

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1975

ESURANCE INSURANCE COMPANY

VERSUS

**DONNA MEADE, INDIVIDUALLY AND ON BEHALF OF HER MINOR DAUGHTER,
TARA HEMBREE**

Judgment Rendered: MAY - 8 2009

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On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 548,732

Honorable Timothy E. Kelley, Judge Presiding

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of her minor daughter, Tara Hembree

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Parro, J., concurs.

DME
JKW

McCLENDON, J.

Defendant-in-reconvention, Esurance Insurance Company (Esurance), appealed the trial court's award of penalties under LSA-R.S. 22:1220 to plaintiffs-in-reconvention, Donna Meade, individually and on behalf of her minor daughter, Tara Hembree (Ms. Meade). We affirm.

After a hearing on the issues of penalties and attorney's fees, the trial court found that there was a settlement between Esurance and Ms. Meade, the settlement amount was not paid to Ms. Meade within thirty days, and penalties under LSA-R.S. 22:1220 applied. The trial court took the issue of attorney's fees, pursuant to LSA-R.S. 22:658, under advisement. Subsequently, the trial court found that Esurance was not arbitrary and capricious in its actions in trying to rescind the settlement,¹ and paid within thirty days of the trial court's ruling that the settlement was valid. In the absence of arbitrary and capricious acts, the court found that Ms. Meade was not entitled to attorney's fees. By written judgment signed on May 23, 2008, the trial court awarded Ms. Meade \$5000.00 in penalties and denied her request for attorney's fees.

Esurance filed a suspensive appeal of the penalty award, but Ms. Meade did not appeal the denial of attorney's fees or answer the appeal of Esurance. Thus, the only issue before us on appeal is Esurance's claim that the "trial court erred in determining that Esurance owed a \$5,000.00 penalty under [LSA-R.S.] 22:1220, when Esurance challenged the settlement and had a good faith basis to ask the court to rescind the settlement."

In pertinent part, the applicable provision, LSA-R.S. 22:1220,² provides as follows:

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.

¹ The settlement was held to be valid by a separate judgment that is not part of this appeal.

² By Acts 2008, No.415, § 1, effective January 1, 2009, LSA-R.S. 22:1220 was renumbered as LSA-R.S. 22:1973.

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:

...

(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.

After reviewing LSA-R.S. 22:1220, the Louisiana Supreme Court, in **Sultana Corporation v. Jewelers Mutual Insurance Company**, 2003-0360, p. 5 (La. 12/3/03), 860 So.2d 1112, 1117, initially noted that:

An insurer owes its insured the duty specified by LA.REV.STAT. ANN. § 22:1220(B)(2), *i.e.*, payment of a settlement within thirty days after it has been reduced to writing, and an insured has a cause of action against the insurer for a violation of that duty. As this Court recognized in *Theriot*, 694 So.2d 184, the practice by insurers of delaying the issuance of settlement checks was one of the principal grounds for the enactment of this statute. *Theriot*, 694 So.2d at 187.

After further analysis and review, the supreme court found that, under the clear wording of the statute, the insured did not need "to prove that it suffered damages as a prerequisite for the discretionary award of penalties under Section (C) of [LSA-R.S.] 22:1220." **Sultana Corporation**, 2003-0360 at p. 9, 860 So.2d at 1119. Further, the supreme court rejected the claim that the insured had the burden to prove that the insurer "arbitrarily and capriciously withheld the settlement funds for more than thirty days," before penalties under 1220C could be awarded. *Id.* In conclusion, the court held that section 1220B "simply requires that the insured or claimant must show that failure of an insurer to timely pay the settlement be 'knowingly committed.'" *Id.*

In the instant case, it is undisputed that the insurer knowingly failed to pay within thirty days after the settlement was reduced to writing. See LSA-R.S. 22:1220B(2). Thus, we find no error in the trial court's award of penalties.

For these reasons, we affirm the judgment. The costs of the appeal are assessed to appellant, Esurance Insurance Company.

AFFIRMED.