NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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2018 CA 1571

CLAIRE WICKER

VERSUS

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY
AND WILLIAM DANNENBERG

JUDGMENT RENDERED: MAY 31 2019

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge • State of Louisiana
Docket Number 655164 • Section 24 • Division I

The Honorable R. Michael Caldwell, Judge Presiding

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DEFENDANTS—Allstate Property and Casualty Insurance Co. and William Dannenberg

* * * * * * *

BEFORE: WELCH, CHUTZ, AND LANIER, JJ.

Chutz, J. concurs with reasons

WELCH, J.

The plaintiff, Claire Wicker, appeals a judgment in her favor and against the defendant, Allstate Property and Casualty Insurance Company ("Allstate"), awarding her damages, plus judicial interest, for the diminished value of her vehicle following an automobile accident. For reasons that follow, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

On February 8, 2017, Ms. Wicker filed a petition for damages against Allstate and William Dannenberg. According to the allegations of the petition, on September 21, 2016, Ms. Wicker was operating her 2016 Porsche Boxster in Baton Rouge, Louisiana. On the same date, location and time, Mr. Dannenberg was operating a motor vehicle when he suddenly and without warning struck the rear of the Ms. Wicker's vehicle. On that date of the accident, Mr. Dannenberg had a policy of automobile liability insurance with Allstate, which provided coverage for the accident. Ms. Wicker claimed that as a result of the accident, which was caused solely by the negligence of Mr. Dannenberg, she suffered damages in the form of the diminished value of her vehicle. However, Allstate denied Ms. Wicker's claim for the diminished value of her vehicle by letter dated November 2, 2016.

Ms. Wicker further alleged that thereafter, on January 9, 2017, Allstate received satisfactory proof that her vehicle had diminished in value as a result of the accident, which proof consisted of a letter from David Gaffney, an expert in the purchase and sale of used cars and their value before and after collision damage and repair. Ms. Wicker further alleged that pursuant to La. R.S. 22:1892, within thirty days of Allstate's receipt of satisfactory proof of her loss, Allstate had an obligation to make a written offer to her regarding her claim for the diminished value of her vehicle; however, it had arbitrarily and capriciously failed to do so.

Therefore, Ms. Wicker sought damages for the diminished value of her vehicle, plus legal interest on those damages, costs of the proceedings, and statutory penalties and attorney fees pursuant to La. R.S. 22:1892.

In response to Ms. Wicker's petition, Allstate generally denied the allegations of the petition, except that it admitted that a collision occurred involving vehicles operated by Ms. Wicker and Mr. Dannenberg and that it had issued a policy of automobile liability insurance to Mr. Dannenberg. In addition, Allstate asserted that it had acted in good faith and in accordance with Louisiana law at all times with regard to Ms. Wicker's claim.

A trial on the merits was held on May 24, 2018. At trial, it was deemed admitted that Allstate failed to make a written offer to Ms. Wicker regarding her claim for the diminished value of her vehicle within thirty days of its receipt of satisfactory proof of loss. Therefore, the issues to be determined at trial were the amount of damages Ms. Wicker was entitled to for the diminished value of her vehicle and whether Ms. Wicker was entitled to penalties and attorney fees for Allstate's failure to make a written offer within thirty days of its receipt of satisfactory proof of loss. After evaluating the expert testimony presented by both Ms. Wicker and Allstate, the trial court, in oral reasons for judgment, set the diminished value of Ms. Wicker's vehicle at $1,500.00. The trial court then determined that while La. R.S. 22:1892(A)(4) was applicable to third-party property damage claims, the penalties and attorney fees provision set forth in La. R.S. 22:1892(B)(1) was not applicable to such claims. Nevertheless, the trial court concluded that the actions of Allstate were not arbitrary and capricious or without probable cause. Therefore, the trial court declined to award Ms. Wicker penalties and attorney fees.

On June 19, 2018, the trial court signed a judgment in in favor of Ms. Wicker and against Allstate awarding her $1,500.00 for the diminished value of

her vehicle, together with judicial interest from judicial demand, costs of the proceedings, and expert witness fees in the amount of $500.00.[1] From this judgment, Ms. Wicker has appealed.

On appeal, Ms. Wicker contends that the trial court erred in: (1) determining that La. R.S. 22:1892(B)(1) was inapplicable to a third party claim for penalties and attorney fees for an insurer's failure to make an offer within thirty days of receiving satisfactory proof of loss; (2) finding that Allstate's failure to make a written offer to settle within thirty days of receiving satisfactory proof of loss, as required by La. R.S. 22:1892(A(4) was not arbitrary, capricious, or without probable cause and in failing to find Allstate liable for penalties and attorney fees in accordance with La. R.S. 22:1892(B)(1); and (3) improperly assessing the diminished value of her vehicle at $1,500.00.

LAW AND DISCUSSION

On appeal, Ms. Wicker first contends that the trial court erred in concluding that La. R.S. 22:1892(B)(1) does not provide for the imposition of penalties and attorney fees against an insurer for its failure to make an offer to settle third-party claims within thirty days after receipt of satisfactory proof of loss. This issue involves the interpretation of a statute, which raises a question of law; thus, it is reviewed by this Court under the *de novo* standard of review. **Red Stick Studio Development, L.L.C. v. State ex rel. Dept. of Economic Development**, 2010-0193 (La. 1/19/11), 56 So.3d 181, 187.

Louisiana Revised Statutes 22:1892 provides, in pertinent part, as follows:

> A. (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.

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[1] The trial court's judgment was silent with respect to Ms. Wicker's claim for statutory penalties and attorney fees. It is well-settled that silence in a judgment of the trial court as to any issue, claim, or demand placed before the court is deemed a rejection of the claim and the relief sought is presumed to be denied. See **L.J.D. v. M.V.S.**, 2016-0008 (La. App. 1st Cir. 1/25/17), 212 So.3d 581, 584. Accordingly, we deem the silence in the trial court's judgment with respect to Ms. Wicker's claim for statutory penalties and attorney fees as a denial 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, **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. 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. (Emphasis added).

Herein, Ms. Wicker is not the insured of Allstate; rather, she is a third party claimant falling under the provisions of La. R.S. 22:1892(A)(4). Pursuant to La. R.S. 22:1892(A)(4), Allstate was required, but admittedly failed, to make a written offer to settle Ms. Wicker's property damage claim for the diminished value of her vehicle, "within thirty days after receipt of satisfactory proofs of loss of that claim." Therefore, we must determine whether Allstate's failure to do so subjects it to the imposition of penalties under La. R.S. 22:1892(B)(1).

As previously noted, the trial court concluded that the statutory penalty and attorney fee provision set forth in La. R.S. 22:1892(B)(1) was not applicable to an insurer's failure to make an offer to settle claims made by third parties. This conclusion was based on the phrases "due from the insurer to the insured" and "payable to the insured" that are used in La. R.S. 22:1892(B)(1) wherein it provides for the calculation of the amount of the penalty. Based on these two phrases, the trial court reasoned that being an insured was a prerequisite to claiming penalties against an insurer. The trial court then noted that Ms. Wicker was not an "insured" of Allstate, and therefore, Ms. Wicker was not entitled to

penalties or attorney fees for Allstate's failure to make a written offer to settle Ms. Wicker's property damage claim.

In **State Farm Mut. Auto Ins. Co. v. Norcold, Inc.**, 2011-1355(La. App. 3rd Cir. 4/4/12), 88 So.3d 1245, 1250-1251, the Third Circuit Court of Appeal was presented with this same legal issue. Notwithstanding the above noted phrases, the Third Circuit concluded that based upon the statutory language of La. R.S. 22:1892(B)(1), the historical amendments thereto, the legislative intent, and the jurisprudence, La. R.S. 22:1892(B)(1) does provide for an award of penalties and attorney fees in favor of a third-party claimant against an insurer who fails to make an offer of settlement after receiving satisfactory proof of loss, if the insurer's failure is arbitrary, capricious, or without probable cause. We agree with this well-reasoned opinion by our brethren in the Third Circuit, and in particular, its conclusion that the statutory language of the statute supports this interpretation.

As noted by the Third Circuit, looking at the language of La. R.S. 22:1892, it includes "a third-party claim" twice within the relevant provisions. First, La. R.S. 22:1892(A)(4) sets forth the statutory duty of an insurer with respect to written offers to settle property damage claims thirty days after receiving satisfactory proofs of loss of that claim. This provision not only makes the insurer's duty mandatory in nature by its use of the word "shall," but it also expressly includes "third-party claims." Likewise and consistent therewith, in the event the insurer is found to be "arbitrary, capricious, or without probable cause," the corresponding penalty portion of the statute, La. R.S. 22:1892(B)(1) not only makes the imposition of a penalty mandatory in nature by its use of the word "shall," but it also expressly "include[s] a third-party claim." To accept the interpretation of La. R.S. 22:1892 espoused by the trial court (and posited by the insurers in **State Farm Mut. Auto Ins. Co.**, 88 So.3d at 1251) would negate these two mandatory provisions covering third-party claims contained within the statute; it would also

render the mandatory duty of the insurer toward third party claims meaningless and would completely ignore the inclusion of "third-party claims" in the penalty provision as a consequence of an insurer's failure to abide by that duty. See **State Farm Mut. Auto. Ins. Co.**, 88 So.3d at 1251.

For this reason, we find that La. R.S. 22:1892(B)(1) does provide for an award of penalties and attorney fees in favor of a third-party claimant against an insurer who violates La. R.S. 22:1892(A)(4) by failing to make an offer of settlement after receiving satisfactory proof of loss, if the insurer's failure to do so is arbitrary, capricious, or without probable cause and the trial court erred in concluding otherwise.

Having determined that La. R.S. 22:1892(B)(1) does provide for the imposition of penalties and attorney fees against an insurer for its failure to make an offer to settle third-party claims within thirty days after receipt of satisfactory proof of loss and since Allstate admittedly failed to do so, we must next determine whether Allstate's actions were arbitrary, capricious, or without probable cause.

The phrase "arbitrary, capricious, or without probable cause" is synonymous with "vexatious" and means a refusal that is unjustified and without a reasonable or probable cause or excuse. **Reed v. State Farm Mut. Auto. Ins. Co.**, 2003-0107 (La. 10/21/03), 857 So.2d 1012, 1021. Both phrases describe an insurer whose willful refusal of a claim is not based on a good-faith defense. *Id.* Thus, penalties and attorney fees are inappropriate when the insurer has a reasonable basis to defend the claim and was acting in good faith reliance on that defense. *Id.*; **Guillory v. Lee**, 2009-0075 (La. 6/26/09), 16 So.3d 1104, 1127. Whether the insurer's actions were arbitrary, capricious, or without probable cause is a question of fact, and a trial court's finding should not be disturbed absent manifest error. **Jacobs v. GEICO Indemnity Company**, 52,372 (La. App. 2nd Cir. 9/26/18), 256 So.3d 449, 457.

Although the trial court concluded that Ms. Wicker was not entitled to penalties and attorney fees under La. R.S. 22:1892(B)(1) because it was not applicable to third-party claims, it nevertheless found that the actions of Allstate were not arbitrary, capricious, or without probable cause. The trial court made this factual finding based on the trial deposition testimony of Charles LaRock, the Allstate claims adjustor assigned to Ms. Wicker's claim. Mr. LaRock testified that Ms. Wicker's claim for the diminished value of her vehicle was initially rejected by Allstate. However, following Allstate's receipt of Ms. Wicker's proof of loss, *i.e.*, the letter from Mr. Gaffney setting forth the diminished value of Ms. Wicker's vehicle at $5,020.00 that was attached to a letter from Ms. Wicker's counsel dated January 3, 2017, he contacted Metro Appraisals, a third party diminished value assessor company, on January 11, 2017 and requested a diminished value appraisal.

Thereafter, on January 23, 2017, Mr. LaRock received the appraisal from Alvin Ray, the appraiser, who set the diminished value of Ms. Wicker's vehicle at $447.50. Mr. LaRock testified that on that same date (January 23, 2017), he contacted counsel for Ms. Wicker; however, she was not available. He stated that he then spoke to counsel for Ms. Wicker the following day, January 24, 2017, and on that date, he made an oral offer on Ms. Wicker's claim for the diminished value of her car in the amount of $447.50, which was based on Mr. Ray's appraisal. He further testified that he sent an email to counsel for Ms. Wicker regarding the offer and attached the appraisal, that he documented his file that such email was sent, and that his sent box for his emails reflected that such email was written and sent. However, for some reason, counsel for Ms. Wicker did not receive the email, and this omission was not discovered until after suit was filed. Based on this testimony, the trial court concluded that Allstate believed it had complied with the statute and made a written offer and that it was reasonable for Allstate to believe

that it had made a written offer. Therefore, the trial court found that Allstate was not arbitrary, capricious, or without probable cause with respect to its failure to make a written offer to settle Ms. Wicker's claim for diminished value of her vehicle within thirty days after its receipt of satisfactory proof of loss. Based on our review of the record, we find the trial court's factual finding in this regard is reasonably supported by the testimony of Mr. LaRock and is not manifestly erroneous. Therefore, we find no error in the trial court's implicit rejection of Ms. Wicker's claim for penalties and attorney fees.[2]

Lastly, on appeal, Ms. Wicker challenges the trial court's decision to assess the diminished value of her vehicle at $1,500.00 and maintains that the award should be increased. With respect to the diminished value of Ms. Wicker's vehicle, the trial court was presented with the testimony of two experts. The conclusions of these two experts were vastly different: Ms. Wicker's expert, Mr. Gaffney, testified that the diminished value of Ms. Wicker's vehicle as a result of the accident was $5,020.00; Allstate's expert, Mr. Ray, concluded that the diminished value was $447.50.

Mr. Gaffney testified that for luxury vehicles, such as Ms. Wicker's Porsche Boxster, he always sets the diminished value of a vehicle at 10% of the value of the vehicle. He stated that since the NADA value on the car was $50,200.00, the diminished value of Ms. Wicker's vehicle was $5,020.00. He admitted however, that the diminished value percentage would depend upon the severity of the damage and the type of vehicle. Mr. Gaffney also admitted that at the time that he gave his written opinion on Ms. Wicker's vehicle, he had never seen the vehicle, had never seen the Carfax report on it, had never seen the photographs of the vehicle following the accident, and had never seen the property damage estimate.

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[2] See footnote 1.

On the other hand, Mr. Ray valued Ms. Wicker's vehicle at $44,750.00 and applied a 1% diminution. He explained that he uses a guideline in which he places the extent of the vehicle damage into one of four categories: minor, moderate, major, and severe. He also takes into consideration whether the vehicle sustained any structural damage. According to the guideline, diminished value estimates range from 0-25% of a vehicle's value based upon the severity of the impact, the presence or absence of body or structural damages, and parts that have to be replaced. Since Ms. Wicker's vehicle needed only paint repair at a cost of $836.00 with no structural damages, he assessed the diminished value at 1%.

After considering the testimony of these two experts, the trial court noted that the average of the two values placed on the vehicle was $47,475.00, but then set the value of Ms. Wicker's vehicle at $50,000.00, because the value placed on the vehicle by Mr. Ray was several months after the accident. The trial court then found that although Mr. Ray's evaluation of the diminished value of the vehicle was more accurate and more substantially based on methodology and procedures, he should have accounted for the fact that Ms. Wicker's vehicle was a luxury or performance vehicle. Therefore, the trial court believed that a 3% diminution in value was appropriate and awarded Ms. Wicker diminution in value damages in the amount of $1,500.00, or 3% of $50,000.00. Based on our review of the record, we find that the trial court's award, which was based on the testimony of the experts and an evaluation of their credibility, was reasonable and not an abuse of its vast discretion. Accordingly, we affirm the trial court's judgment awarding Ms. Wicker damages in the amount of $1,500.00 for the diminution in the value of her vehicle.

CONCLUSION

For all of the above and foregoing reasons, the June 19, 2018 judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiff, Claire Wicker.

AFFIRMED.

CLAIRE WICKER	**STATE OF LOUISIANA**
VERSUS	**COURT OF APPEAL**
	FIRST CIRCUIT
ALLSTATE PROPERTY AND CASUALTY INSURANCE CO. AND WILLIAM DANNENBURG	**NUMBER 2018 CA 1571**

CHUTZ, J., concurring.

The majority correctly holds that a reasonable factual basis exists to support the trial court's implicit conclusion that Allstate Property and Casualty Insurance Company was neither arbitrary, capricious, nor acting without probable in failing to make a written offer to settle the claim for the diminished value of a vehicle within 30 days of satisfactory proof of loss asserted by third-party claimant, Claire Wicker. As such, it is unnecessary for this court to determine whether La. R.S. 22:1892B(1) allows for an award of penalties and attorney fees against an insurer that, under La. R.S. 22:1892A(4), failed to make a timely written offer of settlement to a third-party claimant. Therefore, I agree with the result reached by the majority, affirming the trial court's dismissal of Ms. Wicker's claims for penalties and attorney fees under La. R.S. 22:1892B(1).