

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1078

STEVE AND MARY BETH DARNELL, INDIVIDUALLY
AND ON BEHALF OF THEIR MINOR SON, JUSTIN DARNELL

VERSUS

HARTFORD PROPERTY AND CASUALTY INSURANCE
AND DONALD R. LEMOINE

Judgment Rendered: December 23, 2009

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2005-10,431

Honorable Allison H. Penzato, Judge

John M. Robin
Covington, LA

Attorney for
Plaintiffs – Appellants
Steve and Mary Beth Darnell,
Individually and on Behalf of
Their Minor Son, Justin Darnell

Jude H. Trahant, Jr.
Madisonville, LA

Attorney for
Defendant – Appellee
Allstate Ins. Co.

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

JW

V G W by

WELCH, J.

Plaintiff, Mary Beth Darnell, appeals a judgment denying her demand for penalties and attorney fees from her insurer, Allstate Insurance Company. We affirm.

BACKGROUND

On December 14, 2004, Mrs. Darnell was driving a vehicle in St. Tammany Parish in which her young son was riding, when her vehicle was rear-ended by a vehicle driven by Donald Lemoine. As a result of that accident, Mrs. Darnell and her husband filed this lawsuit on January 27, 2005, seeking damages individually and on their son's behalf against Mr. Lemoine and his automobile insurer, State Farm Fire and Casualty Company. On August 11, 2006, Allstate Insurance Company, the Darnells' uninsured/underinsured carrier, was added as a defendant in the litigation.¹

Mrs. Darnell settled her claims against State Farm and its insured for the policy limits of \$100,000.00 and dismissed those parties from the lawsuit. Prior to trial against Allstate, the only remaining defendant, the parties stipulated that Mrs. Darnell's claim against Allstate was less than \$50,000.00, that Allstate issued a policy providing \$50,000.00 per person UM coverage to her, and that Allstate paid Mrs. Darnell \$1,000.00 in medical payments. The parties also stipulated that the accident was caused solely by the fault of Mr. Lemoine.

At trial, Mrs. Darnell sought to establish that she sustained a neck injury and suffered memory loss as a result of the accident, resulting in damages in excess of the \$100,000.00 policy limits paid to her by State Farm. She also demanded penalties and attorney fees against Allstate pursuant to La. R.S. 22:658 and La.

¹ Plaintiffs did not prosecute a loss of consortium claim or any claim on behalf of the child against Allstate at trial. The record reflects that State Farm paid \$35,000.00 in settlement of all claims on behalf of the minor child. We shall refer to Mrs. Darnell as the only plaintiff in this litigation.

R.S. 22:1220 for Allstate's alleged arbitrary refusal to pay her claim. Her case consisted of her testimony, medical records, a statement of her treating chiropractor, the deposition of a physician specializing in rehabilitation medicine, the deposition of a psychologist, pictures of her damaged vehicle, and the deposition of James Magnum, the Allstate adjuster who handled her claim. Allstate presented the testimony of a psychiatrist to refute Mrs. Darnell's claim that she sustained memory loss as a result of the accident.

Following the conclusion of the evidence, the court found that Mrs. Darnell proved that she sustained general and special damages in the amount of \$115,000.00 in the accident. Specifically, the court found that Mrs. Darnell proved that she sustained a neck injury in the accident, but did not prove that she suffered any post-traumatic stress syndrome affecting her memory. The court stated that the medical evidence showed Mrs. Darnell had a bulging disc in her neck that was either caused by the accident or pre-existed the accident and became aggravated or symptomatic as a result of the accident. Allstate was given a set-off in the amount of the State Farm policy limits of \$100,000.00 and the \$1,000.00 medical payment made by Allstate.

The original reasons for judgment were silent as to Allstate's liability for penalties and attorney fees, and Mrs. Darnell filed a motion to amend the judgment. In reasons for judgment, the trial court denied this claim, finding that Mrs. Darnell failed to prove she was entitled to penalties and attorney fees by a preponderance of the evidence. Thus, judgment was rendered against Allstate in the amount of \$14,000.00, but Mrs. Darnell's claim for penalties and attorney fees was dismissed with prejudice.

This appeal, in which Mrs. Darnell contests only the trial court's failure to award penalties and attorney fees against Allstate, followed.

DISCUSSION

In her sole assignment of error, Mrs. Darnell contends that Allstate's refusal to make a tender pursuant to the UM portion of the automobile policy was arbitrary, capricious, and without probable cause, warranting the imposition of penalties and attorney fees under La. R.S. 22:658 and La. R.S. 22:1220.²

In order to establish a cause of action for penalties and/or attorney fees and costs under La. R.S. 22:658, a claimant must show that: (1) an insurer received satisfactory proof of loss, (2) the insurer failed to tender payment within 30 days thereof, and (3) the insurer's failure to pay is arbitrary, capricious, or without probable cause. **Guillory v. Lee**, 2009-0075, p. 30 (La. 6/26/09), 16 So.3d 1104, 1126. Additionally, La. R.S. 22:1220 imposes an obligation of good faith and fair dealing on an insurer, including the affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims, and subjects an insurer to liability for damages for failing to pay claims when such failure is arbitrary, capricious, or without probable cause.

The term "arbitrary, capricious or without probable cause," as used in La. R.S. 22:658 and La. R.S. 22:1220 has been equated with the term "vexatious," and a "vexatious refusal to pay" means unjustified, without reasonable or probable cause or excuse. **Louisiana Bag Company, Inc. v. Audubon Indemnity Company**, 2008-0453, pp. 13-14 (La. 12/2/08), 999 So.2d 1104, 1114. Both phrases describe an insurer whose willful refusal to pay a claim is not based on a good-faith defense. **Guillory**, 2009-0075 at p. 31, 16 So.2d at 1127. Whether a refusal to pay is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action. **Guillory**, 2009-0075 at pp. 31-

² By virtue of La. Acts 2008, No. 415, § 1, effective January 1, 2009, La. R.S. 22:658, authorizing the imposition of a penalty for an insurer's arbitrary failure to make a payment within 30 days of satisfactory proof of loss, was redesignated La. R.S. 22:1892, and La. R.S. 22:1220, providing for penalties and attorney fees for an insurer's failure to timely pay a claim, was redesignated La. R.S. 22:1973.

32, 16 So.2d at 1127.

An insurer is required to pay any undisputed amount over which reasonable minds could not differ, and the insurer's failure to do so will subject the insurer to penalties and attorney fees. **Louisiana Bag Company, Inc.**, 2008-0453 at pp. 16-17, 999 So.2d at 1116; **McDill v. Utica Mutual Insurance Company**, 475 So.2d 1085 (La. 1985). However, when there are substantial, reasonable, and legitimate questions as to the extent of an insured's liability or an insured's loss, the failure to pay within the statutory time is not arbitrary, capricious, or without probable cause. **Louisiana Bag Company, Inc.** 2008-0453 at pp. 14-15, 999 So.2d at p. 1114. The question of arbitrary and capricious behavior is a factual issue, and the trial court's finding should not be disturbed in the absence of manifest error. **Reed v. State Farm Mutual Automobile Insurance Company**, 2003-0107, p. 14 (La. 10/21/03), 857 So.2d 1012, 1021.

In support of her claim for penalties and attorney fees, Mrs. Darnell introduced the deposition of James Magnum, the Allstate adjuster who handled the claim. Mr. Magnum stated that Allstate did not receive notice of the claim until September of 2006, when it was added as a defendant in this lawsuit. Mr. Magnum stated that based on all of the information provided to him, Mrs. Darnell appeared to have a soft-tissue injury, which he felt was of a temporary nature, with a small laceration to her head for which she received some staples. After evaluating all of the medical reports, Mr. Magnum did not put a specific dollar amount on the claim because he felt that Mrs. Darnell's damages fell within the \$100,000.00 tort limits provided by the State Farm policy, and consequently, Allstate did not make a tender under the UM portion of the policy. During the deposition, when asked to put a value on the claim, Mr. Magnum thought it was worth between \$20,000.00 to \$25,000.00 in addition to some medicals.

Mrs. Darnell posits that she demonstrated that Allstate's denial of her UM

claim was arbitrary and capricious because of the severe impact of the collision, in which her vehicle flipped over a number of times, the fact the evidence showed she had a bulging disc, and because the trial court awarded her damages in the amount of \$115,000.00.

We disagree. The medical evidence available to Allstate reflects that as a result of the accident, Mrs. Darnell sustained a small laceration on the left side of her head, which required stapling. Mrs. Darnell also suffered neck pain that was related to the accident by medical evidence. Two weeks after the accident, Mrs. Darnell sought chiropractic treatment for neck pain and received regular chiropractic treatment for her neck pain for a period of 8 months. She was released from such care on August 11, 2005, with exercises to be performed at home, because her response to the chiropractic treatment had been favorable, and because she had reached a permanent and stationary status. Future supportive chiropractic care was recommended to increase flexibility and maintain activities of daily living.

On November 28, 2005, Mrs. Darnell visited The North Institute, complaining of neck pain. A review of c-spine x-rays showed a mild loss of normal curve, early degenerative changes. An MRI was ordered, and physical therapy was initiated. An MRI, performed on February 3, 2006, showed disc bulging and osteophytic ridging in one of Mrs. Darnell's cervical discs. Dr. Susan Bryant, a physician specializing in physical and rehabilitative medicine with The North Institute, examined Mrs. Darnell on one occasion in March of 2006. Dr. Bryant observed that by that time, Mrs. Darnell had approximately 12 physical therapy visits and appeared to be doing well with physical therapy. She noted that the bulging disc on the MRI could account for Mrs. Darnell's complaints of pain. While Dr. Bryant agreed that this type of finding could be the result of a trauma like the automobile accident, she noted that the challenge in this case was that there

was no MRI before the accident. Dr. Bryant did state that more likely than not, in the absence of prior complaints of neck pain and the absence of an MRI prior to the accident, the motor vehicle accident was the cause of Mrs. Darnell's neck problems. Dr. Bryant also indicated there was no reason to consider surgery at that time. Mrs. Darnell did not return to see Dr. Bryant after March of 2006.

Mrs. Darnell's physical therapy progress notes reflect that she had 19 treatments, had made "excellent progress to treatment," had resumed full cervical mobility, and had zero complaints of pain. Because Mrs. Darnell reached all of her physical therapy goals, she was discharged in June of 2006.

In early 2006, Mrs. Darnell was referred by her attorney to Dr. Susan Andrews, a psychologist, for a neuropsychological evaluation. Mrs. Darnell complained of difficulty concentrating and forgetfulness following the accident. A battery of neuropsychological tests were administered to Mrs. Darnell measuring general intellectual ability, attention and concentration, memory and new learning, and perceptual, motor, personality/emotional, and language functions. According to Dr. Andrews, Mrs. Darnell scored in the impaired range or lower than predicted on several of the tests measuring intellectual functions, attention, and motor, perceptual, and language functions. She believed that those findings suggested the presence of a mild injury primarily involving the left hemisphere. However, Dr. Andrews noted that Mrs. Darnell's memory abilities were average, and while Mrs. Darnell reported experiencing anxiety, none of her symptoms were severe enough to warrant a diagnosis of post-traumatic stress disorder or panic disorder.

Allstate's expert, Dr. Harold Ginzburg, a psychiatrist, reviewed Dr. Andrews' deposition, her report, wherein Dr. Andrews detailed Mrs. Darnell's medical history and treatment following the accident, the results of the neuropsychological evaluation, and the emergency room records. He noted that following the accident, emergency room records indicated that Mrs. Darnell had a

laceration to her head, was alert and verbal, and a brain scan noted no abnormalities. Because the report also noted the absence of a hematoma, Dr. Ginzburg opined that the laceration was not caused by any blunt trauma, but by a piece of broken glass. Moreover, he stated, there was nothing in Dr. Andrews' report to indicate more probably than not that there was any cause or connection between any complaints Mrs. Darnell may have had about memory loss and the automobile accident. Dr. Ginzburg stated that to have cognitive brain damage, there must have been a traumatic brain injury, which Mrs. Darnell did not have as a result of the accident. In short, the doctor opined, there was no evidence linking Mrs. Darnell's performance on the test with the automobile accident.

Upon a thorough review of the record, we find the trial court's conclusion that Mrs. Darnell failed to demonstrate that Allstate's refusal to pay pursuant to the UM portion of its policy was arbitrary, capricious, or without probable cause is entirely reasonable. Allstate could have reasonably considered Mrs. Darnell's neck injury to be moderate and temporary in nature and could have concluded that Mrs. Darnell's memory loss was not related to the accident, as did its expert and the trial court. Therefore, we find no manifest error in the trial court's denial of Mrs. Darnell's claim for penalties and attorney fees.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, Mary Beth Darnell.

AFFIRMED.