

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1685

*WBR  
MJ  
Jah*

JOSEPH PEYTON WINDHAM

VERSUS

FRANCISCO RAMIREZ, AMERICAN STATES  
INSURANCE COMPANY, EARTH RESOURCES, INC.,  
AND XYZ INSURANCE COMPANY

Judgment Rendered: SEP 13 2013

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On Appeal from the  
21st Judicial District Court,  
In and for Livingston Parish,  
State of Louisiana  
Trial Court No. 121120

The Honorable Elizabeth P. Wolfe, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

**CRAIN, J.**

In this suit for personal injury damages, United Services Automobile Association (USAA) appeals a default judgment taken against it by the plaintiff, Joseph Peyton Windham. We reverse and remand.

### **FACTS AND PROCEDURAL HISTORY**

Windham sued the defendants Francisco Ramirez, Ramirez's employer, and their insurers for personal injury damages. He alleged that on May 31, 2008, Ramirez was driving his employer's vehicle while intoxicated, crossed the center line of traffic, and collided with the Harley Davidson motorcycle operated by Windham. Windham suffered serious injuries, including the amputation of his left leg.

Windham amended his petition to name Gary Lewis as a defendant, alleging that Lewis was negligent in arranging for Ramirez to obtain a vehicle to drive, permitting Ramirez to drive while intoxicated, and permitting Ramirez to obtain a vehicle without having a driver's license. Windham amended his petition a second time to add USAA as a defendant, alleging that it provided liability insurance coverage to Lewis and Ramirez.

USAA was served with the petition through the Secretary of State. According to Windham, he agreed for USAA to have at least two extensions of time to answer. When no answer was timely filed, and USAA made no formal appearances in the proceeding, a preliminary default was entered.<sup>1</sup> A confirmation hearing was held approximately six months later and a default judgment was confirmed against USAA in the amount of \$300,000.00, the amount of bodily injury coverage shown on the USAA policy declarations page. USAA now

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<sup>1</sup> In his motion for preliminary default, Windham stated that the last extension expired approximately three months prior.

appeals, contending that the evidence was insufficient to support the default judgment.

### STANDARD OF REVIEW

In reviewing a default judgment, an appellate court is restricted to determining the sufficiency of the evidence offered in support of the judgment. *Arias v. Stolthaven New Orleans, L.L.C.*, 08-1111 (La. 5/5/09), 9 So. 3d 815, 818. This factual determination is governed by the manifest error standard of review. *Id.*

### DISCUSSION

If a defendant fails to answer within the time prescribed by law, judgment by default, sometimes referred to as a preliminary default, may be entered against him. La. Code Civ. Pro. art. 1701; *Arias*, 9 So. 3d at 819. The judgment of default may then be confirmed according to the requirements provided by Louisiana Code of Civil Procedure article 1702:

A. A judgment of default must be confirmed by proof of the demand sufficient to establish a prima facie case. If no answer is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the judgment of default. . . .

B. (1) When a demand is based upon a conventional obligation, affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering judgment.

. . . .

D. When the demand is based upon a claim for a personal injury, a sworn narrative report of the treating physician or dentist may be offered in lieu of his testimony.

Confirmation of the default is similar to a trial with the defendant being absent. The plaintiff is required to present admissible and competent evidence establishing a prima facie case, proving both the existence and the validity of the

claim as though the defendant denied each allegation of the petition. *Arias*, 9 So. 3d at 820; *Northshore Regional Medical Center, L.L.C. v. Dill*, 12-0850 (La. App. 1 Cir. 3/22/13), 115 So. 3d 475, 480, *writ denied*, 13-0866 (La. 5/31/13), \_\_\_ So. 3d \_\_\_. “[W]hen an obligation is based on a writing, prima facie proof of the obligation requires introduction of the writing into evidence.” *Arias*, 9 So. 3d at 822.

Louisiana Revised Statute 22:1269 affords an injured person the right to bring an action directly against an insurance company “within the terms and limits of the policy.” Accordingly, “the terms and conditions of the insurance policy are part of the principal basis for the claims and critical to establishing a prima facie case of the insurer’s liability, as well as the [plaintiff’s] right to pursue the insurer alone by default.” *Arias*, 9 So. 3d at 823. The insurance contract is an essential element of a plaintiff’s prima facie case against an insurance company for purposes of confirming a default judgment. *Arias*, 9 So. 3d at 822; *McIntyre v. Sussman*, 10-1281 (La. App. 4 Cir. 10/26/11), 76 So. 3d 1257, 1262, *writs denied*, 11-2777, 11-2791 (La. 2/17/12), 82 So. 3d 290, 201; *see also Savoy v. Harris*, 09-0221 (La. App. 1 Cir. 6/12/09), 20 So. 3d 1075, 1080 n.6, *writs denied*, 09-1580, 09-1611 (La. 10/9/09), 18 So. 3d 1288, 1290.

Windham did not introduce the USAA policy into evidence. A certified copy of a declaration sheet showing that USAA issued an automobile insurance policy to Gary Lewis covering three listed vehicles, with a limit of liability for bodily injury in the amount of \$300,000.00 per person, was introduced into evidence. However, the declaration sheet does not set forth the terms and conditions of the policy, does not establish Windham’s right to bring this action directly against USAA, and does not constitute proof sufficient to support a default

judgment. *Cf.*, *Arias*, 9 So. 3d at 823-824; *Clark v. Clark*, 10-1281 (La. App. 3 Cir. 3/9/11), 58 So. 3d 1081, 1084-85.

Windham argues that the insurance policy was not required in this case, citing *Savoy* and *Succession of Rock v. Allstate Life Ins. Co.*, 340 So. 2d 1325 (La. 1976). Both cases are distinguishable. In *Savoy*, this court found sufficient evidence establishing the existence of the insurance policy without the policy being produced. However, that decision was reached after a trial on the merits and specifically distinguished *Arias* and the line of cases overturning default judgments where the insurance policies were not offered into evidence. *Savoy*, 20 So. 3d at 1080 n.6. In other words, the court in *Savoy* specifically acknowledged that circumstances such as those presented in this case would not be governed by its decision.

In *Succession of Rock*, requests for admissions were served with the petition. The supreme court in *Arias* explained that in *Succession of Rock*, it “carved out an exception to the written instrument mandate . . . for those limited instances where the admission of all essential contract provisions upon which a suit is based has been requested of the opposing party and, upon that party’s failure to answer, they have been deemed admitted.” *Arias*, 9 So. 3d at 824. The record on this appeal contains no requests for admission that could establish Windham’s evidentiary burden regarding insurance coverage.

The insurance policy was necessary to establish the terms and limits of coverage by USAA. It was essential to Windham’s prima facie case against USAA. Without the policy, the trial court was manifestly erroneous in finding that Windham satisfied his burden of proof for confirming the default judgment against USAA.<sup>2</sup> Accordingly, the trial court’s judgment is reversed.

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<sup>2</sup> Finding reversible error on this basis, we pretermitt consideration of the remaining evidentiary issues raised by USAA on appeal.

Additionally, USAA asserts that Windham's claims against it should be dismissed with prejudice. We find no basis for dismissing the claims against Windham at this stage of the proceeding. Therefore this matter is remanded to the trial court for further proceedings.

### **CONCLUSION**

For the foregoing reasons, the default judgment against USAA is reversed. This matter is remanded to the trial court for further proceedings. Each party will bear their own appeal costs.

**REVERSED AND REMANDED.**