

**NOT FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0111

MICHAEL BELANGER

VERSUS

*akp*  
*ant.* SPENCER H. CALAHAN, L.L.C., SPENCER CALAHAN, JONATHAN D.  
MAYEAUX, BRADY PATIN, AND ABC INSURANCE CO.

Judgment Rendered: OCT 25 2018

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On Appeal from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Trial Court No. 644,691

The Honorable Janice Clark, Judge Presiding

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\* \* \* \* \*

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

*Guidry, P. Concur.*

**PENZATO, J.**

Plaintiff/Appellant, Michael Belanger, appeals the trial court's judgment granting summary judgment in favor of Defendants/Appellees, Spencer H. Calahan, L.L.C., Spencer Calahan, Jonathan D. Mayeaux, Brady Patin, and ABC Insurance Co., and dismissing all his claims against defendants. For the reasons that follow, we reverse the judgment of the trial court.

**FACTS AND PROCEDURAL HISTORY**

The matter before us is a legal malpractice action based on underlying litigation that began when Belanger was involved in a motor vehicle accident (MVA) on December 7, 2007, with Natalie N. Stephen, who was insured by GEICO General Insurance Company ("GEICO"). Spencer H. Calahan, L.L.C., Spencer Calahan, Jonathan D. Mayeaux, and Brady Patin, (collectively referred to as "defendants"), the attorneys representing Belanger, filed suit on behalf of Belanger against Stephen and GEICO ("MVA proceeding"), asserting that Belanger requested that GEICO settle the MVA proceeding for its policy limits of \$25,000.00, which GEICO rejected. After a trial was held, on April 26, 2011, the jury returned a verdict in favor of Belanger in the amount of \$450,000.00, and the trial court signed a judgment in accordance with the jury's verdict. GEICO and Stephen appealed the trial court's judgment to this court, and we affirmed the judgment. The Louisiana Supreme Court denied the writ on April 1, 2013. *Belanger v. Stephen*, 2012-0278 (La. App. 1 Cir. 11/14/12), 2012 WL 5506648 (unpublished), *writ denied*, 2012-2679 (La. 4/1/13), 110 So. 3d 581. In May of 2013, GEICO paid its \$25,000.00 policy limit to Belanger stemming from the MVA proceeding.

Thereafter, on September 25, 2013, Stephen assigned to Belanger her rights to any bad faith claim against GEICO due to the excess judgment. On October 4, 2013, Belanger, as assignee of Stephen, filed a petition in the 19th Judicial District

Court against GEICO (“GEICO proceeding”) alleging that GEICO had entered into a contract with Stephen and had acted in bad faith by violating that contract. Belanger prayed for reasonable damages together with legal interest.<sup>1</sup> Defendants also represented Belanger in the GEICO proceeding.

GEICO removed the GEICO proceeding to the United States District Court for the Middle District of Louisiana (Middle District) and filed a Rule 12(b)(6) motion to dismiss for failure to state a claim or an alternative motion for summary judgment. GEICO argued that *Spiers v. Liberty Mut. Fire Ins. Co.*, 2006 WL 4764430, at \*3 (E.D. La. Nov. 21, 2006), set forth that “the causes of action and penalties allowed exclusively for breach of fiduciary duty by an insurer are codified” in La. R.S. 22:1973 (renumbered from La. R.S. 22:1220 by 2008 La. Acts, No. 415 § 1, effective January 1, 2009).<sup>2</sup> GEICO further asserted that a violation of La. R.S. 22:1973 was delictual in nature and therefore, subject to the one-year prescriptive period provided in La. C.C. art. 3492, rather than the ten-year prescriptive period provided in La. C.C. art. 3499. Therefore, GEICO asserted that Belanger’s bad faith claim was prescribed. Belanger argued the application of the doctrine of *contra non valentem* in defense to the Rule 12(b)(6) motion. The Middle District initially determined that prescription began to run from the date of the judgment, April 26, 2011, rather than subsequent to the appeals process and the writ denial by the Louisiana Supreme Court on April 1, 2013. *Belanger v. GEICO General Ins. Co.*, 2014 WL 7338837, at \* 5 (M.D. La. Dec. 22, 2014). Therefore, the Middle District held that the bad faith claim against GEICO prescribed on April 26, 2012, thereby making the October 4, 2013 GEICO proceeding untimely. *Id.* The Middle District noted that the parties did not dispute the application of the one-year prescriptive period. *Id.*, at \* 3 n.2.

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<sup>1</sup> Belanger did not seek attorney’s fees or penalties in the GEICO proceeding.

<sup>2</sup> Hereinafter, the statute will be referred to as La. R.S. 22:1973, the current number, even though the case law refers to the prior number, La. R.S. 22:1220.

Belanger appealed to the United States Court of Appeals for the Fifth Circuit (United States Fifth Circuit), which clarified that because the excess judgment was appealed devolutively, rather than suspensively, it was fully enforceable during the appeals process. Consequently, the court held that Stephen was legally obligated to pay the excess judgment in 2011, which is when the bad faith claim against GEICO arose. *Belanger v. GEICO General Ins. Co.*, 623 Fed. Appx. 684, 689 (5th Cir. 2015). The United States Fifth Circuit noted that Belanger, as an assignee of Stephen, stood in her shoes, and that he argued for the first time on appeal that the prescriptive period for a bad faith claim against an insurer by an insured under La. R.S. 22:1973 was subject to the ten-year prescriptive period for contractual actions rather than the one-year prescriptive period for delictual actions. While finding that there was some support for the application of the ten-year prescriptive period, the appellate court held that Belanger had waived his right to advance the argument, and affirmed the decision of the Middle District. *Id.* The United States Fifth Circuit also recognized that Belanger's counsel made a conscious decision not to raise the ten-year prescriptive period at the Middle District level. *Id.* at 691.

Belanger then filed the present suit against defendants, claiming legal malpractice by not raising in opposition to GEICO's motion to dismiss in the GEICO proceeding that a ten-year prescriptive period applied to GEICO's breach of a contractual duty to defend Stephen, thereby waiving his right to assert such an argument, and precluding his right to collect the excess judgment.<sup>3</sup> Defendants filed a motion for summary judgment, asserting that the bad faith claim against

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<sup>3</sup> Belanger also claimed that defendants were negligent in:

- 1) Failing to file suit within the applicable prescriptive period;
- 2) Failing to file any exhibits opposing GEICO's Motion [to] Dismiss as untimely, or any exhibits supporting [Belanger's] contention that a one year prescriptive period was tolled under *contra non valentem* or other theories;

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- 4) Any other actions/inactions constituting legal malpractice that may be proven at trial.

GEICO prescribed on April 26, 2012, before any alleged malpractice occurred and before Belanger received the assignment of rights against GEICO in the underlying matter. Defendants argued that the bad faith claim pursuant to La. R.S. 22:1973 is a statutory duty, and therefore, the one-year prescriptive period applicable to delictual actions applied. Belanger filed his own motion for partial summary judgment, maintaining that the ten-year prescriptive period was applicable to his claim and defendants deviated below the standard of care by not asserting the ten-year prescriptive period in the GEICO proceeding.

The trial court heard the motions for summary judgment filed by both Belanger and defendants on September 11, 2017, and orally denied Belanger's motion and granted the defendants' motion. On October 4, 2017, the trial court signed a judgment granting the defendants' motion and dismissing Belanger's claims with prejudice.<sup>4</sup> It is from this judgment that Belanger appeals.

### **SUMMARY JUDGMENT**

Summary judgment procedure is favored and "is designed to secure the just, speedy, and inexpensive determination of every action .... and shall be construed to accomplish these ends." La. C.C.P. art. 966(A)(2). In reviewing the trial court's decision on a motion for summary judgment, this court applies a de novo standard of review using the same criteria applied by the trial court to determine whether summary judgment is appropriate. *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512 (La. 7/5/94), 639 So. 2d 730, 750-51.

The burden of proof is on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court, the mover is not required to negate all essential elements of the adverse party's claim, but only to point out to the court the absence of factual support for one or more of the

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<sup>4</sup> Although the record contains a copy of a judgment denying Belanger's motion for partial summary judgment, it does not appear to have been signed by the trial court.

elements necessary to the adverse party's claim. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1).

“After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.” La. C.C.P. art. 966(A)(3). A genuine issue is a triable issue, which means that an issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. A fact is “material” when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. *Kasem v. State Farm Fire & Cas. Co.*, 2016-0217 (La. App. 1 Cir. 2/10/17), 212 So. 3d 6, 13, *citing Smith*, 639 So. 2d at 751. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Tate v. Outback Steakhouse of Florida*, 2016-0093 (La. App. 1 Cir. 9/16/16), 203 So. 3d 1075, 1077.

An attorney is liable to his client for the damages caused by the attorney's negligence in handling the client's business, providing that the client proves by a preponderance of the evidence that such negligence is the proximate cause of the loss claimed. *Broadscape.com, Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP*, 2003-0904 (La. App. 4 Cir. 2/25/04), 866 So. 2d 1085, 1091, *writ denied*, 2004-0940 (La. 6/18/04), 876 So. 2d 806.

Normally, in order to establish a valid legal malpractice claim, a plaintiff must present evidence sufficient to convince a reasonable trier of fact of (1) the existence of an attorney-client relationship; (2) negligent representation by the

attorney; and (3) loss caused by that negligence. *MB Indus., LLC v. CNA Ins. Co.*, 2011-0303 (La. 10/25/11), 74 So. 3d 1173, 1184. The plaintiff has the burden of proving the defendant failed to “exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality.” *Id.*, quoting *Ramp v. St. Paul Fire and Marine Ins. Co.*, 263 La. 774, 269 So. 2d 239, 244 (1972).

In the instant case, the present motion for summary judgment was not premised on the factual issues of the alleged negligence of defendants. Instead, defendants made the legal argument that because the claim of Stephen was prescribed at the time it was assigned, Belanger could not establish that any alleged negligence caused damage to him. Defendants contended that Belanger could not meet his burden of proving the third essential element of legal malpractice, loss causation. Belanger opposed the motion for summary judgment arguing that subsequent decisions from Federal and Louisiana courts show that, more probably than not, had defendants raised the issue, his claims would have survived the asserted prescription claims.<sup>5</sup>

The Louisiana Supreme Court in *Costello v. Hardy*, 2003-1146 (La. 1/21/04), 864 So. 2d 129, 139, held that summary judgment is proper as to the third element of a plaintiff’s legal malpractice claim, i.e., the “absence of factual support for an essential element of plaintiff’s claim: loss or damages.” The proper method of determining whether an attorney’s malpractice is a cause in fact of damage to his client is whether the performance of that act would have prevented the damage. *Teague v. St. Paul Fire and Marine Ins. Co.*, 2006-1266 (La. App. 1 Cir. 4/7/09), 10 So. 3d 806, 821, *writ denied*, 2009-1030 (La. 6/17/09), 10 So. 3d 722. The

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<sup>5</sup> Belanger cited *Aspen Specialty Ins. Co. v. Technical Indus., Inc.*, No. 6:12-CV-0231, 2015, WL 339598, (W.D. La. Jan. 22, 2015), and *Prudhomme v. Geico Ins. Co.*, No. CIV. A. 15-00098, 2015 WL 2345420, (W.D. La. May 14, 2015), both of which were decided during the pendency of the United States Fifth Circuit appeal.

element of legal causation, in addition to causation in fact, must also be proven under the duty-risk analysis. Its importance in a legal malpractice action has been emphasized as follows:

As in any tort claim, the plaintiff in a malpractice claim must establish that the attorney's breach was not only the factual cause but also the legal cause of any injury. Legal or proximate cause, or scope of duty, normally does not present a significant or serious problem in a legal malpractice case. However, the issue does arise.... In sum, the legal cause issue, like so many duty/risk or legal cause issues under Louisiana tort law, is an important one that should not be ignored. However it may provide practical and intellectual challenges to the client, lawyer, judge, and jury.

*Leonard v. Reeves*, 2011-1009 (La. App. 1 Cir. 1/12/12), 82 So. 3d 1250, 1263, quoting 21 Frank L. Maraist, et al., *Louisiana Civil Law Treatise: Louisiana Lawyering* § 18.5 at pp. 375-76 (2007).

Therefore, we must conduct a de novo review of the evidence submitted with the motion for summary judgment to determine if there remains a genuine issue of material fact with regard to legal causation in this matter.

### **LAW AND DISCUSSION**

Defendants categorize the GEICO proceeding as a "bad faith action" falling solely within the purview of La. R.S. 22:1973, which states in pertinent part:

- A. An insurer ... owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

Defendants based their motion for summary judgment on the premise that La. R.S. 22:1973 is delictual in nature, and therefore, the claim against GEICO was prescribed at the time of the assignment. They assert that they cannot be liable for failure to assert a ten-year prescriptive period pursuant to La. C.C. art. 3499 in the GEICO proceeding because a one-year prescriptive period pursuant to La. C.C.



3492 was already determined by jurisprudence to apply to claims under La. R.S. 22:1973.

Attached to defendants' motion for summary judgment was the original petition filed in the MVA proceeding, the original petition filed in the instant action, the affidavit of Spencer Calahan, the assignment executed by Stephen and Belanger, GEICO's motion to dismiss filed in the Middle District, Belanger's opposition to the motion to dismiss, the Middle District's Ruling on the motion to dismiss, and the judgment in favor of Belanger in the MVA proceeding. Based on these documents, defendants asserted that Belanger could not demonstrate that his damages were caused by defendants.

In opposition to the motion for summary judgment, Belanger submitted some of the same documents above but also included admissions of defendants, the original petition filed in the GEICO proceeding, a letter brief drafted by defendants to the United States Fifth Circuit at that court's request, and a transcript of portions of the argument before the United States Fifth Circuit. Belanger asserted, based on previous and subsequent jurisprudence, that the conduct alleged in the underlying action was of a contractual nature, and had defendants raised the argument that the ten-year prescriptive period applied, his claims would have survived.

The evidence presented at the motion for summary judgment hearing was that Belanger was awarded a \$450,000.00 judgment against Stephen and GEICO in the MVA proceeding on April 26, 2011, but he only received the \$25,000.00 policy limits from GEICO. Stephen then assigned her rights to a bad faith claim against GEICO to Belanger on September 25, 2013. The bad faith claim is defined in the assignment agreement, in pertinent part, as follows:

[A]ny potential action that [Stephen] may have against [GEICO] ... in connection with the handling of the claim and/or tort action ... This shall include, but is not limited to, claims and actions based upon [GEICO]'s failure to protect [Stephen] from liability for damages sustained by [Belanger] that were in excess of the coverage limits

afforded by the [GEICO] policy. It shall also include any claim or action [Belanger] may have against [GEICO] **to enforce the terms of the insurance contract and any obligations arising thereunder.** [Emphasis added].

Defendants, on behalf of Belanger, then filed the GEICO proceeding on October 4, 2013. In that proceeding, the petition specifically alleged:

[GEICO] entered into a contract of insurance with [Stephen] ... and **violated the terms of that contract**, specifically, but not limited to, not negotiating settlement of this case in good faith in a timely manner, not accepting the offer to settle for policy limits and releasing [Stephen], not timely notifying [Stephen] of offers by [Belanger] to release her in exchange for the policy limits and failing to protect her interests in a timely and proper manner. All of these rights of [Stephen's] to hold [GEICO] responsible for the excess judgment were assigned to [Belanger] in the September 25, 2013, compromise agreement. [Emphasis added].<sup>6</sup>

Defendants, on behalf of Belanger, submitted a supplemental letter brief on August 3, 2015, to the United States Fifth Circuit at the court's request. In the letter brief, defendants argued that the petition in the GEICO proceeding alleged an insurance contract existed between Stephen and GEICO, and that GEICO violated that contract. Defendants also argued that "[a]n insured's claim against his/her insurer for the insurer's bad faith failure to settle within the insured's policy limits is in contract and is therefore subject to 10-year liberative prescription."

In their response to the United States Fifth Circuit, defendants cited *Kelly v. State Farm Fire & Cas. Co.*, 2014-1921 (La. 5/5/15), 169 So. 3d 328, 336, which

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<sup>6</sup> As this action was filed initially in state court, the provisions of La. C.C.P. art. 863 are applicable thereto, which provides, in pertinent part:

B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading, and that to the best of his knowledge, information, and belief formed after reasonable inquiry, he certifies all of the following:

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(2) Each claim, defense, or other legal assertion in the pleading is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.

(3) Each allegation or other factual assertion in the pleading has evidentiary support or, for a specifically identified allegation or factual assertion, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

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answered certified questions relating to whether an insurer could be liable in bad faith for failing to settle a claim when it never received a firm settlement offer under La. R.S. 22:1973(A) and whether it could be liable for misrepresenting or failing to disclose facts not related to the insurance policy coverage under La. R.S. 22:1973(B)(1). Defendants noted that the Louisiana Supreme Court relied on earlier case law, which stated that La. R.S. 22:1973 “recognizes the jurisprudentially established duty of good faith and fair dealing owed to the insured, which is an outgrowth of the contractual and fiduciary relationship between the insured and insurer.” *Kelly*, 169 So. 3d at 336, quoting *Theriot v. Midland Risk Ins. Co.*, 1995-2895 (La. 5/20/97), 694 So. 2d 184, 187. As previously noted herein, the United States Fifth Circuit found that Belanger’s counsel made a conscious decision not to raise these arguments at the trial court level, and thereby, waived Belanger’s right to assert the arguments on appeal.

The proper prescriptive period to be applied in any action depends upon the nature of the cause of action. It is the nature of the duty breached, the nature of the conduct, and the damages sought that should determine whether the action is in tort or in contract. *Roger v. Dufrene*, 613 So. 2d 947, 948 (La. 1993). Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years. La. C.C. art. 3499; *Bezou v. Bezou*, 2015-1879 (La. App. 1 Cir. 9/16/16), 203 So. 3d 488, 495, writ denied, 2016-1869 (La. 12/5/16), 210 So. 3d 814. Delictual actions are subject to a liberative prescription period of one year. La. C.C. art. 3492. An action on a contract is governed by the prescriptive period of ten years. La. C.C. art. 3499. The classical distinction between “damages ex contractu” and “damages ex delicto” is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty owed to all persons. Even when tortfeasor and victim are bound by a contract, courts usually apply the delictual prescription to

actions that are really grounded in tort. *Thomas v. State Employees Grp. Benefits Program*, 2005-0392 (La. App. 1 Cir. 3/24/06), 934 So. 2d 753, 757. It is well settled that in certain circumstances the same acts or omissions may constitute breaches of both general duties and contractual duties and may give rise to both actions in tort and actions in contract. *Le v. Bradford Grp., LLC*, 2012-439 (La. App. 3 Cir. 11/7/12), 105 So. 3d 186, 190, *writ denied*, 2013-0237 (La. 3/8/13), 109 So. 3d 365, and *writ denied*, 2013-0256 (La. 3/8/13), 109 So. 3d 367; *Good Hope Baptist Church v. ICT Insurance Agency, Inc.*, 2010-142 (La. App. 3 Cir. 6/9/10), 41 So. 3d 1229, 1234; *We Sell Used Cars, Inc., v. United Nat. Ins. Co.*, 30,671 (La. App. 2 Cir. 6/24/98), 715 So. 2d 656, 659; *Franklin v. Able Moving & Storage Company, Inc.*, 439 So. 2d 489, 491 (La. App. 1 Cir. 1983).

Defendants, on behalf of Belanger, alleged in the GEICO proceeding that Stephen was an insured of GEICO; that Stephen assigned her rights against GEICO to Belanger; that a contract existed between Stephen and GEICO; and that GEICO violated the terms of that contract. Specifically, Belanger alleged:

[GEICO] entered into a contract of insurance with [Stephen] ... and **violated the terms of that contract**, specifically, but not limited to, not negotiating settlement of this case in good faith in a timely manner, not accepting the offer to settle for policy limits and releasing [Stephen], not timely notifying [Stephen] of offers by [Belanger] to release her in exchange for the policy limits and failing to protect her interests in a timely and proper manner. All of these rights of [Stephen's] to hold [GEICO] responsible for the excess judgment were assigned to [Belanger] in the September 25, 2013, compromise agreement. [Emphasis added].

Defendants sought only reasonable damages on Belanger's behalf and did not seek penalties and/or attorney's fees or reference that a cause of action was being asserted solely under La. R.S. 22:1973.<sup>7</sup> As previously stated, in certain circumstances the same acts or omissions may constitute breaches of both general duties and contractual duties, and may give rise to both actions in torts and actions

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<sup>7</sup> The damages sought in the underlying GEICO proceeding are distinguishable from those sought in the current malpractice suit.

in contracts. *Le*, 105 So. 3d at 190. While the allegations may also set forth a cause of action under La. R.S. 22:1973, they sound in contract which are subject to a liberative prescriptive period of ten years pursuant to La. C.C. art. 3499. Therefore, this court finds that based upon the pleadings certified by defendants in the GEICO proceeding, there is a material issue of fact herein precluding summary judgment as to the contractual nature of Belanger's claims independent of a cause of action legislatively established by the enactment of La. R.S. 22:1973.<sup>8</sup>

Defendants assert that Belanger failed to allege that a specific contractual provision was violated, and therefore, the action should be considered tort-based. An examination of the petition filed in the GEICO proceeding reveals that Belanger did assert that GEICO violated its contractual provisions, but no specific contractual provision is referenced. However, we find this argument to be disingenuous, as defendants, who were representing Belanger, drafted the petition against GEICO. Any failure to allege a specific contractual provision against GEICO is attributable to defendants. Defendants cannot have it both ways; they cannot rely on the contract when it works to their advantage and then repudiate it when it works to their disadvantage. *See Snyder v. Belmont Homes, Inc.*, 2004-0445 (La. App. 1 Cir. 2/16/05), 899 So. 2d 57, 62-63, *writ denied*, 2005-1075 (La. 6/17/05), 904 So. 2d 699; *see also Audubon Orthopedic & Sports Med., APMC v. Lafayette Ins. Co.*, 2009-0007 (La. App. 4 Cir. 4/21/10), 38 So. 3d 963, 979, *writ denied*, 2010-1153 (La. 10/8/10), 46 So. 3d 1266, and *writ denied*, 2010-1155 (La. 10/8/10), 46 So. 3d 1266 (after prevailing on a factual issue with the jury, plaintiff ironically could not argue the opposite—to ignore the jury finding—in order to affirm the award of attorney's fees).

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<sup>8</sup> Based upon this finding, we pretermitt a discussion of the prescriptive period of claims brought solely under La. R.S. 22:1973.

Defendants also assert that Belanger failed to submit the GEICO policy in this matter. As previously stated, it was the defendants who asserted a contractual claim on behalf of their client in the GEICO proceeding. Any failure to include the policy herewith leaves unanswered the question of the contractual nature of this claim based upon the pleadings certified by the defendants.<sup>9</sup> Further, the Louisiana Supreme Court has recognized that the duty of good faith and fair dealing arises from the contract of insurance. *Theriot*, 694 So. 2d at 187.

Based on the foregoing, this court finds that there exists a genuine issue of material fact herein, precluding the grant of summary judgment.

### **CONCLUSION**

For the above and foregoing reasons, the October 14, 2017 judgment granting summary judgment on behalf of Spencer H. Calahan, L.L.C., Spencer Calahan, Jonathan D. Mayeaux, Brady Patin, and ABC Insurance Co., is reversed. All costs of this appeal are assessed against defendants, Spencer H. Calahan, L.L.C., Spencer Calahan, Jonathan D. Mayeaux, Brady Patin, and ABC Insurance Co.

**REVERSED.**

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<sup>9</sup> In fact, one allegation of negligence in this case is the failure to file exhibits in opposition to the Rule 12(b)(6) motion in the GEICO proceeding.