. The amendments do not pertain to this appeal.

unambiguous, but not in proper form, it is also ineffective. Therefore, the rejection of UM coverage must be clear and meet the formal requirements of law to be valid.

Id; Dardar v. Prudential Prop. & Cas. Ins. Co., 98-1363 (La. App. 1 Cir. 6/25/99), 739 So.2d 330, 333, writ denied, 99-2196 (La. 11/12/99), 750 So.2d 195.

When interpreting an insurance contract, the court must attempt to discern the common intent of the insured and insurer. Analysis should begin with a review of the words in the contract and the contract must be enforced as written when the words are clear and explicit and lead to no absurd consequences. La. C.C. art.

2046; Travelers Home and Marine Ins. Co., 867 So.2d at 753; Dyess, 886 So.2d at 451.

State of Louisiana

This form was promulgated pursuant to LRS 22:1406.D.(1)(a)(ii). This form may not be altered or modified.

Uninsured/Underinsured Motorist Bodily Injury Coverage Form

Uninsured/Underinsured Motorists Bodily Injury Coverage, referred to as "UMBI" in this form, is insurance which pays persons insured by your policy who are injured in an accident caused by an owner or operator of an uninsured or underinsured motor vehicle.

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. (Economic-Only UMBI Coverage may not be available from your insurance company. In this case, your company will have marked options 3 and 4 below as "Not Available.")

UNINSURED/UNDERINSURED MOTORIST BODILY INJURY COVERAGE

You may select one of the following UMBI Coverage options (initial only one option):

1. I select UMBI Coverage which will compensate me for my economic and non-economic losses with the same limits as my Bodily Injury Liability Coverage.
initials Economic losses are those which can be measured in specific monetary terms including, but not limited to, medical costs, funeral expenses, lost wages, and out of pocket expenses.
 Non-economic losses are losses other than economic losses and include, but are not limited to, pain, suffering, inconvenience, and mental anguish.
2. I select UMBI Coverage which will compensate me for my economic and non-economic losses with limits lower than my Bodily Injury Liability Coverage limits:
initials \$ each person \$ each accident
3. I select Economic-Only UMBI Coverage which will compensate me only for my economic losses with the same limits as my Bodily Injury Liability Coverage.
initials
4. I select Economic-Only UMBI Coverage which will compensate me only for my economic losses with limits lower than my Bodily Injury Liability Coverage limits:
initials \$ each person \$ each accident
5. JS I do not want UMBI Coverage. I understand that I will not be compensated through UMBI Coverage for losses arising from an accident caused by an uninsured/underinsured motorist.
initials

SIGNATURE

The choice I made by my initials on this form will apply to all persons insured under my policy. My choice shall apply to the motor vehicles described in the policy and to any replacement vehicles, to all renewals of my policy, and to all reinstatement or substitute policies until I make a written request for a change in my Bodily Injury Liability Coverage - UMBI Coverage.

JAN NEIL SHIREY 37282161-0
Named Insured or Legal Representative (Please Print) Policy Number
[Signature] 8-1-03
Signature of a Named Insured or Legal Representative Date

The form at issue directs the insured or his legal representative to make a selection regarding UM coverage by “initial[ing] only one option.” Immediately above the signature line there is language that reads, “The choice I made by my initials on this form will apply to all persons under this policy...” Therefore, based on the clear and explicit language of the contract, we find that proper execution of the UM rejection form in accordance with La. R.S. 22:1406(D) requires that the signatory must also make the selection rejecting UM coverage by marking his initials next to the appropriate option. Applying the legal principles set forth above, we find the intent of the contract is that the same person who signs the contract must initial the option regarding UM coverage because the signature binds the signatory to the terms of the contract, in this case, the rejection of UM coverage. Because we reach this conclusion, whether Tracie Shirey or someone else placed the initials “TS” in the blank rejecting UM coverage is immaterial.

Accordingly, we find the UM rejection form in this case invalid; the trial court did not err in granting Plaintiffs’ motion for summary judgment. All costs of this appeal are assessed to Progressive.

AFFIRMED