NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 0025

DEDRA GRIFFIN AND SHEDDRICK GRIFFIN

VERSUS

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Judgment Rendered: SEP 18 2015

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 590,868

Honorable Janice Clark, Judge

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

Drake, J. – dissent without written reasons

WELCH, J.

State Farm Mutual Automobile Insurance Company ("State Farm"), in its capacity as uninsured/underinsured motorist ("UM") insurer, appeals a judgment in favor of the plaintiffs, Dedra and Sheddrick Griffin, awarding them statutory penalties and attorney's fees due to State Farm's bad faith in handling the plaintiffs' claim. Finding no error in the judgment of the trial court, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On May 20, 2010, the plaintiffs filed a petition for damages against State Farm. According to the factual allegations of the plaintiffs' petition, on January 13, 2010, Dedra Griffin was operating a 2000 Infiniti I30 eastbound on U.S. Highway 190 in West Baton Rouge Parish, Louisiana. Sheddrick Griffin, her husband, was a guest passenger in this vehicle. At approximately the same time and place, Jacob P. Savoy was operating a 2001 Mitsubishi Spyder eastbound on U.S. Highway 190, and he was traveling behind the vehicle occupied by the plaintiffs when he struck their vehicle in the rear, causing injuries, damages and other losses. At the time of the accident, there was in full force and effect a policy of liability insurance issued by Allstate Fire and Casualty Insurance Company ("Allstate") insuring the 2001 Mitsubishi operated by Jacob Savoy. Allstate paid the limits of its policy to the plaintiffs and had been released by the plaintiffs.

The plaintiffs further alleged that their damages exceeded the limits of Allstate's liability policy and that at the time of the accident, there was in full force and effect a policy of UM insurance issued by State Farm insuring the vehicle driven by the plaintiffs, with limits of $10,000.00/$20,000.00. In addition, the plaintiffs asserted they had submitted satisfactory proof of loss in writing to State Farm for the UM benefits, but State Farm had failed to pay a reasonable portion of

the claim as required by law.[1] Accordingly, the plaintiffs sought judgment against State Farm for their damages, as well as an award of statutory penalties and attorney's fees for its bad faith in handling their claims. See La. R.S. 22:1892 and La. R.S. 22:1973.

A trial on the merits was held on October 25, 2012. For purposes of trial, the following were established as facts:

On or about January 13, 2010, an automobile accident occurred between a 2001 Mitsubishi Spyder, owned and operated by Jacob P. Savoy, and a 2000 Infiniti I30 operated by Dedra Griffin, but owned by Rose Wilson,[2] and occupied by Sheddrick Griffin. The 2001 Mitsubishi Spyder owned and operated by Jacob Savoy was insured by Allstate with liability limits of $10,000.00/$20,000.00. The 2000 Infiniti I30 operated by Dedra Griffin was insured by State Farm.

Dedra Griffin demanded the State Farm UM policy limits or undisputed portion on April 22, 2010, and again on June 16, 2010, and provided documentation of related medical expenses, a copy of the Allstate "dec sheet," a copy of the Allstate settlement documentation, and an affidavit from Louisiana Department of Motor Vehicles on driver Jacob Savoy. The medical expenses attached to her April 22, 2010 demand letter totaled $25,200.55, and the medical expenses attached to her June 16, 2010 demand letter totaled $27,859.55. State Farm, under the UM coverage of its policy, made an unconditional tender of $2,000.00 to Dedra Griffin on May 14, 2010, and it made a second unconditional tender of $8,000.00 on March 16, 2011.

Sheddrick Griffin demanded the State Farm UM policy limits or undisputed portion on April 22, 2010, and provided documentation of related medical

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[1] There is no dispute that the plaintiffs made separate demands to State Farm for payment of the Medical Payment coverage limit of $5,000.00, which was paid to both plaintiffs within a reasonable delay.

[2] The record reveals that Rose Wilson is Dedra Griffin's mother and that Dedra Griffin was using the vehicle with her mother's permission.

expenses, a copy of the Allstate "dec sheet," a copy of the Allstate settlement documentation, and an affidavit from Louisiana Department of Motor Vehicles on driver Jacob Savoy. The medical expenses attached to his April 22, 2010 demand totaled $23,897.20. State Farm, under the UM coverage of its policy, made an unconditional tender of $1,200.00 to Sheddrick Griffin on May 14, 2010, and it made a second unconditional tender of $8,800.00 on March 16, 2011.

Thus, because the full amount of UM coverage had been paid before trial, the issues to be determined at trial were: whether State Farm was in bad faith for failing to tender the undisputed portion of the policy; and if so, the amount of penalties and attorney's fees to which the plaintiffs were entitled to recover. After the close of evidence and the receipt of post-trial briefs, the trial court determined that State Farm had been arbitrary and capricious in handling the plaintiffs' claims, as its tenders were insufficient with respect to the facts known by State Farm at the time the tenders were made and were untimely. In accordance with these factual findings, the trial court rendered judgment, in favor of the plaintiffs and against State Farm, awarding penalties in favor of Dedra Griffin in the amount of $16,000.00 and Sheddrick Griffin in the amount of $17,600.00, and awarding them attorney's fees in the amount of $8,000.00. A judgment in accordance with the trial court's ruling was signed on September 3, 2014, and it is from this judgment that State Farm appeals.

On appeal, State Farm essentially contends that: (1) the trial court erred in finding it was responsible for penalties and attorney's fees because there was no proof that it had been arbitrary and capricious in handling the plaintiffs' claims; and (2) assuming State Farm was in bad faith, the penalties and attorney's fees awarded by the trial court were not supported by the law or competent evidence.

LAW AND DISCUSSION

Louisiana Revised Statutes 22:1892(A)(1) requires insurers to pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss. In addition, La. R.S. 22:1892(B)(1) provides, in pertinent part, that:

> [The f]ailure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor ... when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater ... or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs. ...

Thus, La. R.S. 22:1892(A)(1) and (B) subjects an insurer, when it is arbitrary or capricious in failing to unconditionally tender the undisputed amount within thirty days of satisfactory proof of loss, to the mandatory imposition of penalties and attorney's fees for the collection of such amount.[3] **Ibrahim v. Hawkins**, 2002-0350 (La. App. 1st Cir. 2/14/03), 845 So.2d 471, 476.

Further, La. R.S. 22:1973[4] imposes an obligation of good faith and fair dealing on an insurer, including the affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant. An insurer who breaches this duty may be subject to damages sustained as a result of this breach, and if the insurer fails to pay a claim due within sixty days of receiving satisfactory proof of loss, when such failure is arbitrary, capricious, or without probable cause, the insurer may also be subject to penalties

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[3] Louisiana Revised Statutes 22:1892 was renumbered from La. R.S. 22:658 by 2008 La. Acts, No. 415, §1, effective January 1, 2009. Since the renumbering of the statute effected no change in the law, the jurisprudence under former La. R.S. 22:658 is applicable to La. R.S. 22:1892. See for e.g., **Lemoine v. Mike Munna, L.L.C.**, 2013-2187 (La. App. 1st Cir. 6/6/14), 148 So.3d 205, 215, citing **Reed v. State Farm Mutual Automobile Insurance Company**, 2003-0107 (La. 10/21/03), 857 So.2d 1012, 1020.

[4] Louisiana Revised Statutes 22:1973 was renumbered from La. R.S. 22:1220 by 2008 La. Acts, No. 15§ 1 effective January 1, 2009. Since the renumbering of the statute effected no change in the law, the jurisprudence under former La. R.S. 22:1220 is applicable to La. R.S. 22:1973. See footnote 3.

not to exceed two times the damages sustained as a result of the breach or five thousand dollars, whichever is greater. La. R.S. 22:1973(A), (B)(5), and (C).

Both La. R.S. 22:1892 and La. R.S. 22:1973 are penal in nature and must be strictly construed. **Lemoine v. Mike Munna, L.L.C.**, 2013-2187 (La. App. 1st Cir. 6/6/14), 148 So.3d 205, 215, citing **Reed v. State Farm Mutual Automobile Insurance Company**, 2003-0107 (La. 10/21/03), 857 So.2d 1012, 1020. There is a close relationship between the conduct prohibited by La. R.S. 22:1892A(1) and (B) and the conduct prohibited by La. R.S. 22:1973(B)(5). In fact, the conduct described is virtually identical: the failure to timely pay a claim after receiving satisfactory proof of loss when that failure to pay is arbitrary, capricious, or without probable cause. **Lemoine**, 148 So.3d at 215; **Reed**, 857 So.2d at 1020. The primary difference is the time periods allowed for payment. **Lemoine**, 148 So.3d at 215; **Reed**, 857 So.2d at 1020. Under La. R.S. 22:1892(A)(1), the insurer must pay the claim within thirty days of receiving satisfactory proof of loss, whereas under La. R.S. 22:1973(B)(5), there is a longer sixty-day period. While La. R.S. 22:1973(C) provides the greater penalty, it supercedes La. R.S. 22:1892(B), such that the insured cannot recover penalties under both statutes. See **Calogero v. Safeway Ins. Co.**, 99-1625 (La. 1/19/00), 753 So.2d 170, 174; **Durio v. Horace Mann Insurance Company**, 2011-0084 (La. 10/25/11), 74 So.3d 1159, 1171 n.12. However, because La. R.S. 22:1973 does not provide for attorney's fees, the insured is entitled to recover the greater penalties under La. R.S. 22:1973 and attorney's fees under La. R.S. 22:1892 for its insurer's arbitrary or capricious failure to timely pay his claim after receiving satisfactory proof of loss. See **Calogero**, 753 So.2d at 174; **Ibrahim**, 845 So.2d at 478.

One who claims entitlement to penalties and attorney's fees has the burden of proving the insurer received satisfactory proof of loss as a predicate to a showing that the insurer was arbitrary, capricious, or without probable cause.

Lemoine, 148 So.3d at 215; **Reed**, 857 So.2d at 1020. A "satisfactory proof of loss" is that which is sufficient to fully apprise the insurer of the insured's claim. **Lemoine**, 148 So.3d at 215, citing **Louisiana Bag Company, Inc. v. Audubon Indemnity Company**, 2008-0453 (La. 12/2/08), 999 So.2d 1104, 1119 and **McDill v. Utica Mutual Insurance Company**, 475 So.2d 1085, 1089 (La. 1985). To establish a "satisfactory proof of loss," the insured must show that the insurer received sufficient facts which fully apprise the insurer that (1) the owner or operator of the other vehicle involved in the accident was uninsured or underinsured, (2) that he was at fault, (3) that such fault gave rise to damages, and (4) establish the extent of those damages. **Lemoine**, 148 So.3d at 215; **McDill**, 475 So.2d at 1089.

The sanctions of penalties and attorney's fees are not assessed unless a plaintiff's proof is clear that the insurer was in fact arbitrary, capricious, or without probable cause in refusing to pay. **Lemoine**, 148 So.3d at 215; **Reed**, 857 So.2d at 1021. The phrase "arbitrary, capricious, or without probable cause" is synonymous with "vexatious," and a "vexatious refusal to pay" means "unjustified, without reasonable or probable cause or excuse." **Lemoine**, 148 So.3d at 215; **Louisiana Bag Company, Inc.**, 999 So.2d at 1114.

Whether an insurer's conduct in refusing to pay is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action, and penalties should not be assessed when the insurer has a reasonable basis to defend the claim and acts in good-faith reliance on that defense. **Lemoine**, 148 So.3d at 215; **Louisiana Bag Company, Inc.**, 999 So.2d at 1114; **Reed**, 857 So.2d at 1021. When there is a reasonable and legitimate question as to the extent and causation of a claim, bad faith should not be inferred from an insurer's failure to pay within the statutory time limits when such reasonable doubts exist. **Lemoine**, 148 So.3d at 215; **Reed**, 857 So.2d at 1021. In those instances where

there are substantial, reasonable, and legitimate questions as to the extent of an insurer's liability or an insured's loss, failure to pay within the statutory time period is not arbitrary, capricious or without probable cause. **Lemoine**, 148 So.3d at 215; **Louisiana Bag Company, Inc.**, 999 So.2d at 1114.

Whether an insurer's refusal to pay is arbitrary, capricious, or without probable cause is essentially a factual issue; thus, the trial court's finding should not be disturbed on appeal absent manifest error. **Lemoine**, 148 So.3d at 216; **Louisiana Bag Company, Inc.**, 999 So.2d at 1120. With respect to the assessment of penalties and attorney's fees, the trial court's conclusion is also a factual finding that should not be disturbed in the absence of a finding that it was manifestly erroneous. **Ibrahim**, 845 So.2d at 477.

State Farm contends that its decision process with regard to the payment of the plaintiffs' claims was well reasoned and could not be considered arbitrary and capricious so as to support an award of penalties and attorney's fees. However, based on our review of the entire record, we cannot say that the trial court manifestly erred in determining that State Farm acted arbitrarily or capriciously in dealing with the plaintiffs' claims. The undisputed evidence in the record reveals that the accident occurred when Dedra Griffin was driving at a speed close to the speed limit when Jacob Savoy came from behind her and rear-ended the vehicle she was driving. The accident caused extensive property damage to the vehicle Dedra Griffin was driving and it was considered a "total loss." As a result of the accident, Dedra sustained injuries to her shoulder, neck, and chest wall, as well as an aggravation of some pre-existing injuries to her neck, back, and legs. Additionally, as a result of the accident, Sheddrick sustained injuries to his left knee, chest wall, and back. Both plaintiffs were treated by Dr. David Wyatt, an orthopedic surgeon, for their accident-related injuries.

The record also reflects that State Farm opened a claim for the plaintiffs on January 19, 2010, that UM and Medical Payment coverage inuring to the plaintiffs' benefit had been confirmed around January 25, 2010, and that State Farm then commenced its investigation of the plaintiffs' claims for UM and Medical Payment benefits. During the investigation, State Farm determined that the accident was caused solely by the fault of Jacob Savoy. Prior to filing suit, on April 22, 2010, the plaintiffs made separate demands to State Farm for UM benefits, and on June 16, 2010, another demand was made for Dedra Griffin for UM benefits.

All of the information regarding the nature and extent of both parties' accident-related injuries and the treatment for such injuries were set forth in the records of Dr. Wyatt and Baton Rouge Imaging and were provided with the plaintiffs' demands for UM benefits. As previously noted, the medical expenses attached to Dedra Griffin's April 22, 2010 demand letter totaled $25,200.55, and the medical expenses attached to her June 16, 2010 demand letter totaled $27,859.55. The medical expenses attached to Sheddrick Griffin's April 22, 2010 demand totaled $23,897.20. Thus, the trial court could have reasonably concluded that Dedra Griffin provided satisfactory proof of her loss to State Farm through her demand letters of April 22, 2010 and June 16, 2010 and that Sheddrick Griffin provided satisfactory proof of loss in his demand letter of April 22, 2010.

On May 14, 2010, which was within thirty days of the April 22, 2010 demand, State Farm unconditionally tendered $2,000.00 to Dedra Griffin and $1,200.00 to Sheddrick Griffin. State Farm then propounded written discovery to the plaintiffs, and State Farm then took the plaintiffs' depositions on December 6, 2010. On March 10, 2011 (and approximately eleven months after the plaintiffs' initial April 22, 2010 demand), State Farm unconditionally tendered the remainder of the UM benefits to the plaintiffs—$8,000.00 to Dedra Griffin and $8,800.00 to Sheddrick Griffin. State Farm claimed that its delay in tendering the remainder of

the UM benefits was attributable to the fact that it wanted to conduct discovery and take the plaintiffs' depositions. However, State Farm admitted that following the plaintiffs' depositions on December 6, 2010, through its tender on March 10, 2011, (which exceeded the allowed statutory delays for paying claims under La. R.S. 22:1892(A)(1) (thirty days) and/or under La. R.S. 22:1973(B)(5) (sixty days)), it obtained no new information concerning the plaintiffs' claims. State Farm also attempted to explain that its delay in tendering the remaining UM benefits to the plaintiffs was based on "suspicions" that its adjuster had about the plaintiffs' counsel, Dr. Wyatt, and Baton Rouge Imaging. However, State Farm did not offer any evidence to support any of the adjuster's "suspicions" in this regard. Thus, the record reasonably supports the conclusion that State Farm did not have substantial, reasonable or legitimate questions as to the extent of its liability and the plaintiff's losses. Accordingly, we find no manifest error in the trial court's determination that State Farm was arbitrary and/or capricious in its handling of the plaintiffs' claims.

With regard to penalties and attorney's fees in favor of the plaintiffs for State Farm's bad faith, as previously set forth, La. R.S. 22:1892 provides for penalties in the amount of fifty percent on the amount found to be due from the insurer to the insured, *or* one thousand dollars, whichever is greater; or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due, as well as reasonable attorney's fees and costs. And, La. R.S. 22:1973(C) provides for an award of penalties not to exceed two times the damages sustained *or* five thousand dollars, whichever is greater. When La. R.S. 22:1973(C) provides the greater penalty, it supersedes the penalty set forth in La. R.S. 22:1892(B)(1); however, the plaintiffs are still entitled to recover attorney's fees under La. R.S. 22:1892(B)(1). See **Calogero**, 753 So.2d at 174. In determining an award of attorney's fees to be

assessed under La. R.S. 22:1892(B), the trial court should consider the services needed to effect recovery, the degree of professional skill and ability exercised, the volume of work performed, the time devoted to the case, the result obtained, the amount in controversy, the novelty and difficulty of the questions involved, and the percentage fixed for attorney's fees in the plaintiff's contract. **Ibrahim**, 845 So.2d at 477.

Herein, the trial court awarded Dedra Griffin penalties in the amount of $16,000.00, Sheddrick Griffin penalties in the amount of $17,600.00, and awarded both of them attorney's fees in the total amount of $8,000.00. We note that the penalties awarded by the trial court represent two times the difference between the amount initially tendered by State Farm to each plaintiff on May 14, 2010 (*i.e.*, $2,000 to Dedra Griffin and $1,200.00 to Sheddrick Griffin) and the amount that it ultimately should have paid (*i.e.*, the $10,000.00 UM policy limits).[5] Thus, the trial court apparently concluded that the "damages" sustained by the plaintiffs consisted of the sums that were due or owed to them, but were not paid, following their April 22, 2010 demand for UM benefits. The record establishes that the plaintiffs had no health insurance coverage and were not eligible for Medicaid or Medicare at any time pertinent to the proceeding. Dedra Griffin testified that she did not undergo certain medical treatments recommended by Dr. Wyatt because she could not afford the treatments, and Sheddrick Griffin testified that they were depending on insurance to pay their medical bills. Given this evidence, the trial

[5] As to Dedra Griffin, the difference between the $2,000.00 initially tendered and the policy limits of $10,000.00 is $8,000.00. Multiplied by 2, the sum is $16,000.00. (($10,000.00-$2,000.00) x 2 = $16,000.00). As to Sheddrick Griffin, the difference between the $1,200.00 initially tendered and the policy limits of $10,000.00 is $8,800.00. Multiplied by 2, the sum is $17,600.00. (($10,000.00-$1,200.00) x 2 = $17,600.00).

court's determination of damages and its assessment of penalties under La. R.S. 22:1973(C) was not manifestly erroneous or otherwise in error.[6]

With regard to the award of attorney's fees, considering all of the relevant factors set forth above, we note that the amount of attorney's fees awarded by the trial court represents about one-fourth of the total amount recovered by the plaintiffs. The sum was recovered by the plaintiffs' counsel following a full trial on the merits, which involved the examination of four witnesses, as well as the introduction of numerous documentary exhibits. In addition, the record reveals that counsel for plaintiffs participated in discovery, and he prepared several pleadings, a pre-trial order, and post-trial brief. Based on our review of the record, the assessment of attorney's fees pursuant to La. R.S. 22:1892(B) in the amount of $8,000.00 was not excessive or unwarranted, and thus, was not manifestly erroneous.

CONCLUSION

For all of the above and foregoing reasons, the September 3, 2014 judgment of the trial court is affirmed. All costs of the appeal are assessed to the defendant/appellant, State Farm Mutual Automobile Insurance Company.

AFFIRMED.

[6] We note that the penalties under La. R.S. 22:1973(C) are greater than those that would be awarded under La. R.S. 22:1892(B). Thus, the penalty provision of La. R.S. 22:1973(C) is applicable.