NOT DESIGNATED FOR PUBLICATION

JERRY L. ROBINETT	*	**NO. 2002-CA-2484**
VERSUS	*	**COURT OF APPEAL**
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND DELISA MARCHAND	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	**CONSOLIDATED WITH:**
	* * * * * * *	
		NO. 2003-CA-1208

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-19685, DIVISION "B-15"
Honorable Rosemary Ledet, Judge
* * * * * *
Judge Edwin A. Lombard
* * * * * *

(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Moon Landrieu, Judge Pro Tempore)

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In Proper Person, PLAINTIFF/APPELLANT

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AFFIRMED.

Plaintiff, Jerry Robinett, In Proper Person, appeals the trial court's finding that there exists no genuine issue of material fact that State Farm Mutual Automobile Insurance Company negligently adjusted his claim and violated La. R. S. 22:1220. For the following reasons we affirm.

FACTS AND PROCEDURAL HISTORY

In December 1998, Jerry Mr. Robinett ("Mr. Robinett") and Delisa Marchand ("Marchand") were involved in an automobile accident. Both Mr. Robinett and Marchand were insured under automobile liability insurance policies issued to them by State Farm, and both made claims to State Farm

alleging that the other was at fault in causing the accident. The claims were assigned to two different State Farm adjusters. A police report was obtained and statements were taken from two independent witnesses.

Following an investigation of the accident, State Farm concluded that Mr. Robinett was at fault in causing the accident and paid Marchand's property damage claim under plaintiff's policy. However, Mr. Robinett's claim against Marchand's policy was denied.

Mr. Robinett subsequently instituted this action against Marchand and State Farm, both in its capacity as Marchand's insurer and as his own insurer. In his original petition, Mr. Robinett alleged that State Farm was negligent in handling his claim. He later amended his petition to add a bad faith claim against State Farm under La. R.S. 22:1220 for wrongfully adjusting the insurance claims arising from the accident and for breach of duty.

On July 6, 2001, State Farm filed a Motion for Partial Summary Judgment requesting that Mr. Robinett's claims against it for penalties under La. R.S. 22:1466 and La. R.S. 22:1220 be dismissed on the grounds that plaintiff's allegations did not constitute a violation of those statutes. Mr. Robinett opposed the motion with regard to his claim for penalties under La. R.S. 22:1220. He did not oppose State Farm's motion with regard to La.

R.S. 22:1466 as he had not contemplated nor prayed for penalties pursuant to that statute. Following a hearing, on November 13, 2001, the trial court granted State Farm's motion, dismissing plaintiff's bad faith claims under La. R.S. 22:1466 and La. R.S. 22:1220.

Subsequently, on February 27, 2002, State Farm filed a Motion for Summary Judgment on whether there was an issue of material fact as to whether it failed to adequately investigate the accident and wrongfully adjusted Mr. Robinett's insurance claims. A hearing was held on April 5, 2002. On April 17, 2002, the trial court granted State Farm's motion for summary judgment and dismissed Mr. Robinett's claims.

Mr. Robinett appeals from that judgment and asserts that the trial court erred in granting State Farm's motion for summary judgment dismissing his claim that State Farm failed to adequately investigate and adjust his claims. In an consolidated case, Mr. Robinett complains that the trial court erred in granting State Farm's motion for partial summary judgment dismissing his bad faith claims under La. R.S. 22:1220.

LAW AND ANALYSIS

An appellate court reviews summary judgment *de novo* under the same criteria that govern the trial court's consideration of whether a summary judgment is appropriate. *Osborne v. Vulcan Foundry, Inc.*, 95-

2766 (La. App. 4 Cir. 5/29/96), 675 So. 2d 837. Pursuant to Louisiana Code of Civil Procedure art. 966, the use of the summary judgment procedure is favored and the rules regarding such should be construed liberally. *Spicer v. Louisiana Power & Light Co.*, 97-2406 (La. App. 4 Cir. 4/8/98), 712 So.2d 226, *writ denied*, 724 So.2d 209 (La. 1998). The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action; it shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La.C.C.P. art. 966B.

The burden of proof is on the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to provide factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

La. C.C.P. art. 966(C)(2).

According to La. C.C.P. art. 966 a motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. A fact is material only where its existence or non-existence is essential to plaintiff's cause of action under the applicable theory of recovery. *Advanced Orthopedics L.L.C. v. Moon*, 95-76 (La.App. 5 Cir. 5/30/95) 656 So.2d 1103. Once the moving party has met this burden, the adverse party may not rest on the mere allegations of his pleadings and his response must set forth specific facts showing that there is a genuine issue for trial. La. C.C.P. art. 967; *Trondsen v. Irish-Italian Parade Committee*, 95-28 (La.App. 5 Cir. 5/10/95); 656 So.2d 694, *writ denied* 95-1467 (La.9/22/95), 660 So.2d 476.

NEGLIGENT ADJUSTMENT OF CLAIM

In the case before us, the trial court found that Mr. Robinett presented no evidence that State Farm acted improperly in denying his claim for damages or intentionally increased his insurance premiums as a result of his accident. The trial court also found that Louisiana law does not recognize liability in tort for an insurer’s alleged breach of contract obligation.

Louisiana Civil Code articles 2315 and 2316 are the codal bases for a claim in tort. Article 2315 states that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Article 2316 provides that "[e]very person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." *Porteous v. St. Ann's Cafe & Deli*, 97-0837 (La.5/29/98), 713 So.2d 454, 456-67. To determine whether liability exists under the facts of a particular case, the Louisiana Supreme Court has adopted a duty-risk analysis. Under this analysis, the plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached. *Berry v. State, Through Dep't of Health and Human Resources*, 93-2748 (La.5/23/94), 637 So.2d 412, 414; *Lavine v. Jackson*, 97-2804 (La.App. 1st Cir.12/28/98), 730 So.2d 958, 961. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. *Mathieu v. Imperial Toy Corp.*, 94-0952 (La.11/30/94), 646 So.2d 318, 326.

Duty is a question of law. Simply put, the inquiry is whether the plaintiff has any law--statutory, jurisprudential, or arising from general

principles of fault--to support his claim. *Faucheaux v. Terrebonne Consol. Gov't*, 615 So.2d 289, 292 (La.1993); *Clark v. Dep't of Pub. Safety and Corrections*, 96-2737 (La.App. 1st Cir.2/20/98), 716 So.2d 1, 3.

The issue presented for our review is whether, based on the pleadings, affidavits and other evidence filed by the parties pursuant to State Farm's motion for summary judgment, a genuine issue of material fact was presented as to whether State Farm adequately investigated and adjusted the claims that arose from an occurrence covered under the contract of insurance.

Under the provisions of the liability insurance contract here at issue, State Farm was authorized to "make such investigation, negotiation and settlement of any claim or suit it deems expedient." This provision vests the insurer with absolute authority to settle claims within the limits of the policy with the insured's having no power to compel the insurer to make settlements or to prevent it from so doing.

We find that under the particular facts of this case, Mr. Robinett has failed to offer any genuine issue of material fact to support his claim that State Farm negligently adjusted or investigated the claim. Mr. Robinett has offered no evidence to support his theory that State Farm acted improperly in investigating and adjusting the claim that resulted in the denial of his

claim for damages.

Furthermore, we agree with the trial court's determination that without more, the plaintiff was unable to prove how he was prejudiced or damaged by State Farm's actions. According to the evidence presented in this case, we conclude that there exists no genuine issue of material fact as to Mr. Robinett's claim for failure to investigate and adjust the claim. Thus, State Farm is entitled to a judgment in its favor as a matter of law.

VIOLATION OF LA R.S. 22:1220

Next, we turn to Mr. Robinett's contention that the trial court erred in granting State Farm's motion for partial summary judgment and finding State Farm did not violate La. R.S. 22:1220. Mr. Robinett contends that State Farm violated La. R.S. 22:1220 (B)(1) which states:

> 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:
>
> (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

Specifically, Mr.Robinett alleges State Farm misrepresented that Marchand had coverage at the time of the accident. He asserts that this misrepresentation led to an erroneous adjustment of his claim in favor of Marchand.

A right of action is available to both insureds and third-party

claimants under La. R.S. 22:1220. However, only the commission of one of the specific acts listed in La. R.S. 22:1220(B) will support a private right of action under the statute. *Theriot v. Midland Risk Insurance Company*, 95-2895 (La.5/20/97), 694 So.2d 184; *Smith v. Midland Risk Insurance Company*, 29,793 (La.App.2d Cir.9/24/97), 699 So.2d 1192. While a private right of action under La. R.S. 22:1220 is available to Mr. Robinett, a third-party claimant, recovery is only available if State Farm's conduct fits one of the five acts listed in the statute.

We find that Mr. Robinett presented no adequate proof that State Farm misrepresented the insurance policy provisions relating to any coverage at issue. Further, Mr. Robinett only asserted that, without proof, State Farm misrepresented the fact that Marchand's coverage had lapsed. Accordingly, State Farm's conduct evidences no breach of La. R.S. 22:1220, and Mr. Robinett has not presented a scintilla of evidence of bad faith under the statute.

COSTS AND ATTORNEY FEES

Finally, State Farm asserts that the plaintiff's appeal is frivolous and requests payment of all costs of appeal plus a sum of $2000.00 for attorney fees. Generally, an appellate court will not consider an appellee's request for attorney fees on appeal absent an appeal or an answer to the appeal.

Saacks v. Mohawk Carpet Corp., 03-0386 (La. App. 4 Cir. 8/20/03), 855 So.2d 359, *writ denied,* 03-2632 (La. 12/12/03), ____So.2d ____. State Farm did not appeal or answer the appeal in this case and, accordingly, we do not consider the request for attorney fees. The parties are each assessed their own costs for this appeal.

CONCLUSION

Based on the evidence presented, the trial court correctly found that State Farm has borne its burden of showing that no genuine issue of material fact existed, and that it was entitled to judgment in its favor as a matter of law. Accordingly, the trial court's judgment granting the summary judgments at issue in this appeal is affirmed.

AFFIRMED.