RODERICK F. LEE	*	**NO. 2017-CA-0490**
VERSUS	*	
		COURT OF APPEAL
THOMAS D. SAPP, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, BMW FINANCIAL SERVICES, N.A., L.L.C. AND FINANCIAL SERVICES VEHICLE TRUST, INC.	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2010-07164, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *

Judge Rosemary Ledet
* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Paula A. Brown, Judge Marion F. Edwards, Pro Tempore)

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APPEAL CONVERTED TO WRIT; WRIT GRANTED; RELIEF DENIED

DECEMBER 6, 2017

This is a personal injury case. The plaintiff, Roderick Lee, appeals the trial court's March 6, 2017 judgment, granting a partial peremptory exception (the "Exception"). The Exception was filed by the defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), in its capacity as the liability insurer of the alleged tortfeasor, Thomas Sapp. The judgment, which sustained the Exception, dismissed a portion of the insurance "bad faith" claims that Mr. Lee asserted against State Farm. For the reasons that follow, we convert the appeal to an application for supervisory writs, grant the writ application, and deny relief.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2009, Mr. Lee was involved in an automobile accident with Mr. Sapp. The accident occurred on Prytania Street in New Orleans, Louisiana; the vehicle that Mr. Sapp was driving collided with the vehicle that Mr. Lee was driving. In July 2010, Mr. Lee filed suit, naming as defendants, among others, Mr. Sapp and his alleged automobile liability insurer, State Farm. In his petition, Mr. Lee prayed for damages for his personal injuries incurred in the accident as the result of Mr. Sapp's alleged negligence; he asserted no property damage claim. In

its capacity as Mr. Sapp's alleged insurer, State Farm answered the suit, averring that Mr. Sapp's policy was not in effect on the date of the accident and, therefore, denying coverage for the accident. In March 2012, Mr. Lee filed a First Amended and Supplemental Petition, asserting a negligent entrustment claim against the lessor of the vehicle that Mr. Sapp was driving.[1]

On a prior appeal, this court held that coverage existed at the time of the accident. *Lee v. Sapp*, 14-1047 (La. App. 4 Cir. 3/4/15), 163 So.3d 60 ("*Sapp I*"). In July 2016, Mr. Lee filed a Second Amended and Supplemental Petition, asserting insurance "bad faith" claims against State Farm. For the first time, Mr. Lee averred that State Farm was not only Mr. Sapp's insurer, but also his insurer. He also averred that State Farm was his uninsured or underinsured motorist ("UM") insurer.

In August 2016, Mr. Lee entered into a settlement agreement with Mr. Sapp and State Farm (the "Release"). In the Release, Mr. Lee settled all his claims against Mr. Sapp and State Farm, in its capacity as Mr. Sapp's insurer, arising out of the August 2009 accident with the exception of certain "Reserved Claims." The Release defined the term "Reserved Claims" to mean "all bad faith claims asserted by Plaintiff against State Farm Mutual Automobile Insurance Company in the Second Supplemental and Amended Petition for Damages."

In September 2016, State Farm filed the Exception, seeking dismissal of all the Reserved Claims, except for Mr. Lee's claims for misrepresentation under La.

[1] The claims against the lessor of the vehicle Mr. Sapp was driving were settled and are not a part of this appeal.

R.S. 22:1973(B)(1), which were expressly carved out of the Exception.[2] Following a hearing, the trial court sustained the Exception. This appeal followed.

JURISDICTIONAL ISSUE

Before reaching the merits of this appeal, we must first address the jurisdictional issue that State Farm raises regarding whether the March 6, 2017 judgment is an appealable, final judgment.[3] State Farm contends that because the judgment is only a partial final judgment and because the trial court did not designate the judgment as appealable under La. C.C.P. art. 1915 ("Article 1915"), the judgment is non-appealable and, thus, the appeal should be dismissed. Mr. Lee counters that "[t]he judgment was designated a final judgment on that Peremptory Exception alone" and, thus, the appeal should not be dismissed.

"[A] judgment that only partially determines the merits of the action is a valid partial final judgment (and therefore appealable) only if authorized by Article 1915." *Rhodes v. Lewis*, 01-1989, p. 3 (La. 5/14/02), 817 So.2d 64, 66 (quoting *Douglass v. Alton Ochsner Med. Found.*, 96-2825 (La. 9/13/97), 695 So.2d 953). Article 1915 has two subparts—Subparts A and B. *See Quality Envtl. Processes, Inc. v. Energy Dev. Corp*., 16-0171, 16-0172, p. 6 (La. App. 1 Cir. 4/12/17), 218 So.3d 1045, 1053. The judgment granting State Farm's Exception—a partial peremptory exception—falls under Subpart B,[4] which "provides that when

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[2] Carving out these claims, State Farm stated in the Exception that "plaintiff has raised specific claims that State Farm made various misrepresentations to plaintiff; however, such claims are not the subject of the current Exception."

[3] *See Moulton v. Stewart Enters., Inc*., 17-0243, 17-0244, p. 3 (La. App. 4 Cir. 8/3/17), 226 So.3d 569, 571 (noting that an appellate court has a duty to determine, even if the parties do not raise it, whether subject matter jurisdiction exists); *see also Moon v. City of New Orleans*, 15-1092, 15-1093, p. 5 (La. App. 4 Cir. 3/16/16), 190 So.3d 422, 425.

[4] Subpart A "designates certain categories of partial judgments as final judgments subject to immediate appeal without the necessity of any designation of finality by the trial court." *Quality Envtl. Processes*, 16-0171, 16-0172 at p. 6, 218 So.3d at 1053. As in *Quality Envtl. Processes*,

a court renders a partial judgment, partial motion for summary judgment, or exception in part, it may designate the judgment as final when there is no just reason for delay." *Id.; see also Favrot v. Favrot*, 10-0986, pp. 2-3 (La. App. 4 Cir. 2/9/11), 68 So.3d 1099, 1102.

Subpart B of Article 1915 has two subparts. The first subpart provides that "the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay." La. C.C.P. art. 1915(B)(1). The second subpart provides that "[i]n the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties." La. C.C.P. art. 1915(B)(2); s*ee also* La. C.C.P. art. 1911(B) (providing, in part, that "[n]o appeal may be taken from a partial final judgment under Article 1915(B) until the judgment has been designated a final judgment under Article 1915(B)").

The record reflects that the trial court did not designate the judgment as "final" and immediately appealable pursuant to La. C.C.P. art. 1915(B).[5] Because the trial court did not designate the judgment as final and immediately appealable, it is a non-appealable judgment. Nonetheless, this court has exercised its discretion

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the judgment at issue here "does not: (1) dismiss the suit as to any party; (2) grant a motion for judgment on the pleadings; (3) pertain to an incidental demand that was tried separately; (4) adjudicate the issue of liability; or (5) impose sanctions or disciplinary action." 16-0171, 16-0172 at p. 7, 218 So.3d at 1054.

[5] The parties did not request that the trial court designate the judgment as final for purposes of appeal pursuant to La. C.C.P. art. 1915(B).

to convert an appeal of a non-appealable judgment into an application for supervisory writs when the following two conditions are met:

> (i) The motion for appeal has been filed within the thirty-day time period allowed for the filing of an application for supervisory writs under Rule 4–3 of the Uniform Rules, Courts of Appeal.
>
> (ii) When the circumstances indicate that an immediate decision of the issue sought to be appealed is necessary to ensure fundamental fairness and judicial efficiency, such as where reversal of the trial court's decision would terminate the litigation.[6]

Mandina, Inc. v. O'Brien, 13-0085, pp. 7-8 (La. App. 4 Cir. 7/31/13), 156 So.3d 99, 104 (quoting *Delahoussaye v. Tulane Univ. Hosp. and Clinic*, 12-0906, 12-0907, pp. 4-5 (La. App. 4 Cir. 2/20/13), 155 So.3d 560, 563).[7]

In the current case, both conditions are met. Mr. Lee's motion for appeal was filed within thirty days of the date of the notice of judgment and fundamental fairness and judicial efficiency warrant the exercise of our discretion. Accordingly, we convert the appeal to an application for supervisory writs. *See Stelluto v. Stelluto*, 05-0074, p. 7 (La. 6/29/05), 914 So.2d 34, 39 (noting that "the decision to convert an appeal to an application for supervisory writs is within the discretion of the appellate courts").

DISCUSSION

The sole issue presented is whether the trial court erred in granting the Exception, which State Farm entitled a "Peremptory Exception of No Cause of Action and No Right of Action." As one commentator has noted, "[b]ecause the

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[6] State Farm, nonetheless, suggests that it is inappropriate for this court to convert the appeal to a writ because the reversal of the trial court's judgment will not terminate the litigation. Contrary to State Farm's suggestion, termination of the litigation is only one factor to be considered in making the determination of whether to convert an appeal to a writ.

[7] *See also McGinn v. Crescent City Connection Bridge Auth*., 15-0165, pp. 4-5 (La. App. 4 Cir. 7/22/15), 174 So.3d 145, 148; *Kirby v. Poydras Ctr., LLC,* 15-0027, 15-0391, p. 12, n. 9 (La.

distinction between no cause of action and no right of action is elusive, attorneys frequently plead an 'exception of no cause or right of action.' There is no such procedural device." 1 Frank L. Maraist, LA. CIV. L. TREATISE, CIVIL PROCEDURE § 6:7 (2d ed. 2017). No cause of action and no right of action are separate peremptory exceptions; each of these exceptions serves a different purpose, and each is governed by different procedural rules. *Badeaux v. Southwest Computer Bureau, Inc*., 05-0612, 05-719, p. 6 (La. 3/17/06), 929 So.2d 1211, 1216.

"[O]ne of the primary differences between the exception of no right of action and no cause of action lies in the fact that the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit, while the focus in an exception of no cause of action is on whether the law provides a remedy against the particular defendant." *Badeaux*, 05-0612, 05-719, at p. 6, 929 So.2d at 1216-17. An important procedural distinction between the two exceptions is that evidence may be introduced on an exception of no right of action; whereas, "[n]o evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action." La. C.C.P. art. 931.

Peremptory exceptions of no cause of action and no right of action present legal questions; hence, appellate courts review trial court judgments granting such exceptions under a *de novo* standard. *Zeigler v. Housing Auth. of New Orleans*, 12-1168, p. 6 (La. App. 4 Cir. 4/24/13), 118 So.3d 442, 449 (citing *St. Pierre v. Northrop Grumman Shipbuilding, Inc*., 12-545, p. 7 (La. App. 4 Cir. 10/24/12),

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App. 4 Cir. 9/23/15, 13), 176 So.3d 601, 608; *Wadick v. General Heating & Air Conditioning, LLC,* 14-0187, pp. 8-9 (La. App. 4 Cir. 7/23/14), 145 So.3d 586, 592-93.

102 So.3d 1003, 1009); *B-G & G Investors VI, L.L.C. v. Thibaut HG Corp.,* 08-0093, p. 2 (La. App. 4 Cir. 5/21/08), 985 So.2d 837, 840.

To place the issue presented here in context, we begin by briefly outlining the well-settled principles governing insurance "bad faith" claims in Louisiana. "Insurance 'bad faith' law is codified in La. R.S. 22:1892 (formerly La. R.S. 22:658) and La. R.S. 22:1973 (formerly La. R.S. 22:1220)."[8] Dean A. Sutherland, *Insurance "Bad Faith" Law, Revisited*, 57 LA. B.J. 374, 375 (2010) ("*Sutherland*"). The purpose of these penalty statutes is to "provide remedies to insureds whose insurance claims are improperly handled or to whom payment is unreasonably delayed. In a few instances, remedies are also provided to third-party claimants." 15 William Shelby McKenzie and H. Alston Johnson, III, LA. CIV. L. TREATISE, INSURANCE LAW & PRACTICE § 11:1 (4th ed. 2017) ("*McKenzie & Johnson*").

Although Section 22:1973(A) is broadly worded, the Louisiana Supreme Court has interpreted that statutory provision as not giving a third-party claimant the right to sue an insurer based upon a generalized breach of its duty of good faith and fair dealing. *Kelly v. State Farm Fire & Cas. Co*., 14-1921, p. 6 (La. 5/5/15), 169 So.3d 328, 332-33 (citing *Theriot v. Midland Risk Ins. Co.*, 95-2895 (La. 5/20/97), 694 So.2d 184). In the *Theriot,* case, the Supreme Court recognized that "La. R.S. 22:1220(B)(1)-(5) and La. R.S. 22:658 [now La. R.S. 22:1973(B) and La. R.S. 22:1892] *do* create certain limited causes of action in favor of third party claimants that derogate from established rules of insurance law." 95-2895 at p. 15, 694 So.2d at 193. The Supreme Court, however, cautioned that these statutes must

[8] In Acts 2008, No. 415, § 1, effective Jan. 1, 2009, the Louisiana Legislature renumbered these two provisions without making any substantive changes.

be strictly construed in favor of "a limited expansion of third-party rights." *Theriot*, 95-2895 at p. 16, 694 So.2d at 193.

The limited nature of the insurance "bad faith" claims available to third-party claimants is attributable to the nature of the relationship between an insurer and a third-party claimant. "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." *Langsford v. Flattman*, 03-0189, p. 3 (La. 1/21/04), 864 So.2d 149, 151 (citing *Theriot*, 95-2895 at p. 15, 694 So.2d at 193).

In the current case, State Farm, in the Exception, sought dismissal of all the Reserved Claims, except for Mr. Lee's claims for misrepresentation under La. R.S. 22:1973(B)(1), which State Farm identified as the only valid third-party claims pled in the petition.[9] In support, State Farm contended that it was sued only

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[9] State Farm acknowledges that Mr. Lee had one other potential third-party claim regarding the reimbursement of his $500.00 property damage deductible (the "Deductible"). State Farm points out that Mr. Lee never pled a claim against Mr. Sapp or State Farm, in its capacity as Mr. Sapp's liability insurer, for property damage—the recovery of the Deductible. State Farm further points out that all claims, except for the Reserved Claims, against Mr. Sapp and State Farm, in its capacity as Mr. Sapp's insurer, have been compromised and released pursuant to the Release.

Mr. Lee's argument regarding the Deductible is that he has a first-party claim in that "State Farm has a policy obligation to plaintiff to pay the claim for the vehicle [property damage] (which they did minus the $500.00 dollar deductible) and then go into Subrogation against defendant 'SAPP' INSURER (which they did NOT do) in order to maintain that good-faith or in the words of the Supreme Court 'High Fiduciary' Duty." As discussed elsewhere in this opinion, this is not a valid first-party claim.

Mr. Lee further points out that following this court's decision in *Sapp I*, *supra*, finding coverage, his attorney sent a demand letter to State Farm requesting payment of the Deductible. He contends that "when State Farm refused to tender plaintiffs [sic] $500.00 deductible within 60 days of demand thereof," it violated La. R.S. 22:1892(A)(1). Again, as explained elsewhere in this opinion, as a third-party claimant, Mr. Lee has no cause of action under La. R.S. 22:1892 (A)(1).

in the third-party capacity as Mr. Sapp's insurer and only for Mr. Lee's personal injuries.[10]

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[10] The remaining claims set forth in the Second Supplemental and Amended Petition to which the Exception was addressed—all the Reserved Claims, except for the misrepresentations claims under La. R.S. 22:1973(B)(1)—are as follows:

> Plaintiff avers that, as the provider of insurance to both defendant, Thomas Sapp and plaintiff, Roderick Lee, State Farm Mutual Automobile Insurance Company (sometimes referred to as "State Farm" herein) committed bad faith breach of duty of good faith and fair dealing against plaintiff, Roderick Lee, as follows:
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> A. Petitioner avers that proper evidence was submitted to defendant, State Farm Mutual Automobile Insurance Company, to warrant payments under the State Farm policy of uninsured/underinsured coverage . . . ; however, State Farm has not tendered any monies, denying petitioner's demand to pay and/or claim and breached the duty of good faith and fair dealing, which caused petitioner to suffer damages, and is therefore in Bad Faith, according to the laws of the State of Louisiana, La. R.S. 22:1973, Good faith duty; claims settlement practices; cause of action, sub-sections A., B. (3) (5) (6), and is subject to penalties and attorney's fees under La. R.S. 22:1973(C), Redesignated from R.S. 22:1220 by Acts 2008, No. 415, § 1, eff. Jan. 1, 2009; Acts 2012, No. 271, § 1.
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> * * * * *
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> D. State Farm Mutual Automobile Insurance Company committed Bad Faith in the following ways:
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> 1. By failing to attempt in good faith and fair dealing, to adjust claims fairly and promptly and to settle claims with the insured or the claimant, or both, and thus is liable for any damages sustained as a result of the breach. La. R.S. 22:1973 A, when such failure is arbitrary, capricious or without probable cause;
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> 2. By breaching the insurer's duties imposed upon it by La. R.S. 22: 1973 Subsection A in its denial when such failure is arbitrary, capricious or without probable cause;
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> 3. By breaching the insurer's duties and failing to pay the amount of a claim due any person within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious or without probable cause;
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> 4. By breaching the insurer's duties and failing to pay claims pursuant to La. R.S. § 22:1892 and § 22:1893 when such failure is arbitrary, capricious, or without probable cause;
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> * * * * *
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> 6. By arbitrary and capriciously denying the claim, having satisfactory proof of loss, the insurer is in Bad Faith and subject to penalties under La. R.S. 1973(C), which states "claimant may be awarded penalties and attorney's fees and costs assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater . . . .

Opposing the exception, Mr. Lee did not challenge State Farm's contention that the only valid third-party claim he had pled was for misrepresentation under La. R.S. 22:1973(B)(1). Rather, he contended that, at the time of the accident, State Farm insured both him and Mr. Sapp under separate, unrelated automobile liability policies. He thus contended that he had valid first-party bad faith claims against State Farm. Contrary to the averments of his petition, Mr. Lee acknowledged that State Farm was not his UM carrier and that he did not have a valid claim under La. R.S. 22:1893, which pertains to immovable property. Indeed, he moved for a limited dismissal of those two claims.

Agreeing with State Farm, the trial court ruled as follows:

> All extra-contractual, bad faith claims asserted by Plaintiff in the Second Supplemental and Amended Petition for Damages are DISMISSED WITH PREJUDICE with the exception that this Judgment does not include the dismissal of Plaintiff's claim for misrepresentation brought pursuant to LA R.S. 22:1973(B)(1). Plaintiff's claim against Defendant for misrepresentation pursuant to La. R.S. 22:1973(B)(1) is reserved.

Although Mr. Lee assigns several errors on appeal, the gist of his argument is that the trial court erred in failing to find he is a first-party claimant and that all the insurance "bad faith" claims he pled in his petition (other than the UM claim and La. R.S. 22:1893 claims that he moved to dismiss) are valid. The narrow issue presented here, thus, can be framed as whether Mr. Lee is a first-party claimant, with broad-based general bad faith claims, or a third-party claimant, with limited bad faith claims.

"In the world of insurance, a first-party claim is a claim filed by an insured against his own insurer for damage to property or person; whereas a third-party claim is made by a claimant against the insured for damages allegedly caused by the insured." Gary Langlois, Jr., *Kelly v. State Farm Fire & Casualty Company:*

Practical Effects Resulting from an Expansion of Insurers' Broad Good-Faith Duty, 61 LOY. L. REV. 799, 805 (2015) (internal quotation marks omitted). Stated otherwise, "[f]irst-party claims are claims brought by a policyholder against their own insurance company, seeking direct compensation." Cassandra Feeney, *Are You "In Good Hands"? : Balancing Protection for Insurers and Insured in First-Party Bad-Faith Claims with A Uniform Standard*, 45 NEW ENG. L. REV. 685, 687, n. 16 (2011); s*ee also McKenzie & Johnson*, *supra,* § 11:4 (defining a first-party claim as "a claim by person who is an insured under the insurance policy"); *Pixton v. State Farm Mut. Auto. Ins. Co. of Bloomington, Illinois*, 809 P.2d 746, 748, n. 1 (Utah Ct. App. 1991) (noting that "in a first-party situation the insurer agrees to pay claims submitted by the insured for losses suffered by the insured. In a third-party situation, however, the insurer agrees to defend the insured against claims made by third-parties against the insured and to pay resulting liability up to a specified amount").

To properly classify the relationship between Mr. Lee and State Farm, it is necessary to examine the various iterations of the petition. In the original petition, Mr. Lee sued State Farm in its capacity as Mr. Sapp's insurer for the personal injuries he sustained; he averred that "[a]t all times pertinent hereto, STATE FARM was the automobile liability insurer of SAPP." Based on the allegations of the original petition, Mr. Lee is a third-party claimant—he is asserting a claim against State Farm's insured, Mr. Sapp, for his own injuries. Mr. Lee does not dispute this classification; however, he contends that he also became a first-party claimant as a result of the averments of the Second Supplemental and Amending Petition.

In the Second Supplemental and Amended Petition, Mr. Lee avers that "as the provider of insurance to both defendant, Thomas Sapp and plaintiff, Roderick Lee, State Farm . . . committed bad faith/breach of duty of good faith and fair dealing against plaintiff, Roderick Lee." The only other reference in the Second Supplemental and Amended Petition to State Farm as Mr. Lee's insurer, however, is to State Farm in its capacity as Mr. Lee's alleged UM carrier; he avers that "proper evidence was submitted to defendant, State Farm Mutual Automobile Insurance Company, to warrant payments under the State Farm policy of uninsured/underinsured coverage."

Contrary to the averments of the Second Supplemental and Amended Petition, Mr. Lee admitted that State Farm was not his UM insurer at the time of the accident. In both the opposition he filed in the trial court to the Exception and the appellant brief he filed in this court, Mr. Lee acknowledged that State Farm was not his UM insurer at the time of the accident and that the averment in the petition that State Farm was his UM insurer was incorrect. In both pleadings, he made the following statement: "[t]he plaintiff does not oppose a limited partial dismissal, dismissing plaintiff[']s claims for UM coverage."[11]

On an exception of no cause of action, the allegations of the petition must be accepted as true and evidence cannot be introduced. Both trial and appellate courts, however, can, *sua sponte*, recognize an exception of no right of action, which allows courts to consider evidence outside the petition. *See* La. C.C.P. art. 927(B). We find it appropriate to do so here. Mr. Lee's judicial admissions that State Farm

[11] Mr. Lee made the same judicial admissions and requests to dismiss his claim under La. R.S. 22:1893, regarding immovable property.

was not his UM insurer are sufficient to establish that he lacks a right of action against State Farm, in its capacity as his alleged UM carrier. *See Rhyne v. OMNI Energy Servs. Corp*., 14-711, p. 10 (La. App. 3 Cir. 12/10/14), 155 So.3d 155, 161 (relying on judicial confession of appellant's counsel "to take notice of an exception of no right of action in this case, as opposed to a no cause of action"); La. C.C. art. 1853 (providing that "[a] judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.").

Mr. Lee, nonetheless, maintains that the reference in the Second Supplemental and Amended Petition to the fact that both he and Mr. Sapp were insured by State Farm sufficed to convert him to a first-party claimant. State Farm counters that Mr. Lee failed to assert any claim against it based on his own insurance policy. State Farm further counters that the only claims Mr. Lee made against it were third-party claims against it in its capacity as Mr. Sapp's insurer. According to State Farm, Mr. Lee's arguments establish that he does not understand either the capacity in which he sued State Farm or the difference between first-party and third-party claims.

A review of the petitions reveals that Mr. Lee failed to assert, at any time, a first-party claim against State Farm in its capacity as his own insurer. Although in the Second Supplemental and Amended Petition Mr. Lee mentions that he was insured by State Farm, Mr. Lee asserts in the petition no first-party claim for recovery under his own policy. In order to maintain an insurance "bad faith" claim under either La. R.S. 22:1892 or La. R.S. 22:1973, a plaintiff must have a valid underlying claim upon which insurance coverage is based. *See Clausen v. Fidelity & Deposit Co. of Md.,* 95-0504, p. 3 (La. App. 1 Cir. 8/4/95), 660 So.2d 83, 85

(holding that "[t]he penalties authorized by these [insurance bad faith] statutes do not stand alone; they do not provide a cause of action against an insurer absent a valid, underlying, insurance claim."). Mr. Lee failed to plead a valid, underlying first-party claim under his own policy; the only claims he pled were third-party claims for his own personal injuries under Mr. Sapp's policy.

The arguments Mr. Lee makes in support of his status as a first-party claimant are premised solely on the coincidence that he and Mr. Sapp both were insured by State Farm at the time of the accident. The essence of Mr. Lee's argument is that State Farm owes a special duty to him because he was insured by State Farm as opposed to "Allstate or GEICO or Progressive Insurance Company or some other insurance company." Addressing similar arguments, courts have labeled this as the "double-insured situation"—one in which the tortfeasor and the injured party are insured by the same insurer, albeit generally under different policies. *Herrig v. Herrig*, 844 P.2d 487, 491 (Wyo. 1992); *see also Darlow v. Farmers Ins. Exch*., 822 P.2d 820, 827 (Wyo. 1991) (defining the double-insured situation as one in which both parties to an incident are insured by the same company).

In the double-insured situation, courts, almost universally, have rejected the argument, advanced by Mr. Lee here, that an enhanced duty of good faith should be imposed on the insurer when dealing with its own insured in the third-party claimant capacity. *Heigis v. Cepeda*, 862 P.2d 129, 132 (Wash. Ct. App. 1993). The rationale is that, despite this coincidence of the plaintiff and the tortfeasor having the same insurer, "the plaintiff and his insurer occupy adversarial positions." *Myers v. State Farm Mut. Auto. Ins. Co*., 950 F. Supp. 148, 151 (D.S.C.

1997).[12] When faced with the issue, "courts simply refuse to place an insurer in the untenable position of owing a duty of good faith and fair dealing to both the insured and the adversary of the insured, whether in the double-insured context or not." *Herrig*, *supra*.[13] Accordingly, the courts have concluded that the insured's duty to the plaintiff under the tortfeasor's policy is no different than if the plaintiff was insured by a different insurance company. *Myers*, *supra*.

Given that Mr. Lee is solely a third-party claimant, the only bad faith claims that he may assert are those available, by statute, to a third-party claimant. *See Century Sur. Co. v. Blevins*, 799 F.3d 366, 371 (5th Cir. 2015) (noting that the *Theriot* case "merely holds that § 22:1973 creates an exclusive cause of action for *third parties* because no judicial cause of action for *third parties* existed before the statute's enactment"). Although Mr. Lee does not challenge State Farm's argument that the only valid third-party claims that have been pled are the misrepresentation claims under La. R.S. 22:1973(B)(1), we briefly address the two insurance "bad faith" statutes that Mr. Lee cites in his Second Supplemental and Amending Petition—La. R.S. 22:1973 and La. R.S. 22:1892.[14]

Mr. Lee's La. R.S. 22:1973 claims

It is "hornbook law" that "third-party claimants, i.e., those not covered by the insurance policy at issue, . . . are only afforded a private cause of action for

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[12] *See also Martin v. State Farm Mut. Auto. Ins*. Co., 808 N.E.2d 47, 51 (Ill. App. Ct. 2004) (citing *Myers, supra*); *Herrig*, 844 P.2d at 492; *Chavez v. Chenoweth,* 89 N.M. 423, 430, 553 P.2d 703, 710 (1976); *Galusha v. Farmers Ins. Exch*., 844 F. Supp. 1401, 1403 (D. Colo. 1994); *Caserotti v. State Farm Ins. Co*., 791 S.W.2d 561, 565 (Tex. App. 1990)).

[13] In *Theriot*, the Supreme Court cited the *Herrig* case for the general rule that an insurer's duty runs primarily in its insured's favor and that the relationship between an insurer and a third-party claimant is fundamentally adverse. *Theriot*, 95-2895 at p. 15, n. 16, 694 So.2d at 193.

[14] Although Mr. Lee also cites in his petition La. R.S. 22:1893, we find, based on his judicial admissions discussed elsewhere in this opinion, that he has no right of action under that statute.

violation of one of the specifically-enumerated acts under Subsection (B) [of La. R.S. 22:1973]." *Dodge v. Sherman*, 17-70, p. 8 (La. App. 3 Cir. 6/7/17), ___ So.3d ___, ___, 2017 WL 2462190 (citing *Theriot*, *supra*). As a third-party claimant, Mr. Lee does not have a cause of action against State Farm under La. R.S. 22:1973(A). "*Theriot* also recognized that the second sentence of La. R.S. 22:1973(A) does confer a private right of action on third-party claimants, but only for the specific acts listed in Subsection (B)." *Dodge,* 17-70 at p. 9, ___ So.3d at ___.

Subsection B of La. R.S. 22:1973, sets forth the following six causes of action:

> (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
>
> (2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
>
> (3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.
>
> (4) Misleading a claimant as to the applicable prescriptive period.
>
> (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.
>
> (6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.

As State Farm points out, the Reserved Claims—asserted in the Second Supplemental and Amended Petition—fall into only three of these Subsections—(B)(1), (5), and (6). The trial court expressly reserved the Subsection (B)(1) claims in the judgment; as noted elsewhere, State Farm carved those claims out of the Exception. As to the Subsection (B)(5) claims, Mr. Lee is not "a person insured by the contract"; and Subsection (B)(5), by law, does not apply to him. *Langsford v.*

Flattman, 03-189, p. 3 (La. 1/21/04), 864 So.2d 149, 151.[15] As to the Subsection (B)(6) claims, Mr. Lee acknowledges that he has no cognizable claim under La. R.S. 22:1893, which pertains to immovable property; and Subsection (B)(6) likewise does not apply here. Thus, Mr. Lee's only valid claims under La. R.S. 22:1973 are his misrepresentation claims under Subsection (B)(1), which the trial court reserved in the judgment.

Mr. Lee's La. R.S. 22:1892 claims

Mr. Lee alleges that State Farm failed to pay his claim pursuant to R.S. 22:1892. As State Farm points out, Mr. Lee has not pled any property damage claim; thus, the only pertinent provision relating to the bodily injury claims that Mr. Lee has pled is Subsection (A)(1) of La. R.S. 22:1892.[16] As one commentator

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[15] The *Theriot* case left open the question of whether a third-party claimant has a right of action under Subsection (B)(5). *See Paul v. Allstate Ins. Co*., 98-499, p. 8 (La. App. 5 Cir. 10/28/98), 720 So.2d 1251, 1255. Following the *Theriot* case, the jurisprudence the jurisprudence has consistently held that a third-party claimant does not have a cause of action against an insurer under Subsection (B)(5) for failing to pay the amount of any claim "due to any person insured by the contract," within 60 days of receipt of satisfactory proof of loss. The rationale behind this holding is that the term "due to any person insured by the contract" is strictly construed to mean that only an "insured" has such a cause of action. *Woodruff v. State Farm Ins. Co*., 99-2818, p. 5 (La. App. 4 Cir. 6/14/00), 767 So.2d 785, 788-89 (collecting cases decided subsequent to *Theriot* holding Subsection (B)(5) inapplicable to a third-party claimant and holding that "Subsection 1220 B(5) [now La. R.S. 22:1973(B)(5)], by its express language, applies only to claims due to an insured"). Citing these post-*Theriot* cases with approval, the Louisiana Supreme Court, in *Langsford, supra*, recognized that "[t]he jurisprudence has consistently held that a third party claimant . . . is not a person insured by the contract for purposes of La. R.S. 22:1220(B)(5)." 03-189 at p. 3, 864 So.2d at 151.

[16] The duties owed to a third-party claimant by an insurer under La. R.S. 22:1892, which relate primarily to property damage claims, have been outlined as follows:

> According to that statute, the insurer:
>
> (2) . . . shall pay the amount of any third party property damage claim and of any reasonable medical expenses claim due any bona fide third party claimant within thirty days after written agreement of settlement of the claim from any third party claimant.
>
> (3) . . . shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen days after notification of loss by the claimant. . . . Failure to comply with the provisions of this Paragraph shall subject the insurer to the penalties provided in R.S. 22:1973.

has noted, "[t]he prohibited conduct under La. R.S. 22:1892A(1) . . . and La. R.S. 22:1973B(5) is virtually identical: 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. . . . Both provisions apply to claims by insureds, not to third-party claims." *Sutherland*, *supra*. (internal quotation marks and footnote omitted). As a third-party claimant, Mr. Lee fails to state a cause of action under La. R.S. 22:1982(A)(1).

In sum, Mr. Lee has pled only claims against State Farm as third-party liability insurer of Mr. Sapp and only for his personal injuries. Mr. Lee is solely a third-party claimant; hence, he is limited to asserting third-party insurance "bad faith" claims. The only cognizable third-party bad faith claims asserted in the Second Supplemental and Amended Petition are the misrepresentation claims under La. R.S. 22:1973(B)(1). Accordingly, we find no error in the trial court's judgment dismissing all the Reserved Claims, except for the claims under La. R.S. 22:1973(B)(1).

DECREE

For the foregoing reasons, we convert the appeal to an application for supervisory writs, grant the writ application, and deny relief.

APPEAL CONVERTED TO WRIT; WRIT GRANTED; RELIEF DENIED

> (4) . . . 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.

Armstrong v. Safeway Ins. Co., 10-183, p. 9 (La. App. 3 Cir. 10/6/10), 47 So.3d 63, 68-69 (quoting La. R.S. 22:1982).