NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 1735

LISA VILLNERVE

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: SEP 15 2006

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Appealed from the
Twenty-Third Judicial District Court in and for the
Parish of Ascension, State of Louisiana
Trial Court Number 76,929

Honorable Ralph Tureau, Judge Presiding

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Timothy Martinez **Baton Rouge, LA**	**Counsel for Plaintiff/Appellant,** **Lisa Villnerve**
Henry Terhoeve **Baton Rouge, LA**	**Counsel for Defendant/Appellee,** **State Farm Mutual Automobile Insurance Company**

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BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

WHIPPLE, J.

Plaintiff, Lisa Villnerve, appeals from a judgment of the trial court dismissing her claims for penalties and attorneys fees pursuant to LSA-R.S. 22:658 and LSA-R.S. 22:1220 against her UM insurer, State Farm Mutual Automobile Insurance Company ("State Farm"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 29, 2003, plaintiff's vehicle was stopped in traffic on Airline Highway near Old Hammond Highway in Baton Rouge when her vehicle was hit from the rear by a vehicle that had been hit from the rear, causing her vehicle to then strike the rear of the vehicle immediately in front of her. At the time of the accident, plaintiff's vehicle was insured by State Farm. The parties do not dispute that Sedric L. Johnson was the offending motorist who caused the accident.

Johnson's vehicle was insured by U.S. Agencies, with a "10/20 minimum policy limits," i.e., $10,000.00 per person and $20,000.00 per occurrence. On or about November 25, 2003, plaintiff settled her claim against U.S. Agencies and Johnson, for $10,000.00, the maximum amount of insurance provided to Johnson at the time of the accident.

In October of 2003, State Farm issued a check for $3,358.64 for medical expenses incurred by plaintiff. In November of 2003, State Farm issued a check for the remaining funds under the $5,000.00 medical payments coverage representing the maximum policy amount; paid for the property damage to the vehicle; which totaled approximately $2,300.00; and paid for plaintiff's rental car expenses.

On December 16, 2003, after finally receiving confirmation of the underlying policy limits, and taking into account the other sums plaintiff had

received from the liability insurer, State Farm made an unconditional tender to plaintiff of $299.00, representing reimbursement for plaintiff's remaining medical expenses incurred with Dr. Sylvest.

On January 9, 2004, plaintiff filed a petition for damages, statutory penalties and attorney's fees. Therein, plaintiff alleged that she was entitled to recover penalties and attorney's fees pursuant to LSA-R.S. 22:658 and LSA-R.S. 22:1220 for State Farm's alleged willful, arbitrary, and capricious refusal to make an unconditional tender of its UM policy limits.[1]

Thereafter, as additional medical information, deposition and discovery responses, and other claim information was received, additional sums were tendered, until the UM policy limits were exhausted on June 14, 2004. On August 27, 2004, the matter proceeded to trial solely on the issue of statutory penalties and attorney's fees. At the conclusion of the hearing, the trial court rendered oral reasons finding that plaintiff had failed to prove by a preponderance of the evidence that State Farm "was arbitrary and capricious in its refusal to pay the claim in its entirety and that it was not based on a good faith defense." On September 7, 2004, the trial court signed a judgment dismissing plaintiff's claims.

DISCUSSION

The sole issue before us on appeal is whether the trial court erred in its determination that State Farm acted in good faith and was reasonable in its handling of plaintiff's claim.

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[1]While we note that plaintiff alleged in her petition that State Farm's failure to pay reasonable sums made it "necessary for plaintiff to retain counsel and institute suit to recover such sums," plaintiff testified that she did not seek out an attorney as a result of any problems she had in dealing with State Farm. In fact, plaintiff testified that she had not yet talked to anyone from State Farm when she hired an attorney nor did she seek any personal contact with anyone from State Farm concerning this accident.

Louisiana Revised Statute 22:658 subjects an insurer, when it is arbitrary or capricious in failing to unconditionally tender the undisputed amount within thirty days of satisfactory proof of loss, to the mandatory imposition of penalties and attorney fees for the collection of such amount. Ibrahim v. Hawkins, 2002-0350, p. 4 (La. App. 1st Cir. 2/14/03), 845 So. 2d 471, 476.

The conduct prohibited in LSA-R.S. 22:658(A)(1) is virtually identical to the conduct prohibited in LSA-R.S. 22:1220(B)(5): 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. Calogero v. Safeway Insurance Company of Louisiana, 99-1625, p. 7 (La. 1/19/00), 753 So. 2d 170, 174. The primary difference is the time periods allowed for payment. Calogero, 753 So. 2d at 174. However, both LSA-R.S. 22:658 and LSA-R.S. 22:1220 are penal in nature and must be strictly construed. Reed v. State Farm Mutual Insurance Company, 2003-0107 (La. 10/21/03), 857 So. 2d 1012, 1020.

One who claims entitlement to penalties and attorney fees has the burden of proving the insurer received satisfactory proof of loss as a predicate to a showing that the insurer was arbitrary, capricious, or without probable cause. Reed, 857 So. 2d at 1020. It logically follows from this burden that a plaintiff who possesses information that would suffice as satisfactory proof of loss, but does not relay that information to the insurer is not entitled to a finding that the insurer was arbitrary or capricious. Reed, 857 So. 2d at 1020-1021; see also, McClendon v. Economy Fire & Casualty Insurance Company, 98-1537, p. 5 (La. App. 3rd Cir. 4/7/99), 732 So. 2d 727, 730.

Penalties and attorney fees will not be sanctioned unless a plaintiff's proof is clear that the insurer was in fact arbitrary, capricious, or without probable cause in refusing to pay. Reed, 857 So. 2d at 1021. Statutory penalties are inappropriate when the insurer has a reasonable basis to defend the claim and acts in good-faith reliance on that defense. See Rudloff v. Louisiana Health Services and Indemnity Company, 385 So. 2d 767, 771 (La. 1980) (on rehearing). Especially when there is a reasonable and legitimate question as to the extent and causation of a claim, bad faith should not be inferred from an insurer's failure to pay within the statutory time limits when such reasonable doubts exist. Reed, 857 So. 2d at 1021.

In order to determine whether an insurer acted reasonably and in good faith in negotiating a claim, one must look to the facts known to the insurer at the time of its action. Combetta v. Ordoyne, 2004-2347 (La. App. 1st Cir. 5/5/06), ___ So. 2d ___, ___. Because the question is essentially a factual issue, the trial court's finding should not be disturbed on appeal absent manifest error. Reed, 857 So. 2d at 1021.

In rejecting plaintiff's claims, the trial court stated in its oral reasons:

> In this case Ms. [Villnerve] was involved in an automobile accident on July 29th that was not caused by her fault. She did go to Our Lady of [the] Lake Hospital that same date and had some test run. The notation was normal study. The impression of the hospital was strain-cervical. She then went to see Dr. Sylvest on August 20, 2003. His diagnosis or impression was cervical lumbar strain.
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> She went back on September 3, he recommended physical therapy, went back on September 17th, she was put on home exercises, October 7th, again physical therapy. October 10th, Baton Rouge Radiology did an MRI. The results of the MRI were normal alignment of the cervical vertebrae. Impressions, broad based right paracentral/lateral access C, recessed C-6-7 disc protrusion with mild sac impingement, with mild to moderate formative encroachment, and small central C5-6 disc protrusion with minor sac impingement.
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> After that she went back to Dr. Sylvest on October 14. He recommended physical therapy, cervical traction, and

> indicated that the MRI scan results showed a right paracentral disc protrusion of the C6-7 with mild sac impingement with mild to moderate right forming of the encroachment with a small central C5-6 disc protrusion which I feel is significant.
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> November 5, 2003 he recommended an epidural steroid injection which she was unable to perform at this time. Then after that was when the letter Mr. Martinez went to State Farm asking that they tender the policy limits at that time.
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> At that point in time according to testimony, there was approximately $7,000 in general damages based on what she had received from the insurance companies involved. She went back on December 3, 2003, the doctor indicated that it was time to do the epidural steroid injections and he didn't [indicate] whether he did them or not, but I assume he did because on March 16, 2003 he recommended that she continue with the epidural injections and [referred] her to Dr. Isaza.
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> As of November 7th, she was on physical therapy and did have some MRI results of that date.
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> And then the testimony is that on April 23, 2004 payment of $13,000 was made. On June 14, 2004 payment of $11,701 was paid.
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> The Court does not find that plaintiff has proved by a preponderance of the evidence that [State Farm] was arbitrary and capricious in its refusal to pay the claim in its entirety and that it was not based on a good faith defense.

In the instant case, where the extent of plaintiff's damages was in dispute, especially the uncertain possibility of the need for a cervical surgery, and where plaintiff's complaints and medical treatment continued with intermittent transmission of the bills to the insurer, the other facts such as previous accidents with injury to the same cervical area and inconsistencies in testimony, reasonable doubt on the insurer's part as to plaintiff's entitlement to the policy limits can be deemed to exist, justifying the insurer's actions. See Fontana v. Louisiana Sheriffs' Automobile Risk Program, 96-2752, pp. 4-5 (La. App. 1st Cir. 6/20/97), 697 So. 2d 1037, 1040.

Moreover, because there was a reasonable and legitimate question as to the extent and causation of plaintiff's claim, bad faith may not be inferred

from State Farm's failure to pay the entire policy limits within the statutory time limits, given the existence of such reasonable doubts. See Reed, 857 So. 2d at 1021. Considering the information State Farm's claims representatives knew regarding plaintiff's claim and the dates of receipt of that information, State Farm presented a reasonable defense for the timetable in which it tendered payment. Duncan v. Allstate Insurance Company, 2001-840, pp. 8-9 (La. App. 5th Cir. 12/26/01), 803 So. 2d 420, 425, writ denied, 2002-0575 (La. 4/26/02), 814 So. 2d 562.

CONCLUSION

Because the record amply supports the trial court's conclusion that State Farm was not arbitrary and capricious in its handling of plaintiff's UM claim, we find no error in the trial court's refusal to award penalties and attorney's fees. Accordingly, we affirm the September 7, 2004 judgment in accordance with Uniform Rules - Courts of Appeal, Rule 2-16.1B. Costs of this appeal are assessed against the Plaintiff/Appellant, Lisa Villnerve.

AFFIRMED.