NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1002

STEPHANIE SARGENT, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, ANDREAUS SARGENT

VERSUS

JEANIE LANDRY, SAFEWAY INSURANCE COMPANY OF LOUISIANA AND US AGENCIES CASUALTY INSURANCE COMPANY, INC.

Judgment Rendered: FEB 25 2014

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On Appeal from the
23rd Judicial District Court,
In and for the Parish of Assumption,
State of Louisiana
Trial Court No. 31332

Honorable Jessie M. LeBlanc, Judge Presiding

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Louisiana and Jeanie Landry

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

Defendant, Safeway Insurance Co., appeals a judgment in favor of plaintiffs, Stephanie and Andreaus Sargent. For the following reasons, we amend the judgment of the trial court, and as amended, affirm.

FACTS AND PROCEDURAL HISTORY

On June 8, 2008, Andreaus Sargent,[1] the minor son of Stephanie Sargent, struck a vehicle driven by Jeanie Landry when Ms. Landry failed to yield the right-of-way to Andreaus and pulled out onto the highway in front of him. At time of the accident Andreaus was driving his mother's vehicle. As a result of the accident, Andreaus suffered injury and Ms. Sargent's vehicle was damaged.

Ms. Sargent, on behalf of her minor son, Andreaus, filed a petition for property and personal injury damages against Ms. Landry, Ms. Landry's insurer Safeway Insurance Company of Louisiana, and Ms. Sargent's insurance carrier, USAgencies Casualty Insurance Company. Ms. Sargent's policy with USAgencies included a named driver exclusion endorsement to exclude Andreaus Sargent from coverage which stated that Andreaus lived in her household. Safeway answered the petition and asserted as an affirmative defense that pursuant to La. R.S. 32:866[2] it did not have to pay the first $10,000.00 dollars of bodily injury and/or property damages, because Andreaus was excluded from coverage under Ms. Sargent's policy of insurance with USAgencies.

On August 11, 2008, USAgencies sent a letter to Ms. Sargent's attorney which stated that coverage would be afforded for the accident because the exclusion applied only to persons that resided in the household and Andreaus did not live in the household at the time the exclusion was signed. This letter was subsequently forwarded to Safeway.

After receipt of this letter, Safeway continued to deny coverage. Safeway performed its own investigation in which it determined that Andreaus should have been excluded from coverage.

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[1] Andreaus Sargent was a major at the time of trial.

[2] La. R.S. 32:866 was recently amended to increase this amount, but the increase only applies to new policies issued on or after January 1, 2010.

Subsequently, Ms. Sargent filed a supplemental and amending petition contending that Safeway's denial of her claim for property and personal injury damages, despite its knowledge that USAgencies was providing coverage for the accident, was in violation of La. R.S. 22:1973.

On November 13, 2009, USAgencies filed a motion for summary judgment which was granted on December 6, 2009, dismissing all claims against them.

On February 7, 2013, the matter proceeded to a bench trial. During trial, the parties stipulated to the medical records of Andreaus, and that Ms. Landry was 100% at fault in causing the accident. After conclusion of the trial, judgment was signed on March 19, 2013, awarding Ms. Sargent $3,701.80 for property damages and Andreaus $8,659.86 for his injuries. The judgment also assessed $24,723.32 in penalties against Safeway, in favor of the Sargents, for its failure to pay the Sargents' claims within sixty days after satisfactory proof of loss. It is from this judgment that Safeway appeals, contending that the trial court committed legal error: 1) when it refused to allow Safeway to prove its affirmative defense under the "no-pay, no-play statute;" 2) when it granted a motion in limine in violation of the scheduling order; and 3) when it awarded penalties under La. R.S. 22:1220(B)(5) (now La. R.S. 22:1973(B)(5))[3] to third party claimants.[4]

LAW AND ANALYSIS

I. Assignment of Error Nos. 1 and 2

Safeway, pursuant to the provisions of La. R.S. 32:866,[5] contends that Andreaus was not covered by compulsory motor vehicle liability security at the time of the accident. Safeway asserted the limitations of recovery set forth in La. R.S. 32:866(A)(1)[6] as a

[3] La. R.S 22:1973 was renumbered from R.S. 22:1220 by Acts 2008, No. 415, § 1, effective January 1, 2009 and will be referred to by the current number throughout the report.

[4] The Sargents also requested attorney's fees in their brief; however, they did not appeal nor answer the appeal.

[5] At the time Ms. Sargent entered into the insurance policy with USAgencies, La. R.S. 32:866(B) stated:

> Each person who is involved in an accident in which the other motor vehicle was not covered by compulsory motor vehicle liability security and who is found to be liable for damages to the owner or operator of the other motor vehicle may assert as an affirmative defense the limitation of recovery provisions of Subsection A of this Section.

[6] Subsection A provided that, there should be no recovery for the first ten thousand dollars of bodily injury and no recovery for the first ten thousand dollars of property damage.

defense. As such, the burden is on Safeway, as the party asserting the affirmative defense, to prove by a preponderance of evidence that Andreaus lacked insurance coverage on the vehicle he was driving at the time of the accident. **Johnson v. Henderson**, 2004-1723 (La. App. 4th Cir. 3/16/05), 899 So.2d 626, 627.

Ms. Sargent's insurer, USAgencies, determined that Andreaus was covered by the policy. In so concluding, USAgencies determined that Andreaus was not a resident of Ms. Sargent's home on the date the policy was issued, therefore the exclusion was invalid and Andreaus was covered under the policy.

Safeway contends that in order to prove its affirmative defense, it should have been permitted to introduce evidence to prove that USAgencies erred in covering Andreaus under the policy.

On the day of trial, the Sargents filed a motion in limine[7] seeking an order to exclude Safeway from introducing "any and all evidence, references to evidence, testimony or argument relating to the reasons Safeway believes USAgencies should not be affording coverage to the plaintiffs for the accident in question." The motion was granted by the trial court after Mr. Jim Hessburg, the vice-president of claims for USAgencies, testified that USAgencies concluded in August 2008 that Andreaus was covered by the policy and its position had not changed. The trial court concluded in its written "Reasons for Judgment" that "[Ms. Sargent] and USAgencies are the parties to the contract...Whether or not Safeway agrees with USAgencies affording coverage to [Andreaus] is irrelevant."

The trial court has great discretion in its consideration of motions in limine, which provide litigants with a procedural vehicle to have evidentiary matters decided prior to trial. **Kahl v. Luster**, 2011-2332 (La. App. 1st Cir. 12/28/12), 110 So.3d 1101, 1105. After review of the record, we determine that it was within the trial court's discretion to grant the Sargents' motion in limine and exclude any evidence regarding whether USAgencies erred in providing coverage to Andreaus. As the trial court correctly pointed

[7] On appeal, Safeway assigns as error the timeliness of the Sargents' motion in limine. Safeway made no objection to the timeliness of the motion during the trial. Therefore, that issue is not before us on appeal.

out, the evidence presented clearly proved that USAgencies covered Andreaus under the policy and any evidence regarding the propriety of this decision is not relevant. Louisiana Revised Statute 32:866(B) requires proof that the driver of the vehicle **was not covered**. Evidence proving that the driver should not have been covered is not sufficient to meet Safeway's burden of proof.

II. Assignment of Error No. 3

In Safeway's final assignment of error, it argues that the trial court erred in assessing $24,723.32 in penalties against Safeway for its failure to pay the Sargents' claims timely upon satisfactory proof of loss, because the Sargents are third-party claimants.

Under Louisiana law, there are five penalty statutes that provide remedies to insureds whose insurance claims are improperly handled or to whom payment is unreasonably delayed. Unfortunately, these statutes are not uniform. There are some instances when remedies are provided to third-party claimants and other instances when remedies are limited to those insured by the contract.

In **Theriot**, the supreme court recognized that La. R.S. 22:1973 and 22:1892 create certain limited causes of action in favor of third party claimants that derogate from established rules of insurance law. However, the court cautioned that these statutes must be strictly construed in favor of a limited expansion of third party rights rather than a drastic expansion of such rights. The relationship between the insurer and the third party claimant is neither fiduciary nor contractual; it is fundamentally adversarial. For that reason, a cause of action directly in favor of a third party claimant is generally not recognized absent statutory creation. **Theriot v. Midland Risk Insurance Company**, 95-2895 (La. 5/20/97), 694 So.2d 184, 193.

In this case, the judgment states that Safeway's failure to pay the Sargents' claim was arbitrary, capricious, and without probable cause. This is a factual finding that should not be disturbed on appeal absent manifest error. **Calogero v. Safeway Ins. Co. of Louisiana**, 99-1625 (La. 1/19/00), 753 So.2d 170, 173. The two statutes at issue in this

case are La. R.S. 22:1973 (Good Faith Duty and Claims Settlement) and La. R.S. 22:1892[8] (Other Insurance Coverage). Both statutes provide for penalties for an insurer's arbitrary and capricious failure to pay a claimant. However, because the penalty was based on the arbitrary and capricious failure of the insurer to pay, only La. R.S. 22:1892 provides a cause of action in favor of third parties.

We address the relevant statutes in this case separately.

A. La. R.S. 22:1973

Safeway contends that La. R.S. 22:1973(B)(5)[9] does not permit a third party claimant, such as the Sargents, to seek penalties against the tortfeasor's insurer. For the following reasons, we agree with Safeway's contention that the Sargents, as third party claimants, are not entitled to penalties under La. R.S. 22:1973(B)(5).

Subsection (B)(5) of the statute applies to the insurer's failure "to pay the amount of any claim due any person **insured by the contract** within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause." (Emphasis added.) The supreme court in addressing subsection (B)(5) of the statute noted that although La. R.S. 22:1973(B)(5) uses the word "claimant," the subsection is clearly intended to apply to a claim due "any person insured by the contract." **Langsford v. Flattman**, 2003-0189 (La. 1/21/04) 864 So.2d 149, 151.

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[8] La. R.S. 22:1892 was renumbered from La. R.S. 22:658 by Acts 2008, No. 415, § 1, effective January 1, 2009 and will be referred to by the current number throughout the report.

[9] La. R.S. 22:1973 provides in pertinent part:

> A. An insurer, including but not limited to a foreign line and surplus line 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.
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> B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A of this Section:
>
> * * *
>
> (5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.
>
> C. In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.

Further, the jurisprudence has consistently held that third party claimants, such as the Sargents, are not persons insured by the contract for purposes of La. R.S. 22:1973(B)(5). See **Toerner v. Henry**, 2000-2934 (La. App. 1st Cir. 2/15/02), 812 So.2d 755, writ denied, 2002-1259 (La. 8/30/02), 823 So.2d 951; **Woodruff v. State Farm Ins. Co.**, 99-2818 (La. App. 4th Cir. 6/14/00), 767 So.2d 785; **Venible v. First Financial Ins. Co.**, 97-2495 (La. App. 4th Cir. 8/26/98), 718 So.2d 586; **Smith v. Midland Risk Ins. Co.**, 28,793 (La. App. 2nd Cir. 9/24/97), 699 So.2d 1192 writ denied, 98-2858 (La. 1/8/99), 735 So.2d 638.

B. La. R.S. 22:1892

Safeway contends that Ms. Sargent is not entitled to penalties under La. R.S. 22:1892 because Ms. Sargent did not seek penalties under that article. Unlike section (B)(5) of La. R.S. 22:1973, section (A)(4) of La. R.S. 22:1892 permits a third party to seek penalties for an insurer's arbitrary and capricious failure to make a written offer to settle any property claim within thirty days after satisfactory proof of loss. Subsection (A)(4) is limited to property claims. The statute provides in pertinent part:

> (4) All insurers shall make a written offer to settle any property damage claim, **including a third-party claim**, within thirty days after receipt of satisfactory proofs of loss of that claim.
>
> B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4) of this Section, respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2) of this Section 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...(emphasis added.)

Safeway correctly points out that the Sargents did not request penalties under La. R.S. 22:1892. However, in Ms. Sargent's amended petition under La. R.S. 22:1973(B)(5), she stated that Safeway denied her property damage claim in November 2008 despite its knowledge that USAgencies determined that Andreas was covered by the policy. The

penalty provisions of La. R.S. 22:1973(B)(5) and La. R.S. 22:1892(B)(4) are virtually identical; both penalize an insurer for actions which are "arbitrary, capricious, or without probable cause." Safeway was thus put on notice that Ms. Sargent had alleged special damages in her petition and that she would be arguing at trial that Safeway acted in an arbitrary and capricious manner in failing to pay for her property damages. See **Starr v. Brou**, 2008-612 (La. App. 5th Cir. 1/27/09), 8 So.3d 674, 681.

In accordance with La. R.S. 22:1892(B)(1), the award of penalties and attorney's fees appears to be mandatory. The statute provides that the unreasonable failure to pay timely "shall" subject the insurer to the 50% penalty. Considering the Sargents' petition for penalties, the trial court's determination that Safeway was arbitrary and capricious, and based on the clear language of the statute, we find that the Sargents were entitled to penalties under La. R.S. 22:1892.

The penalty provision in La. R.S. 22:1892(B)(1) provides for an additional penalty of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater. The trial court's award of penalties in the amount of $24,723.32 exceeded the amount provided for in the statute. The trial court awarded $3,701.80 in property damages to Ms. Sargent. Therefore, Ms. Sargent is entitled to penalties in the amount of $1,850.90. The judgment shall be amended to reflect the award of penalties.

CONCLUSION

For the following reasons, the judgment of the trial court is amended to reduce the award of penalties from $24,723.32 to $1,850.90. In all other respects, the judgment of the trial court is affirmed. All costs of the appeal are to be split between the parties.

AMENDED IN PART, AND AS AMENDED, AFFIRMED.