NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1865

WELTON WALKER

VERSUS

CORA WALKER, ACME TRUCK LINE, INC., ZURICH NORTH AMERICAN INSURANCE, ROBERT J. JOHNSON, JR., PROGRESSIVE SECURITY INSURANCE COMPANY AND CLEARWATER INSURANCE COMPANY

Judgment rendered May 6, 2011.

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Appealed from the
16th Judicial District Court
in and for the Parish of St. Mary, Louisiana
Trial Court No. 118863
Honorable Anne Lennan Simon, Judge, Pro Temp

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* * * * * *

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

PETTIGREW, J.

Plaintiff, Welton Walker, appeals the trial court judgment granting a motion for summary judgment in favor of defendant, Zurich American Insurance Company ("Zurich"), dismissing plaintiff's UM claim, with prejudice, on the basis of a valid UM waiver executed by Zurich's insured, Acme Truck Line, Inc. ("Acme"). For the following reasons, the judgment granting defendant's motion for summary judgment and dismissing plaintiff's UM claim is affirmed.

FACTS AND PROCEDURAL HISTORY

According to the record, Mr. Walker was traveling as a passenger in a vehicle driven by his wife, Cora Walker, on U.S. Highway 90 in St. Mary Parish. It is alleged that at all pertinent times hereto, Mrs. Walker was in the course and scope of her employment with Acme. The Walker vehicle collided into the rear of Robert J. Johnson, Jr.'s vehicle, which was stopped on the highway at the time. As a result of injuries sustained in the accident, Mr. Walker filed suit against his wife, Acme, Zurich, in its capacity as Acme's insurer, Mr. Johnson, Progessive Security Insurance Company, in its capacity as Mr. Johnson's insurer, and Clearwater Insurance Company, in its capacity as his wife's insurer. Mr. Walker alleged that at the time of the accident, Mr. Johnson was uninsured or underinsured and that the policy issued by Zurich provided uninsured/underinsured motorist ("UM") coverage to him.

In response to Mr. Walker's claims, Zurich filed a motion for summary judgment, asserting that there was no genuine issue as to any material fact and that it was entitled to summary judgment as a matter of law. Zurich alleged there was a valid UM selection form for the policy in question waiving UM coverage and, thus, no UM coverage was available to Mr. Walker. In support thereof, Zurich submitted a copy of Mr. Walker's petition for damages, a copy of the policy in question, a copy of the UM selection form associated with that policy, the affidavit of Michael Coatney, President of Acme, the affidavit of Jeffrey Benzin, the Underwriting Manager of Zurich, and the UM selection forms for five other Zurich policies issued to Acme all indicating rejection of

UM coverage. Mr. Walker submitted a memorandum in opposition to the motion for summary judgment, but did not present any evidence.

On June 25, 2009, the trial court heard arguments on the motion for summary judgment. After considering the applicable law and the evidence in the record, the trial court granted Zurich's motion for summary judgment, finding that the Zurich policy did not provide uninsured/underinsured motorist insurance coverage to Mr. Walker and dismissing, with prejudice, Mr. Walker's claims against Zurich in its capacity as Acme's alleged UM carrier. A judgment in accordance with these findings was signed by the trial court on July 24, 2009. It is from this judgment that Mr. Walker has appealed, assigning the following as error: "The trial court erred in going beyond the Louisiana Uninsured/Underinsured Motorist Bodily Injury Coverage Form to consider extrinsic evidence in the form of an affidavit from Acme Truck Line in deciding whether Acme validly waived UM coverage in this instance."

DISCUSSION

Summary judgments are reviewed on appeal *de novo*. **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482, p. 3 (La. App. 1 Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B).

When a motion for summary judgment is made and supported as provided by law, an adverse party may not rest on the mere allegations or denials of his pleading. His response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary

judgment, if appropriate, will be rendered against him. La. Code Civ. P. art. 967(B); **Robles v. ExxonMobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Bridgefield Cas. Ins. Co. v. J.E.S., Inc.**, 2009-0725, p. 4 (La. App. 1 Cir. 10/23/09), 29 So.3d 570, 573.

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.**, 2007-1670, pp. 8-9 (La. 2/26/08), 977 So.2d 839, 845. In this regard, however, La. R.S. 22:1295(1)(a)(ii) provides in pertinent part that "[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."

In order for a UM form that rejects or lowers coverage to be valid, the six tasks outlined in **Duncan v. U.S.A.A. Ins. Co.**, 2006-363 (La. 11/29/06), 950 So.2d 544, "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." **Gray**, 2007-1670 at 14, 977 So.2d at 849. In **Duncan**, the supreme court listed six requirements for an enforceable UM selection form:

> Before we determine whether the statute requires that all aspects of the form be complied with, let us now consider what the prescribed form entails. Essentially, the prescribed form involves 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.

Duncan, 2006-363 at 11-12, 950 So.2d at 551.

On appeal, Mr. Walker argues that because the UM selection form in question was pre-filled with "N/A" in all blanks except for the blank for rejection of UM coverage, the form is invalid on its face as it does not evidence that the insured was given the

opportunity to make a meaningful selection from the options of UM coverage. Mr. Walker further asserts that the affidavits submitted by Zurich cannot cure the defects in the form and that summary judgment was inappropriate in this matter.

In support of his position, Mr. Walker cites the case of **Johnson v. Government Employees Ins. Co.**, 2007-1391 (La. App. 3 Cir. 4/9/08), 980 So.2d 870, writ denied, 2008-1031 (La. 8/29/08), 989 So.2d 105. In **Johnson**, the insured was presented with a UM selection form with only one blank left open, the blank indicating rejection of coverage. All other blanks on the form had been pre-filled and marked "N/A" by the insurance agent. **Johnson**, 2007-1391 at 7, 980 So.2d at 876. The insured testified that there was no discussion between him and the agent regarding his selection. Rather, he indicated he told the agent over the phone that he wanted "full coverage." **Johnson**, 2007-1391 at 8, 980 So.2d at 876. The **Johnson** court concluded that the pre-filled form was defective as it left the insured with no choice but to reject UM coverage. *Id.*

In response, Zurich maintains that the evidence it submitted proves that for more than a decade, Acme's intent has always been to reject UM coverage. Moreover, Acme argues that "N/A" was inserted in the blanks on the UM selection form at the name insured's request that there be no UM insurance coverage. Directing our attention to the affidavits of Michael Coatney and Jeffrey Benzin, Zurich further notes that **Johnson** is easily distinguishable from the instant case, as the form in question was filled out in response to communications by Acme that it did not want UM coverage.

In his affidavit, Mr. Coatney testified that he has been employed as Acme's President since 1997 and was primarily responsible for obtaining insurance for Acme. Mr. Coatney maintained that Acme has never wanted UM coverage on its liability policies as they did not want to bear the cost and expenses associated with same. He indicated that he was always aware of his options with regard to UM coverage, i.e., reject UM coverage altogether or select UM coverage at the same limits as liability coverage, at lesser limits, or at minimum limits. However, Mr. Coatney consistently and

repeatedly communicated Acme's desire to reject UM coverage to the agents and brokers who procured the insurance for Acme. With regard to the UM selection form in question, after communicating Acme's desires to reject UM coverage to the agent, he received the form with "N/A" inserted by the insurers in all the blanks except for the one indicating rejection of UM coverage, which he selected by initialing same and signing the form on April 30, 2007.

Corroborating Mr. Coatney's testimony is the affidavit of Jeffrey Benzin, Underwriting Manager of Zurich since 1993. Mr. Benzin testified that Acme has never wanted UM coverage on its policies. He further indicated that, in response to communications from Acme that it did not want UM coverage, he prepared the UM selection form in question and entered "N/A" in blanks 1 through 4. Mr. Benzin further confirmed that Mr. Coatney completed the UM selection form by initialing blank 5, indicating his desire to reject UM coverage for Acme, and then signed and dated the form.

In **Taylor v. U.S. Agencies Cas. Ins. Co.**, 2009-1599 (La. App. 1 Cir. 4/7/10), 38 So.3d 433, this court was asked to consider the validity of a UM selection form that was filled out by an insurance agent's employee. Although **Taylor** did not involve rejection of UM coverage but rather a UM selection form executed in connection with changes in liability coverage, a similar argument was made by the insureds that the form was invalid because the insurance agent's employee had filled out all blanks on the form including the selected limits of $10,000/$20,000. Rejecting the argument, this court concluded as follows:

> Mr. Taylor acknowledges that the document was filled out before he signed the form and that he signed it. He does not dispute that he initialed the form. Nevertheless, he argues that these actions deprived him of his right to make an informed decision as to his coverages. We disagree.
>
> As discussed above, the UM/UIM selection/rejection waiver form complies with all *Duncan* tasks and was executed after the form was filled out as required by *Gray*, [2007-1670 at 14, 977 So.2d at 849.] The Taylors have made no showing that their choices were somehow limited. Mr. Taylor could have initialed any of the five choices on the form. He could have modified the numbers written on the form and written new amounts. **The law does not require that the insured fill out the**

> **form.** Accordingly, we conclude that the Taylors have failed to rebut the presumption that they knowingly selected lower limits when Mr. Taylor signed the form and initialed his selection. [Emphasis added.]

Taylor, 2009-1599 at 7, 38 So.3d at 437.

We have thoroughly reviewed the evidence in the record and agree with the trial court's conclusion that summary judgment was warranted in this case. The arguments made by Mr. Walker on appeal are without merit. The UM selection form in question clearly complies with all the requirements of **Duncan** and was executed by Mr. Coatney after the form was filled out as required by **Gray**. There has been no showing that Acme's choices with regard to UM coverage were limited in anyway. Zurich met its burden of proving by clear and unmistakable evidence that the UM selection form was valid. Mr. Walker failed to rebut the presumption that Acme knowingly rejected UM coverage. Accordingly, summary judgment was appropriate.

CONCLUSION

For the above and foregoing reasons, we affirm the July 24, 2009 judgment of the trial court, granting summary judgment in favor of Zurich and dismissing Mr. Walker's UM claim against Zurich with prejudice. All costs associated with this appeal are assessed against Welton Walker.

AFFIRMED.