NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0489

BRANDY ORTEGO

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: NOV 01 2013

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On Appeal from the
23rd Judicial District Court,
In and for the Parish of Ascension,
State of Louisiana
Trial Court No. 97,023

Honorable Guy Holdridge, Judge Presiding

KUHN, J DISSENTS & ASSIGNS REASONS

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

Plaintiff, Brandy Ortego, appeals the trial court's grant of summary judgment in favor of the defendant, State Farm Mutual Automobile Insurance Company (State Farm). For the following reasons, we affirm.

BACKGROUND

On July 14, 2009, Ms. Ortego was involved in an automobile accident where she was hit from behind. After the accident, Ms. Ortego quickly settled with State Farm as the insurer of the alleged tortfeasor for the policy limits of $10,000.00. On August 5, 2009, Ms. Ortego, through her counsel, also presented a claim to State Farm as the insurer of the vehicle she was driving. The State Farm policy provided for uninsured/underinsured motorist (UM) coverage with limits of $10,000.00 per person, and medical payments coverage with limits of $5,000.00 per person.

In response, State Farm paid $2,300.00 to Ms. Ortego on September 8, 2009, and $2,700.00 on September 14, 2009, exhausting the limits of the medical pay coverage. Ms. Meka Young, the claims representative for State Farm's UM coverage, acknowledged that State Farm was the insurance carrier and requested additional information from Ms. Ortego. Counsel for Ms. Ortego forwarded to Ms. Young medical records summarizing the treatment received by Ms. Ortego. The medical records indicated that the medical expenses totaled $5,473.72 and that Ms. Ortego suffered small disc herniations. After receiving the medical records, Ms. Young determined that no UM tender was due and sent a letter on September 10, 2009, stating: "[b]ased upon the information we have received, it appears the primary/underlying liability limits are adequate to compensate your client at this time." Ms. Young's letter also indicated that if additional documentation was provided, she would review it and take appropriate action.

Subsequently, Ms. Ortego's counsel sent a letter requesting a tender of the UM policy and attached additional medical records regarding Ms. Ortego's

treatment, which included records from Ms. Ortego's primary care physician, Dr. Mary Thomas, M.D., and Alliance Therapy Services. The records indicated that Ms. Ortego complained of back pain to Dr. Thomas. She also received physical and massage therapy from Alliance Therapy Services. At therapy, Ms. Ortego complained of right arm tenderness, constant headaches and dizziness. During her evaluation of Ms. Ortego's claim, Ms. Young also received a Bodily Injury Index which indicated that Ms. Ortego was previously involved in a car accident in 2007, with injuries listed as "concussion, jaw pain, hip pain, neck, [and] shoulders." After reviewing the additional information, Ms. Young tendered $2,494.00 to Ms. Ortego and again stated if additional documentation is provided she would review the additional information and take appropriate action.

On July 14, 2010, Ms. Ortego filed a "Petition for Damages" against State Farm seeking the balance of the UM policy and damages for bad faith. In response to discovery, State Farm received additional medical records of Ms. Ortego. On December 28, 2010, State Farm tendered the balance of the UM policy to Ms. Ortego. Therefore, the bad faith claim was the only issue remaining.

On August 15, 2012, State Farm filed a motion for summary judgment contending that there were no genuine issues of material fact, and they were entitled to judgment as a matter of law. The matter was heard on October 15, 2012, and judgment was signed on October 25, 2012, granting summary judgment in favor of State Farm and dismissing Mr. Ortego's suit with prejudice. It is from this judgment that Ms. Ortego timely appeals, asserting that the trial court erred in granting summary judgment.

LAW

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Peak Performance Physical Therapy & Fitness, LLC v. Hibernia Corp.**, 2007-2206 (La. App. 1st Cir. 6/6/08), 992 So.2d 527, 530, writ denied, 2008-1478 (La.

10/3/08), 992 So.2d 1018. The law governing summary judgment is well settled. Louisiana Code of Civil Procedure articles 966 and 967 set forth the guidelines.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record 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. Code Civ. P. art. 966(B)(2). The initial burden is on the mover to show that there is no genuine issue of material fact in dispute. See La. Code Civ. P. art. 966(C)(2). If the moving party will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. At that point, the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. Code Civ. P. art. 966(C)(2). If the mover has put forth supporting proof, the party opposing summary judgment may not rely upon its pleadings and allegations. To the contrary, the nonmoving party must affirmatively come forward with evidence placing material facts in dispute. La. Code Civ. P. art. 967(B).

Louisiana Revised Statute 22:1892(A)(1) (formerly Louisiana Revised Statute 22:658) requires insurers to pay the amount of any claim due to any insured within thirty days after receipt of satisfactory proofs of loss. Section B(1) of this statute provides, in pertinent part:

> Failure 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 payable to the insured, or to any of said employees, 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.

Louisiana Revised Statute 22:1973 (formerly Louisiana Revised Statute 22:1220) 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 may be subject to penalties not to exceed two times the damages sustained or five thousand dollars, whichever is greater, if the insurer fails to pay a claim due to an insured within sixty days of receiving satisfactory proof of loss when such failure is arbitrary, capricious, or without probable cause. La. R.S. 22:1973(B)(5) and C.

The conduct prohibited by Louisiana Revised Statute 22:1892(A)(1) is virtually identical to the conduct prohibited in Louisiana Revised Statute 22:1973(B)(5): 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. **Reed v. State Farm Mut. Auto. Ins. Co.**, 2003-1007 (La. 10/21/03), 857 So.2d 1012, 1020. The primary difference is the time periods allowed for payment. Both statutes are penal in nature and must be strictly construed. **Id.**

The sanctions of penalties and attorney 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. Statutory penalties are inappropriate when the insurer has a reasonable basis to defend the claim and acts in good-faith reliance on that defense. Bad faith should not be inferred from an insurer's failure to pay within the statutory time limits when there is a reasonable and legitimate question as to the extent and causation of a claim. **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. **Louisiana Bag Co., Inc. v. Audubon Indem. Co.**, 2008-0453 (La. 12/2/08), 999 So.2d 1104, 1114.

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." **Louisiana Bag Co., Inc.**, 999 So.2d at

1114. Whether a refusal to pay is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action. **Reed**, 857 So.2d at 1021.

The burden is on the claimant to prove arbitrariness and capriciousness or lack of probable cause. **McDonald v. American Family Life Assurance Company of Columbus**, 2010-1873 (La. App. 1st Cir. 7/27/11), 70 So.3d 1086, 1093. Also, when a reasonable disagreement exists between an insurer and an insured, the insurer is not arbitrary and capricious or without probable cause to deny payment on the claim that is in dispute. **Id.**

DISCUSSION

In support of its motion for summary judgment, State Farm attached 1) Ms. Ortego's petition for damages; 2) an affidavit of claims adjuster, Ms Young; 3) an affidavit of litigation claims adjuster, Chip Magee; 4) discovery propounded by State Farm; and 5) discovery responses by Ms. Ortego.

In Ms. Young's affidavit, she stated that the information she received showed injury to Ms. Ortego's cervical and thoracic spine, but the medical records did not state whether the findings in the MRIs were caused by the accident in question. Based on the information she received Ms. Young determined that the value of Ms. Ortego's claim did not exceed the amount she had already been given. Ms. Young indicated that the Body Injury Index report showing Ms. Ortego's involvement in a prior accident made her further question medical causation of Ms. Ortego's cervical and thoracic MRI findings.

Ms. Young also received additional medical records from Ms. Ortego's primary care physician and Alliance Physical Therapy. In response, Ms. Young made an unconditional tender in the amount of $2,494.00, which covered the total billings for the physical and massage therapy. Ms. Young stated "I determined that this was a reasonable and appropriate amount to tender based on the information provided." In making that determination, Ms. Young noted that when Ms. Ortego

initially went for therapy she attended only six visits and was discharged for having met all goals and noncompliance. Further, when Ms. Ortego went back for an additional initial evaluation she stated that pain returned when she was cleaning house, and she did not mention the subject automobile accident in the second evaluation.

Chip Magee stated in his affidavit that he was assigned Ms. Ortego's claim when the lawsuit was filed on July 14, 2010. According to Mr. Magee, State Farm did not receive any additional medical information until December 9, 2010. On that day, State Farm received discovery responses from Ms. Ortego that included for the first time records from Dr. F. Allen Johnston and Advanced Rehabilitation of Gonzales. Mr. Magee stated that given this additional information and in light of Dr. Johnston's opinion as to causation, State Farm tendered the balance of the UM coverage to the plaintiff on December 28, 2010.[1]

According to the evidence submitted by State Farm in favor of its motion for summary judgment, Ms. Ortego had been involved in a prior accident and State Farm was concerned that the evidence presented before the suit was filed was insufficient to prove that the July 14, 2009 accident was the cause of Ms. Ortego's injuries, specifically the findings in the MRIs. State Farm's concern appears to be reasonable and legitimate considering the information about Ms. Ortego's prior accident and the lack of medical documentation stating that the subject accident caused all of Ms. Ortego's documented injuries.

Because State Farm pointed out that its actions were not unjustified, the burden shifted to Ms. Ortego to produce factual support sufficient to satisfy her evidentiary burden at trial. In opposition to the motion for summary judgment, Ms. Ortego attached State Farm's interrogatories and request for production as well as Ms. Ortego's responses. In the interrogatories, a conversation between Ms.

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[1] In the medical records, Dr. Johnston stated, "[r]egarding causation, it appears that the cervical disc herniation and right arm symptoms have occurred in the past and predated this accident but were asymptomatic at the time of the accident thus re-aggravated. Her mid back and low back are new symptoms related to this accident."

Ortego's counsel and Ms. Young is described in which Ms. Young and Ms. Ortego's counsel clearly disagreed on whether the information provided obviously demonstrated that the claim would exceed the value of the UM coverage. This disagreement was reasonable and was not arbitrary and capricious or without probable cause.

As Ms. Ortego has not provided sufficient evidence to meet her burden of proving that State Farm acted arbitrarily or capriciously in its failure to timely pay UM benefits, there are no genuine issues of material fact and State Farm is entitled to judgment as a matter of law.

CONCLUSION

For the above stated reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to plaintiff, Ms. Brandy Ortego.

AFFIRMED.

BRANDY ORTEGO

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2013 CA 0489

KUHN, J., dissenting.

There exist outstanding issues of material fact that bear on the reasonableness of State Farm's tender of payment for the undisputed portions of Ms. Ortego's claim. See ***Louisiana Bag Co., Inc. v. Audubon Indem. Co.***, 2008-0453 (La. 12/2/08), 999 So.2d 1104, 1121. Thus, summary judgment is inappropriate on the showing made. Therefore, I dissent.