

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0678

BETTY JO VAUGHN

VERSUS

LIBERTY MUTUAL INSURANCE COMPANY, ET AL

Judgment Rendered: DEC 27 2013

*TMH*  
*mt*  
*JEK by TMH*

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On Appeal from the  
19th Judicial District Court,  
In and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. 584,559

Honorable Todd Hernandez, Judge Presiding

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

## **HIGGINBOTHAM, J.**

Plaintiff, Betty Jo Vaughn, appeals the trial court's dismissal of her uninsured/underinsured motorist claim against defendant, State Farm Mutual Automobile Insurance Company. For the following reasons, we affirm.

### **BACKGROUND**

On July 7, 2009, Vaughn's vehicle was hit from behind by a driver who was insured by Liberty Mutual Insurance Company. Because Vaughn suffered neck and back injuries in the accident, she brought suit for damages against Liberty Mutual, the other driver, and her own insurer, State Farm. Liberty Mutual did not dispute liability regarding its insured; thus a settlement was eventually reached where Vaughn received Liberty Mutual's \$50,000.00 policy limits. Liberty Mutual and its insured were dismissed from the lawsuit on October 3, 2011. After settling with Liberty Mutual, Vaughn pursued her claim for additional damages under State Farm's \$25,000.00 UM coverage, and for penalties and attorney fees due to State Farm's alleged bad faith handling of her UM claim pursuant to La. R.S. 22:1892.<sup>1</sup>

The current dispute between Vaughn and State Farm centers on causation and the extent of Vaughn's injuries. Vaughn's treating orthopedic surgeon, Dr. Joseph B. Boucree, Jr., reported four months after the accident that Vaughn had exhausted reasonable conservative treatment for her neck pain associated with the accident, including physical therapy. Dr. Boucree recommended that Vaughn undergo an anterior cervical discectomy and fusion surgical procedure for a herniated cervical disc at the C5-C6 level. At the time of the surgical recommendation on November 20, 2009, State Farm was not yet a party to the lawsuit; it was added as a defendant on January 27, 2010. Shortly after State Farm filed an answer to Vaughn's lawsuit and propounded written discovery requests to Vaughn, State Farm learned about the surgical recommendation on April 26, 2010.

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<sup>1</sup> State Farm tendered \$1,000.00 to Vaughn under the medical payments coverage of its policy; consequently, medical payments are not at issue in this appeal.

At that time, Liberty Mutual had not been dismissed from the lawsuit. State Farm also discovered that Vaughn had been involved in a prior accident that had resulted in injuries to her neck and back.

Before settling with Vaughn, Liberty Mutual requested that Vaughn submit to an independent medical examination on October 11, 2010, by orthopedic surgeon, Dr. Larry G. Ferachi. After evaluating Vaughn's condition, Dr. Ferachi disagreed with Dr. Boucree's surgical recommendation. Instead, Dr. Ferachi opined that Vaughn would benefit from cervical epidural steroid injections, a nerve conduction study, and three-to-five months of physical therapy to treat her cervical and lumbar strain that she had sustained in the accident. Dr. Ferachi also disagreed with Dr. Boucree's conclusion that Vaughn's cervical disc at C5-C6 was herniated. Rather, Dr. Ferachi agreed with the conclusion of the neuroradiologist, Dr. Charles S. Greeson, that Vaughn's C5-C6 cervical disc was bulging, and definitely was not herniated or causing any nerve impingement.

Based on the conflicting medical reports regarding the extent of Vaughn's injuries and her lack of medical treatment for a five-month period after Dr. Boucree recommended surgery, State Farm's adjuster determined that Vaughn was not entitled to UM benefits. State Farm's adjuster valued Vaughn's entire claim, including the approximate \$6,000.00 in medical expenses, to be within the underlying Liberty Mutual policy limits of \$50,000.00. As a result, State Farm did not tender any UM payments to Vaughn. Vaughn maintains that State Farm was in bad faith for not tendering the UM benefits.

The issues of causation, the extent of Vaughn's injuries, and whether additional damages were due, along with State Farm's alleged bad faith handling of Vaughn's UM claim proceeded to a bench trial on May 8, 2012. At the trial, State Farm objected to the admissibility of Dr. Boucree's deposition in lieu of live testimony, arguing that the deposition was highly prejudicial to State Farm because

State Farm's counsel was denied the opportunity to conduct a cross-examination of Dr. Boucree at the deposition that was intended to be used at trial. The trial court sustained State Farm's objection, ruling that the deposition was not admissible. Vaughn objected to the trial court's ruling and proffered Dr. Boucree's deposition. The trial court also ruled that the medical evidence did not support Dr. Boucree's recommendation for surgery and future medical treatment, concluding instead that the evidence showed Vaughn had a degenerative condition in her neck that had been aggravated by the accident, but that there were no disc herniations or nerve root impingements requiring surgery. Based upon a totality of the evidence, the trial court found that Vaughn was justly and fairly compensated for her damages from Liberty Mutual's underlying liability insurance coverage and that State Farm had not acted arbitrarily and capriciously when handling Vaughn's UM claim.

The trial court signed a judgment in favor of State Farm on December 6, 2012, dismissing Vaughn's UM claim for damages, penalties, and attorney fees. Vaughn appealed, assigning three errors: (1) the trial court erred in sustaining State Farm's objection to admission of Dr. Boucree's trial deposition; (2) the trial court erred in ruling that Vaughn had not met her burden of proving that State Farm failed to tender UM payments within thirty days of receiving a satisfactory proof of loss; and (3) the trial court erred in failing to assess additional damages, reasonable attorney fees, and penalties due to State Farm's bad faith and failure to tender UM payments.

## DISCUSSION

### Evidentiary Ruling -

A ruling on the admissibility of evidence is a question of law and is not subject to the manifest error standard of review. **Trascher v. Territo**, 2011-2093 (La. 5/8/12), 89 So.3d 357, 362. A party may not complain on appeal about an evidentiary ruling in the trial court unless the trial judge was given the opportunity

to avoid the perceived error, and the ruling “affected” a “substantial right” of the party. *Id.* The trial court has much discretion in determining whether to allow the use of deposition testimony at trial, and its decision will not be disturbed upon review in the absence of an abuse of that discretion. **State Through Dept. of Social Services Support Enforcement Services in Interest of Bordelon v. Guichard**, 94-1795 (La. App. 1st Cir. 5/5/95), 655 So.2d 1371, 1378, writ denied, 95-1405 (La. 9/15/95), 660 So.2d 454.

Vaughn maintains that the trial court erred in refusing to admit the trial deposition of Dr. Boucree, because State Farm voluntarily waived its right to cross-examine the doctor when State Farm chose to not pay for the additional time required for the cross-examination. We have reviewed the proffered deposition testimony of Dr. Boucree, and we find that the trial court did not abuse its discretion in refusing to admit the deposition into evidence. Vaughn’s counsel halted Dr. Boucree’s deposition at the end of his direct examination, the cost of which had been prepaid by Vaughn. Vaughn’s counsel was unwilling to pay for more of Dr. Boucree’s time so that State Farm could cross-examine the witness. Because State Farm was not willing to pay for a continuation of a deposition that was conducted by the opposing party, the deposition abruptly ended without State Farm’s counsel accomplishing any cross-examination of Dr. Boucree. Where an opposing party never has the opportunity to cross-examine the deponent, the opposing party’s fundamental right to cross-examination is violated. See Trascher, 89 So.3d at 362. Nevertheless, Vaughn claims that the deposition is admissible because the parties stipulated that the deposition was being taken in lieu of Dr. Boucree’s live expert testimony at trial. We disagree with Vaughn’s argument.

Since State Farm did not have the opportunity to cross-examine and test the value of Dr. Boucree’s expert testimony, the deposition was not competent

evidence for use at trial. When Vaughn's attorney stopped the deposition after completing his direct examination, but then refused to pay for any more of Dr. Boucree's time, counsel for State Farm objected as to the admissibility of the deposition testimony without the opportunity to cross-examine the witness. State Farm cannot be expected to pay for the right to cross-examine Vaughn's expert witness in this case. See La. Code Civ. P. art. 1634; **Harry Bourg Corp. v. Punch**, 625 So.2d 735, 737 (La. App. 1st Cir. 1993); **Smith v. Scott**, 577 So.2d 809, 811 (La. App. 2d Cir. 1991). State Farm objected again at trial, on the same grounds, when Vaughn offered the deposition into evidence. The party against whom a deposition is sought to be used must have been afforded a meaningful opportunity to fully cross-examine the deponent. See La. Code Civ. P. art. 1450; **Trascher**, 89 So.3d at 363. Clearly, if a witness provides testimony at trial but the opposing party never is given the opportunity to cross-examine the witness, there would be grounds to strike the testimony given. **Id.**, 89 So.3d at 364. Because State Farm would not have called Dr. Boucree as a witness at trial, and State Farm was effectively denied the opportunity for full cross-examination of Dr. Boucree during the trial deposition, the testimony is inadmissible.

This assignment of error is without merit.

#### Bad Faith -

The determination of whether an insurer acted in bad faith turns on the facts and circumstances of each case. As this determination is largely factual, great deference must be accorded the fact finder. **Richardson v. GEICO Indemnity Co.**, 2010-0208 (La. App. 1st Cir. 9/10/10), 48 So.3d 307, 314, writ denied, 2010-2473 (La. 12/17/10), 51 So.3d 7. Whether an insurer's handling of a claim is arbitrary and capricious is a factual determination that will not be disturbed in the absence of manifest error. **Fontana v. Louisiana Sheriffs' Auto. Risk Program**, 96-2752 (La. App. 1st Cir. 6/20/97), 697 So.2d 1037, 1039.

In **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882 (La. 1993), the Supreme Court set forth the now well-settled two-part test for the reversal of a fact finder's determinations: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Id.** On appeal, the issue to be resolved is not whether the trial court was right or wrong, but whether the fact finder's conclusion was a reasonable one. **Id.** Reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. See **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989).

Whether an insurer's 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 v. State Farm Mut. Auto Ins. Co.**, 2003-0107 (La. 10/21/03), 857 So.2d 1012, 1021. Statutory penalties are inappropriate when the insurer has a reasonable basis to defend the claim and acts in good-faith reliance on that defense, especially when there is a reasonable and legitimate question or disagreement as to the extent and causation of a claim. **Id.** When reasonable doubt exists, bad faith should not be inferred from an insurer's failure to pay within the statutory time limits. **Id.**

The evidence in the record reasonably supports the trial court's finding that State Farm had legitimate reasons for defending the UM claim without making a tender of the UM limits. The medical evidence revealed a substantial disagreement among the medical experts as to the extent of Vaughn's injuries sustained in the accident and whether surgery, as opposed to more conservative treatment, was necessary to resolve Vaughn's neck pain. As such, State Farm did not arbitrarily and capriciously handle Vaughn's UM claim. Considering the record in its

entirety, we find the trial court reasonably concluded that State Farm was not presented with a satisfactory proof of loss that fully demonstrated that Vaughn's claim would undisputedly exceed the value of the underlying coverage provided by Liberty Mutual.

This assignment of error is without merit.

Damages, Attorney Fees, and Penalties -

The medical evidence in the record reasonably supports the trial court's factual determination that Vaughn was fairly compensated by the underlying insurer for an injury that did not require surgery and would have been resolved after three-to-five months of consistent conservative treatment. We find no manifest error in the trial court's reasonable inferences of fact and conclusions that the parties had a legitimate disagreement and there was conflict in the medical evidence as to the extent of Vaughn's injuries. See Stobart, 617 So.2d at 882. Thus, Vaughn is not entitled to additional damages, attorney fees, or penalties.

This assignment of error is without merit.

**CONCLUSION**

For the assigned reasons, we affirm the trial court's judgment in favor of defendant-appellee, State Farm Mutual Automobile Insurance Company. All costs of this appeal are assessed to plaintiff-appellant, Betty Jo Vaughn.

**AFFIRMED.**