

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1537

PATRICIA HENDERSON, ET UX

VERSUS

AMY LASHOUTO, ET AL

***DATE OF JUDGMENT:* MAY 17 2018**

ON APPEAL FROM THE TWENTY FIRST JUDICIAL DISTRICT COURT
NUMBER 2015-0002530, DIVISION E, PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE BRENDA BEDSOLE RICKS, JUDGE

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* * * * *

BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

Disposition: AFFIRMED.

CHUTZ, J.

Plaintiffs-appellants, Patricia and Calvin Henderson, appeal the trial court's grant of summary judgment in favor of defendant-appellee, State Farm Mutual Automobile Insurance Company (State Farm), dismissing Patricia's claims for uninsured/underinsured motorist (UM) coverage. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Patricia was involved in a car accident on August 14, 2014, in which a motor vehicle driven by Amy Lashouto struck the rear of Patricia's BMW. The Hendersons subsequently filed this lawsuit naming as defendants: Lashouto, her motor vehicle insurer, as well as State Farm, whom the Hendersons averred had in "full force and effect a policy of insurance that can be stacked to compensate [her husband and her] for the losses which they have suffered." State Farm answered the lawsuit admitting that it had issued an insurance contract in Calvin's name, but specifically denied that the policy provided UM coverage for the accident.

After Lashouto and her insurer settled their dispute with the Hendersons and were dismissed from the lawsuit, State Farm moved for summary judgment, contending that Calvin had validly rejected UM coverage on the policy. After a hearing, at which the Hendersons waived their appearance, the trial court granted the summary judgment and dismissed the UM coverage claims. A judgment in conformity with the trial court's ruling was subsequently signed from which the Hendersons devolutively appeal.¹

DISCUSSION

On appeal, appellate courts review the grant or denial of a motion for summary judgment de novo under the same criteria governing the trial court's

¹ The appealed judgment expressly reserved the Hendersons' claims for medical payments coverage against State Farm. In light of the lack of connection between the adjudicated and unadjudicated claims, the possibility of settlement after our review, and the unlikelihood of readjudicating this coverage issue, we find no error in the trial court's certification of the appeal as immediately appealable under La. C.C.P. art. 1915B. See *R.J. Messinger, Inc. v. Rosenblum*, 2004-1664 (La. 3/2/05), 894 So. 2d 1113, 1122.

consideration of whether summary judgment is appropriate. *Schultz v. Guoth*, 2010-0343 (La. 1/19/11), 57 So.3d 1002, 1005-06. A motion for summary judgment shall be granted only if the pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions, admitted for purposes of the motion for summary judgment, show there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3) and (4). The burden of proof rests with the mover. La. C.C.P. art. 966(D)(1). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material, for purposes of summary judgment, can be seen only in light of the substantive law applicable to the case. *Gaspard v. Graves*, 2005-1042 (La. App. 1st Cir. 3/29/06), 934 So.2d 158, 160, writs denied, 2006-0882 and 2006-0958 (La. 6/16/06), 929 So.2d 1286 and 1289.

Automobile liability insurers in Louisiana are required to include UM coverage in all policies issued unless the insured specifically rejects it. See La. R.S. 22:1295(1)(a)(i). Unless the insured's expression of his desire to reject UM coverage meets the formal requirements of law, the expression does not constitute a valid rejection. See *Duncan v. U.S.A.A. Ins. Co.*, 2006-363 (La. 11/29/06), 950 So.2d 544, 553. An enforceable UM selection form must include an initialing of the selection or rejection of coverage chosen; if limits lower than the policy limits are chosen, the filling in of the amount of coverage selected for each person and each accident; printing the name of the named insured or legal representative; signing the name of the named insured or legal representative; filling in the policy number; and filling in the date. *Duncan*, 950 So.2d at 551. Rote completion of these tasks by someone at some time is insufficient. *Gray v. American Nat'l Property & Cas. Co.*, 2007-1670 (La. 2/26/08), 977 So.2d 839, 845. "[T]he ... tasks 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.”

Id.

An insurer has the burden of proving by clear and unmistakable evidence that a UM selection form is valid. See Gray, 977 So.2d at 849. A properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected UM coverage, selected a lower limit, or selected economic-only coverage. La. R.S. 22:1295(1)(a)(ii).

In support of its initial burden of proving entitlement to summary judgment, see La. C.C.P. art. 966D(1), State Farm entered into evidence a State of Louisiana, UM Coverage form which Calvin initialed option 4, which states:

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.^[2]

Calvin signed the form at the bottom, printed his name below his signature, and dated it, “3-1-12.” The form is filled out with a policy number and State Farm’s logo and name in a box directly below the policy number.

State Farm also offered excerpts from Calvin’s June 22, 2016 deposition testimony in which he identified his signature on the rejection form. (R-38) Calvin stated that he had no problem reading. While he indicated that he thought he had “every coverage a person could get,” he explained “I try to keep enough -- the full, full coverage and everything on it; so if somebody hit and run or whatever, that way we are fully covered.” Calvin conceded, “But I signed it; so I -- and the signature speaks for itself.”

² The form refers to UM coverage as “UMBI.” The first paragraph of the form contains an explanation that UMBI is a reference for Uninsured/Underinsured Motorists Bodily Injury Coverage. Although the form allows various options for selection of economic-only UMBI coverage, because the issue before us is whether State Farm provided UM coverage “in not less than the limits of bodily injury liability provided by the policy” as statutorily mandated, we refer to the coverage simply as UM. See La. R.S. 22:1295 (1)(a)(i).

The final exhibit State Farm offered in support of summary judgment was the Louisiana Department of Insurance Bulletin No. 08-02, dated August 29, 2008, addressing the UM coverage rejection form that Calvin executed. Thus, State Farm maintained that Calvin executed a valid rejection of UM coverage, noting Calvin's admissions in his deposition testimony that he had initialed, signed, printed his name on, and dated the form, as well as the form's designation of the policy number and identification of State Farm as the insurer by inclusion of its logo in conformity with Bulletin No. 08-02.

In response to State Farm's showing, the Hendersons filed two documents with their opposition memorandum. The first was a single-page document, describing the discounts and surcharges assessed to Calvin by State Farm, which included a designation of Patricia as a "Household Driver." The second attachment was an affidavit executed by Calvin on May 10, 2017. Calvin attested that no agent had explained how he was to secure UM coverage, but that instead, "the secretary at the front desk ... told me to initial a certain place on the form and sign below and I would have maximum [UM] Coverage." Additionally, Calvin stated:

No one called my wife Patricia [] to tell her anything about this insurance.... They never told her anything. They never called her, sat down with her, read the information on the form to her, and informed her that she could select any other [UM] Coverage. The Insurance Company just said initial here, sign here and give us a check.

Lastly, Calvin indicated, "I never told Patricia anything except when she asked me I told her we had full coverage including [UM] Coverage because that is what [State Farm] told me."

Based on their evidence, the Hendersons maintained that an outstanding issue of material fact on whether either of them "received proper and necessary information and advice/explanation regarding [UM] coverage" precluded summary judgment. As such, they urge summary judgment was not appropriate.

In its reply brief to the Hendersons' opposition, State Farm included Calvin's June 22, 2016 deposition testimony indicating that he did not "specifically remember the day" he signed the form or "who [he] talked to or what [they] talked about." He further acknowledged that he had no "specific recollection of any conversation" from the day that he signed the rejection form.³

On appeal, the Hendersons assert that Calvin's attestations establish that neither Patricia nor Calvin was provided sufficient information to make an informed decision.⁴ The Hendersons' petition did not include any allegations addressing the UM rejection. And Calvin's affidavit attestations are contrary to his previous deposition testimony in which he stated he did not remember the day, anyone with whom he spoke, or any conversations he had when he signed the form. A subsequent affidavit in contradiction of prior deposition testimony is not sufficient to create an issue of fact precluding summary judgment without some explanation or support for the contrary statements. *McCastle-Getwood v. Prof'l Cleaning Control*, 2014-0993 (La. App. 1st Cir. 1/29/15), 170 So.3d 218, 222. Mindful that the Hendersons did not appear at the summary judgment hearing to explain the change in Calvin's testimony, we find the affidavit is insufficient evidence to establish that the Hendersons will be able to satisfy their evidentiary burden of proof at trial. Accordingly, the trial court correctly granted summary

³ Unlike the other deposition excerpts State Farm introduced into evidence, this excerpt was copied into the memorandum. The Hendersons have not challenged the authenticity of the excerpt.

⁴ Although reference is made in the Hendersons' brief to facts underlying an argument they asserted in their opposition memorandum claiming that State Farm had issued a separate policy to Patricia for which the rejection form executed by Calvin was inapplicable, on appeal they have not briefed this argument and, therefore, we consider it abandoned. See *Louisiana Commerce & Trade Ass'n, SIF v. Williams*, 2014-1680 (La. App. 1st Cir. 6/5/15), 174 So.3d 696, 699; see also U.R.C.A. Rule 2-12.4(B)(4). Additionally, we note that in support of the motion for summary judgment, State Farm submitted a copy of the insurance policy issued to Calvin insuring a 2005 BMW, and the Hendersons did not submit conflicting evidence of another applicable insurance policy.

judgment dismissing the Hendersons' claims for UM coverage under their State Farm policy.

DECREE

For these reasons, the trial court's judgment is affirmed. Appeal costs are assessed against plaintiffs-appellants, Patricia and Calvin Henderson.

AFFIRMED.