NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1798

GINNY MELANCON CLEMENT, INDIVIDUALLY AS ADMINISTRATRIX OF THE ESTATE OF ROLAND J. CLEMENT AND AS NATURAL TUTRIX OF THE MINOR CHILD CHERISSE M. CLEMENT, LANCE J. CLEMENT; AND STEPHANIE CLEMENT REECE

VERSUS

ESTATE OF JOSEPH T. LAROSE, JR.,
LOUISIANA FARM BUREAU CASUALTY INSURANCE COMPANY,
SUB SURFACE TOOLS, INC. AND THE GRAY INSURANCE COMPANY

Judgment Rendered: MAY 03 2011

* * * * * * *

APPEALED FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF TERREBONNE
STATE OF LOUISIANA
DOCKET NUMBER 120609, DIVISION "B"

THE HONORABLE JOHN R. WALKER, JUDGE

* * * * * * *

Frank Reynolds Whiteley, III
Metairie, Louisiana

Attorney for Defendant/1st Appellant
The Gray Insurance Company

John W. Wilbert, III
Plaquemine, Louisiana

Attorney for Plaintiff/2nd Appellant
Ginny Melancon Clement, Et Al

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

This is an appeal from a judgment rendered on a wrongful death claim brought by the surviving spouse and four children of Roland Clement. For the following reasons, we reverse the judgment of the district court.

FACTS

On November 4, 1996,[1] Clement was operating a truck owned by his employer, Sub Surface Tools, Inc. Joseph Larose, Jr., was traveling in the opposite direction, crossed the center line, and hit Clement head on. Both Clement and Larose were killed in the accident. Clement's family filed suit on November 4, 1997 against the estate of Larose, Louisiana Farm Bureau Casualty Insurance Company, the liability insurer of Larose, Sub Surface Tools, Inc. (Sub Surface) and its liability insurer Gray Insurance Company (Gray), seeking coverage by Gray under the uninsured/underinsured motorist provision of its policy.

Gray issued two policies to Sub Surface, a primary liability policy (#XSAL-072328) with a limit of $1,000,000 and an excess liability policy (#GSX-040755) that provided an additional $4,000,000 of coverage. The primary policy had a term of three years beginning on January 1, 1995 through December 31, 1997, inclusive. The excess policy had a one-year term with the option to renew for two additional one-year terms. Sub Surface had rejected uninsured/underinsured motorist (UM) coverage on both policies.

During the course of the litigation, the plaintiffs accepted the policy limits of $100,000 in liability insurance with Louisiana Farm Bureau Casualty Insurance Company on behalf of Larose and $25,000 in UM coverage on Clement's own policy with State Farm Mutual Automobile Auto Insurance Company.

---

[1] Plaintiffs' brief suggests the date of the accident was November 13, 1996. However, the petition, accident reports, and other documentary evidence indicate it was November 4, 1996.

The jury found in favor of the plaintiffs and awarded a total of $646,734 (plus $3,154.40 for funeral expenses) to the surviving family members in the following amounts:

Ginny Melancon Clement (spouse)	$396,734
Cherisse Clement Babin (minor child)	$100,000
Stephanie Clement Reece	$ 50,000
Christie Clement Maiocchi	$ 50,000
Lance Clement	$ 50,000

The jury also found that UM coverage on the primary policy provided by Gray to Sub Surface had been validly rejected and that UM coverage on the excess policy had not been validly rejected for the 1996 calendar year and, thus, UM coverage was in effect at the time of accident.

A judgment intended to reflect this jury verdict was signed by the presiding judge on December 10, 2004. However, the judgment provided for $100,000 to Stephanie Clement Reece rather than the jury verdict of $50,000. It also dismissed the plaintiffs' claims with prejudice because the total amount did not exceed the UM coverage that had been rejected. Plaintiffs timely filed a motion for new trial, JNOV, and additur. At a hearing on these motions on January 21, 2005, the judge orally granted the motion and increased the amount to Ginny Melancon Clement by $100,000 for a total of $496,734, increased the amount to each of the adult children from $50,000 to $125,000 each, and increased the amount to Cherisse Clement Babin, who was a minor at the time of the fatal accident, from $100,000 to $175,000 for a total of $1,046,734. A second judgment was signed on April 2, 2007. However, this judgment does not reflect the judge's oral changes made on January 21, 2005, but does correctly reflect the jury's verdict form (including the proper award of $50,000 to Stephanie Clement Reece) for a total of $646,734. The

record does not contain a judgment conforming to the judge's oral changes on January 21, 2005.

A second motion for a new trial, JNOV, or additur was filed on April 16, 2007 by plaintiffs, the Clement family. This motion was heard on June 29, 2007, and a judgment was signed on September 21, 2007, increasing the award to $1,296,734 as follows:

Ginny Melancon Clement	$646,734
Cherisse Clement Babin	$200,000
Stephanie Clement Reece	$150,000
Christie Clement Maiocchi	$150,000
Lance Clement	$150,000

From this judgment, cross appeals have been filed with each side assigning the following errors:

Plaintiffs, the Clement family, appeal citing two errors:

1. The jury erroneously found the Option to Reject or Modify Uninsured Motorist Coverage Under Policy Number XSAL-072328 valid.

2. The damages assessed by the jury and the judge for all plaintiffs were impermissibly low based on the damages sustained by the plaintiffs under this case's circumstances.

Defendant, Gray Insurance, appeals citing five errors:

1. The jury committed legal error when it failed to find UM coverage properly rejected on the renewable excess policy.

2. The trial judge erred on granting the first additur increasing jury damages from $646,734.40 to $1,049,888.40[2].

3. The trial court erred in granting the untimely filing of additur and JNOV. The second judgment in this case was signed April 2, 2007. The plaintiff (sic) Motion for JNOV, New Trial & Additur filed on April 16, 2007 was untimely.

---

[2] This amount reflects the inclusion of the $3,154.40 for funeral expenses. The amount for funeral expenses has not been disputed by either party. In the judgments and briefs sometimes it is included in the totals and sometimes it is not included. The totals in this opinion do not include it since it is not in dispute.

4. The trial judge committed legal error and abused his discretion in granting a second additur from $1,049,888.40 to $1,299,888.40.

5. The trial court erred in finding that if legal interest on the damage award below the excess policy causes the damage award to exceed the excess policy, it is therefore collectible under the excess policy.

DISCUSSION

We will address the defendant's second and third assignments of error first. In his second assignment of error, the defendant argues that it was error for the judge to grant the first additur increasing the damages award from $646,734.40 to $1,049,888.40. As previously noted, even though the judge orally increased the jury award, no judgment was ever signed effectuating this increase. Since there was never a judgment for this increase, there is nothing to appeal.

Defendant argues in its third assignment of error that the plaintiffs second motion for JNOV, new trial, and additur was untimely since it was filed more than seven days after the judgment was signed on April 2, 2007. Thus, defendant contends the appeal of the September judgment was untimely. However, there was a supplement to the record that indicates the judgment was mailed on April 11, 2007, making the April 16, 2007 filing within the seven days allowed. See LSA-C.C.P. art. 1974. Neither of these assignments has merit.

Next, we address the issue of the validity of the UM rejections of the two liability policies, the one million dollar "primary" policy (#XSAL-072328) and the four million dollar excess policy (#GSX-040755). The jury was asked to determine if either of the rejection forms was valid. They found the rejection of the primary policy was valid, but found that the rejection of the excess policy was invalid. Both the primary and excess liability policies were acquired in December 1994, with an effective date of January 1, 1995. Kay Vinson, the president of Sub Surface, signed the rejection forms on behalf of the company. Even though not

necessary, the company's board of directors passed a resolution authorizing her to reject UM coverage on the policies.

On the primary policy the plaintiffs suggest that the date on the rejection form was dated by someone other than Vinson. Plaintiffs presented a handwriting expert who examined various rejection forms and concluded the date that was affixed did not match the initials and known handwriting of Vinson. While not remembering all the specific documents she signed during that time, Vinson did state that the writing appeared to be her handwriting. Additionally, Cindy Lirette, the brokerage agent, testified that she remembered having Vinson sign the rejection document. She stated that Vinson had written the effective date of the policy (January 1, 1995) on both the effective date line and on the date of signing line. Lirette returned the rejection form to Vinson who changed the date of signature to 12-13-94.[3] Whether Vinson or someone else changed the date on the document is a factual determination within the sole province of the jury and is subject to the manifest error or clearly wrong standard of review. The jury heard the testimony of the expert, Vinson, and Lirette; they chose to believe Vinson and Lirette rather than the expert. There is nothing clearly wrong with this choice. We find no error in the jury finding that the UM rejection of the primary policy was valid.

With reference to the excess policy, plaintiffs claim they are three separate annual policies. Defendant argues that it is a renewable three-year policy. Plaintiffs did not challenge the authenticity of the UM rejection on the initial excess policy. Cindy Lirette testified that the rejection forms on both policies were signed and dated at the same time on the same date (December 13, 1994). However, only the primary policy had to be returned to Vinson for the date of

[3] Rather than 1-1-95, the "5" had been written over with a "4" and the date is 12-13-94. Lirette testified that Vinson changed the date by writing the "4" over the "5" in "95" and added a "2" after the "1" to create a "12" and a "3" after the second "1" to create a "13".

signature to be changed. There was no problem with the signatures, initials, or dates on the initial excess policy. Each year Gray had Vinson sign and execute a new UM rejection form for the policy that took effect on January 1, 1996, and on January 1, 1997. Each of these policies was given a different policy number, GSX-040817 and GSX-040872, respectively. The jury evidently had some confusion and problem with the rejection forms signed for the policy taking effect on January 1, 1996 (GSX-040817). They found the rejection to be invalid. This finding is subject to the same standard of review as the factual finding by the jury on the primary policy. We find no error in the factual findings of the jury that the UM rejection for 1996 was invalid.

However, we find it was legal error for the jury to find that a valid rejection of UM coverage under the excess policy was again required for the policy year 1996. The original policy was issued effective January 1, 1995. The two later policies are renewal policies. There is no requirement for additional annual rejection forms to be executed. LSA-R.S. 22:1295(1)(a)(ii).[4] The initial excess policy #GSX-040755 option for UM coverage was validly rejected. An initial valid rejection by an insured is valid for renewal policies. *McElroy v. Continental Cas. Co.,* 43,868 (La. App. 2d Cir. 6/24/09), 15 So.3d 377, 381. A "renewal" policy is defined by LSA-R.S. 22:1266A(5) as one issued and delivered by an insurer to replace, at the end of the policy period, a policy previously issued and delivered by the same insurer.

The Second Circuit Court of Appeal examined the same issue before us here in *McElroy, Id.* In *McElroy,* Continental Casualty applied for supervisory writs after the district court's denial of its motion for summary judgment was affirmed by the appeal court. The supreme court accepted writs and remanded to the appeal court for briefing and argument. The opinion subsequently released reviewed the

[4] The statute cited was not applicable at the time of the accident because the Insurance Code was renumbered effective 2008. However, the effective law was the same.

public policy, law, and jurisprudence regarding UM coverage. It cited LSA-R.S. 22:1295(1)(a)(ii), noting that "[t]he form signed by the insured or his legal representative which initially rejects 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." *McElroy*, 15 So.3d at 380-381.

The Second Circuit Court of Appeal in *McElroy* also addressed the issue of the policies having different numbers. "Although the policy number for the first policy was different from the number for the second policy, a change in policy numbers does not necessarily indicate a new policy has been issued rather than a renewal or substitute policy." *McElroy*, 15 So.2d at 381, citing *Lewis v. Lenard,* 29,529 (La. App. 2d Cir. 5/7/97), 694 So.2d 574.

In the matter before us, each of the subsequent policies provides the same coverage to the same insured by the same insurer. Each subsequent policy's term began immediately after the expiration of the term of the preceding policy. There is no lapse in coverage in the three policies.[5] Since these policies were renewal policies, the original UM rejection applied to them. It was valid at the time it was executed for the initial excess policy; it is valid for the subsequent renewal policies. The jury committed legal error in finding UM coverage on the excess policy was not validly rejected.

Because we find there was no insurance coverage under either the primary policy or under the excess policy, there is no need to consider the other assignments of error pertaining to the amount of the damage awards or how to apply them to the insurance policies.

---

[5] The initial policy, #GSX-040755, has an effective date of January 1, 1995 to January 1, 1996 at 12:01 a. m. The first renewal, # GSX-040817, has an effective date of January 1, 1996 to January 1, 1997 at 12:01 a.m. The second renewal, # GSX-040872, has an effective date of January 1, 1997 to January 1, 1998 at 12:01 a.m.

CONCLUSION

Accordingly, the judgment in favor of the plaintiffs against Gray Insurance is reversed. Costs of this appeal are assessed against the plaintiffs.

REVERSED.