NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1327

HARRY JOSEPH HAYNES

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, SAFEWAY INSURANCE COMPANY OF LOUISIANA, and JOHN CHRISTOPHER

Judgment Rendered: March 23, 2012

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On Appeal from the 18th Judicial District Court
In and For the Parish of Pointe Coupee
Trial Court No. 42,676 "D"

Honorable William C. Dupont, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from a judgment of the Eighteenth Judicial District Court (JDC) that ruled in favor of the plaintiff/appellee, Mr. Harry Joseph Haynes, and awarded him damages, penalties, and attorney's fees from his uninsured/underinsured motorist insurance carrier, defendant/appellant, Safeway Insurance Company of Louisiana (Safeway). For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

This suit arose out of an automobile accident that occurred on October 20, 2008. Due to the injuries he sustained in the accident, Mr. Haynes filed suit against Mr. John Christopher (the at-fault driver), Mr. Christopher's insurer, State Farm Mutual Automobile Insurance Company (State Farm), and Safeway. Prior to trial, Mr. Haynes settled his claims with Mr. Christopher and State Farm for their full policy limits of $10,000.00.

Thereafter, on July 20, 2010 Mr. Haynes filed a supplemental and amending petition alleging that although Safeway had been provided all of the information necessary to determine that an unconditional tender should be made, it had arbitrarily, capriciously, and without probable cause, failed to make a tender within the time limits mandated by statute. Thus, Mr. Haynes requested penalties, damages, and attorney's fees.

Trial was held on March 11, 2011. After the close of the evidence, the trial court found that "reasonable minds could not disagree that this was a minimum four and a half month injury" and awarded Mr. Haynes $12,500.00 in general damages and $3,831.43 in special damages. Because the trial court determined "[t]hat being the case, [Safeway's] own testimony is that they should have tendered," the court found that Safeway had breached its duty of good faith and fair dealing to Mr. Haynes and awarded

him an additional $3,000.00 in penalties and $3,500.00 in attorney's fees. Safeway appeals and assigns as error the trial court's finding that its actions were arbitrary, capricious, or without probable cause, subjecting it to penalties and attorney's fees.

LAW AND ANALYSIS

Standard of Review

Safeway does not contest the damage award of the trial court, but only assigns error to the trial court's finding that its failure to make an unconditional tender to Mr. Haynes was arbitrary, capricious, or without probable cause. Such a question is an issue of fact because its determination depends upon what information was known to the insurer at the time of its action, or in this case, inaction. **Reed v. State Farm Mutual Auto. Ins. Co.**, 03-0107 (La. 10/21/03), 857 So.2d 1012, 1020. A court of appeal may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The supreme court has announced a two-part test for the reversal of a factfinder's determinations: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). See also **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). Thus, the issue to be resolved by a reviewing court is not whether the trier-of-fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Stobart v. State, Department of Transportation and Development**, 617 So.2d at 882. Moreover, where there are two permissible views of the evidence, the factfinder's choice between them cannot be

manifestly erroneous or clearly wrong. **Stobart v. State, Department of Transportation and Development**, 617 So.2d at 883; **Wright v. Bennett**, 04-1944, p. 25 (La. App. 1 Cir. 9/28/05), 924 So.2d 178, 193.

The "Bad Faith" Statutes

The two statutes at issue in this case are LSA-R.S. 22:1892[1] and 22:1973.[2] The conduct prohibited by each is very similar: the failure to

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[1] LSA-R.S. 22:1892

> A. (1) All insurers issuing any type of contract... shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest. The insurer shall notify the insurance producer of record of all such payments for property damage claims made in accordance with this Paragraph.
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> * * *
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> 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), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), 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.

[2] LSA-R.S. 22:1973

> 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:
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> * * *
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> (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.
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> (6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.
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> 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.

timely pay a claim after receiving satisfactory proof of loss when that failure to pay is arbitrary, capricious, or without probable cause. The primary difference is the time periods allowed for payment. **Reed v. State Farm**, 857 So.2d at 1020. Whereas LSA-R.S. 22:1892(A)(1) requires payment within thirty days of satisfactory proof of loss, LSA-R.S. 22:1973(B)(5) grants a longer period of sixty days for payment.[3] We further note that both are penal in nature and must be strictly construed. **Reed v. State Farm**, 857 So.2d at 1020.

The phrase "arbitrary, capricious, or without probable cause" is synonymous with "vexatious." Both describe an insurer whose willful refusal of a claim is not based on a good faith defense. **Combetta v. Ordoyne**, 04-2347 (La. App. 1 Cir. 5/5/06), 934 So.2d 836, writ denied, 06-1353, (La. 9/22/06), 937 So.2d 389. An insurer's action in handling a claim is arbitrary and capricious when its willful refusal of a claim is not based on a good faith defense or is unreasonable or without probable cause. **Calogero v. Safeway Ins. Co. of Louisiana**, 99-1625 (La. 1/19/00), 753 So.2d 170, 173.

One who claims entitlement to penalties and attorney fees under either statute has the burden of proving that the insurer received satisfactory proof of loss as a predicate to a showing that it was arbitrary, capricious, or without probable cause. **Reed v. State Farm**, 857 So.2d at 1020. The jurisprudence has defined a "satisfactory proof of loss" as that which is

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[3] Safeway has not contested the amount of the penalties awarded in this case, but assigns error only to the trial court's finding that it acted in bad faith in its handling of Mr. Haynes's claim. As such, the amount of penalties and attorney's fees awarded is not an issue in this appeal. However, we do note that while LSA-R.S. 22:1973 provides for a greater penalty, it supersedes LSA-R.S. 22:1892, such that the insured cannot recover penalties under both statutes. However, because LSA-R.S. 22:1973 does not provide for attorney fees, the insured is entitled to recover the greater penalties under its provisions and attorney's fees under LSA-R.S. 22:1892 for its insurer's arbitrary and capricious failure to timely pay his claim after receiving satisfactory proof of loss. See **Calogero v. Safeway Ins. Co. of Louisiana**, 753 So.2d at 174; see also **Ibrahim v. Hawkins**, 845 So.2d at 478.

sufficient to fully apprise the insurer of the insured's claim. **McDill v. Utica Mut. Ins. Co.**, 475 So.2d 1085, 1089 (La. 1985). To establish a "satisfactory proof of loss," the insured must show that the insurer received sufficient facts to fully apprise the insurer: (1) that the owner or operator of the other vehicle involved in the accident was uninsured or underinsured; (2) that he was at fault; and (3) that such fault gave rise to damages. The information must also indicate the extent of those damages. **McDill v. Utica** 475 So.2d at 1089, **Ibrahim v. Hawkins**, 02-0350 (La. App. 1 Cir. 2/14/03), 845 So.2d 471, **Reed v. State Farm**, 857 So.2d at 1022. When satisfactory proof of loss has been made and the insured has made a showing that the insurer will be liable for some general damages, the insurer must tender the reasonable amount that is due. This amount must be tendered unconditionally, not in settlement of the case, but to show good faith and the insurer's compliance with its contractual duties. The amount due is that amount over which reasonable minds could not differ. **McDill v. Utica** 475 So.2d at 1091, **Ibrahim v. Hawkins**, 845 So.2d at 477.

Lisa Guidry, the litigation supervisor for Safeway, testified at the trial. She conceded that by June of 2009, Mr. Haynes had met his burden of providing sufficient evidence of Mr. Christopher's fault in the accident, of his State Farm policy and limits, and of the exhaustion of those limits. Thus, it is uncontested that the first two **McDill** requirements were met. And while Ms. Guidry also acknowledged that by August of 2010, Safeway had also received all of Mr. Haynes's medical bills and treatment records, she insisted that Safeway still did not owe a tender for two reasons: 1) Based on the medical records, she determined that Mr. Haynes's symptoms had completely resolved within two and a half months, and the underlying State Farm policy limits had therefore fully compensated him, and 2) Because he

was a Medicaid recipient, she had determined that it was necessary for her to obtain the Medicaid lien information with payment history in order to properly evaluate the claim.

In oral reasons for judgment, the trial court stated that "[Safeway] tend[s] to put off a lot on this Medicaid issue,[4] but the reality where the failure starts is in the evaluation of the claim as only a two and a half month injury." The court further stated that:

> The medical records and bills show an injury from October of '08 minimum at least to February of '09...[s]o the [c]ourt believes that reasonable minds could not conclude anything less and that this was at least a minimum four and a half month, four, four and a half month injury...I don't see how any reasonable mind would not concede that.

As such, the court found that Safeway's failure to tender to its insured was a breach of its duty of good faith and fair dealing and was arbitrary, capricious, or without probable cause. Having reviewed the record, we conclude that there was evidentiary support for the trial court's finding. Safeway's position that Mr. Haynes injury lasted only two and a half months is clearly contradicted by both the medical records and the testimony of Mr. Haynes. Due to immediate complaints of pain, he was transported by ambulance from the scene of the accident to Pointe Coupee General Hospital for evaluation and treatment. Thereafter, he was diagnosed with cervical and lumbar sprains with muscle spasms and was treated at New Roads Chiropractic, Pointe Coupee Physical Therapy, and Louisiana Orthopaedic and Spine Institute (Dr. Johnston's office.) And while Safeway contends that his symptoms had completely resolved in December, within two and a

[4] Safeway argues that they had not received satisfactory proof of loss until they received the Medicaid lien letter, with the payment history, on February 11, 2010. However, by Safeway's own admission, it had determined in October of 2009 that Mr. Haynes's injury was only a two and a half month injury. And while Safeway's adjustor admitted that she knew that she needed the Medicaid history as early as April of 2009, Safeway made no attempt to request that information from Medicaid until December 30, 2009. A delay caused by Safeway is hardly a valid basis for defending the bad faith claim. Nevertheless, the trial court based its finding of bad faith in this case on the unreasonableness of Safeway's evaluation.

half months from the date of the accident, he did not complete his prescribed physical therapy until January of 2009 and was not released from the care of Dr. Johnston until February of 2009. The medical records further reflect that until his February discharge, he remained both on light duty work restrictions and on medication for muscle spasms due to the injuries he sustained in the accident. By Safeway's own admission, even under a three and a half month injury evaluation, a tender was owed:

> Q. Okay. You just testified that, and I wrote it down this time so we're clear, you told your attorney "we need to tender nine hundred dollars, this is a tender situation," correct?
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> A. Based on my three and a half month evaluation, yes.
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> * * * *
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> Q. When in your mind, okay, you assumed it was a three and a half month injury, okay, at that point you felt you needed to make a tender of at least $900.00?
>
> A. Right.

Clearly, there is evidentiary support for the trial court's finding in this case and we therefore find no manifest error in the ruling.

CONCLUSION

For the reasons assigned herein, the judgment of the 18th JDC is affirmed. All costs of this appeal are assessed to defendant/appellant, Safeway Insurance Company of Louisiana.

AFFIRMED.