NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1865

VANESSA B. JOHNSON

VERSUS

TEACHERS INSURANCE COMPANY
AND MACK J. LOBRANO

DATE OF JUDGMENT: June 8, 2007

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
(NUMBER 2004-13461 DIV. "C"), PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE PATRICIA T. HEDGES, JUDGE

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William M. Magee Covington, Louisiana	Counsel for Plaintiff/Appellee Vanessa B. Johnson
William C. Lozes Covington, Louisiana	Counsel for Defendant/Appellant State Farm Mutual Automobile Insurance Company

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: AFFIRMED IN PART; REVERSED IN PART.

Welch J. concurs without reasons.

KUHN, J.

Defendant-appellant, State Farm Mutual Automobile Insurance Company (State Farm), appeals the trial court's judgment, denying its motions to strike and for sanctions and granting a motion for sanctions filed by plaintiff-appellee, Vanessa B. Johnson. We affirm in part and reverse in part.

PROCEDURAL BACKGROUND

Johnson filed this lawsuit after she sustained injuries in an automobile accident. In her petition, filed on July 19, 2004, Johnson named the tortfeasor, Mark Lobrano, and his insurer, Teachers Insurance Company (Teachers Insurance), as defendants. In her concluding paragraph, Johnson prayed "there be judgment ... against the defendants ... in an amount ... which includes damages and penalties as provided by [La. R.S. 22:658 and 1220] ... and for attorney's fees." Lobrano and Teachers Insurance answered Johnson's lawsuit, generally denying liability.

On April 8, 2005, Johnson filed a supplemental and amending petition in which she named State Farm as a defendant in its capacity as her underinsured motorist (UM) carrier. This modified petition included the same prayer requesting judgment against "the defendants" in an amount that included penalties and an attorney's fee under La. R.S. 22:658 and 1220.

On May 2, 2005, on Johnson's motion, the trial court signed an order dismissing, with prejudice, the tortfeasor and his insurer from the lawsuit. State Farm filed an answer to Johnson's lawsuit on June 30, 2005, in which it requested a credit for the full extent of the underlying coverage. State Farm also affirmatively pled that Johnson had not provided sufficient documentation of the underlying primary liability limits.

On March 6, 2006, State Farm filed motions to strike and for sanctions, averring that Johnson's demand for penalties and an attorney's fee under La. R.S. 22:658 and 1220 was insufficient because the petition failed to allege the necessary facts to support the claim. State Farm, therefore, maintained that certification of the request for penalties and an attorney's fee was inappropriate. On April 17, 2006, Johnson responded by filing her own motion for sanctions, challenging the propriety of State Farm's certifications of its motions.

After a hearing, the trial court denied State Farm's motions but granted Johnson's.[1] A judgment in conformity with the trial court's rulings was signed, and this appeal followed. On appeal, State Farm challenges all of the trial court's rulings on these motions.[2]

MOTION TO STRIKE

Subsequent to the lodging of this appeal, Johnson filed another amending and supplemental petition on June 29, 2006. According to the modified allegations, Johnson avers, "amicable demand [has been made] to no avail, despite State Farm having received satisfactory proof of loss via letter dated January 31, 2005 as well as from other sources." This modified pleading appears in the record on appeal.

Because Johnson has amended her pleading to expressly state a factual basis to support her claim to entitlement to penalties and an attorney's fee from State Farm, no practical relief can be given by our review. Thus, the matter is moot, ***see***

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[1] In its grant of sanctions to Johnson, the trial court awarded $750 in an attorney's fee and ordered State Farm to pay costs. The quantum of the award is not an issue raised in this appeal.

[2] State Farm's appeal of the trial court's interlocutory rulings denying its motions is properly raised in this review of the final judgment granting Johnson's motion for sanctions. ***Johnson v. Teacher's Insurance Co.***, 06-1017 (La. App. 1st Cir. 7/10/06) (an unpublished writ action) (citing ***People of the Living God v. Chantilly Corp.***, 207 So.2d 752 (La. 1968)).

Robin v. Concerned Citizens, St. Bernard, Inc., 384 So.2d 405 (La. 1980), and we pretermit a discussion of the propriety of the trial court's determination denying State Farm's motion to strike.

MOTIONS FOR SANCTIONS

La. C.C.P. art. 863 addresses the effect of signing of pleadings, stating in relevant part:

> A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record ....
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> B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> D. If, upon motion of any party or upon its own motion, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

Article 863 applies to the signing of pleadings, motions, and other papers, imposing upon attorneys and litigants affirmative duties as of the date a document is signed. ***Tubbs v. Tubbs***, 96-2095, p. 5 (La. App. 1st Cir. 9/19/97), 700 So.2d 941, 944. The court must determine if the individual, who certified the document purported to be violative, has complied with those affirmative duties. ***Id.***

The goal to be served by imposing sanctions is not wholesale fee shifting but to correct litigation abuse. ***Lafourche Parish Council v. Breaux***, 02-1565, p. 5 (La. App. 1st Cir. 5/9/03), 845 So.2d 645, 648. Article 863 does not empower a trial court to impose sanctions on lawyers simply because a particular argument or ground for relief is subsequently found to be unjustified; failure to prevail does not trigger an award of sanctions. ***Tubbs***, 96-2095 at p. 6, 700 So.2d at 945. The article is intended to be used only in exceptional circumstances; where there is even the slightest justification for the assertion of a legal right, sanctions are not warranted. ***Tubbs***, 96-2095 at p. 7, 700 So.2d at 945.

The standard of review by the appellate court has been referred to as the "abuse of discretion" standard. ***Tubbs***, 96-2095 at p. 6, 700 So.2d at 944. This standard is nothing more or less than the "manifestly erroneous" or "clearly wrong" criteria used by the appellate courts in reviewing a trial court's factual findings. ***Id.***

La. R.S. 22:1220 establishes that an insurer has a duty of good faith and fair dealing. Violations of that duty, examples of which are expressly noted in the statute, may give rise to penalties. Similarly, La. R.S. 22:658 imposes penalties in specified instances when an insurer fails to timely tendered payment. This latter statute permits a court to award an attorney's fee in an appropriate scenario. ***See*** La. R.S. 22:658B(4). Neither of these statutes limits the applicability of their respective provisions exclusively to UM insurers.

In order to ascertain whether the trial court erred in denying State Farm's motion for sanctions, we must carefully examine the allegations of the petition as they appeared on July 19, 2004, when Johnson initially asserted her claims; and then again on April 8, 2005, which she modified her petition to name State Farm as her

UM insurer and reiterated her earlier prayer. According to the allegations contained in both, Johnson claimed entitlement to penalties and an attorney's fee under La. R.S. 22:1220 and 658 from "the defendants." Thus, on July 19, 2004, the statutory penalties claim was asserted against defendants Lobrano and Teachers Insurance; and as of April 8, 2005, the allegation added State Farm as a defendant potentially liable to Johnson for penalties and an attorney's fee. Mindful that Lobrano and Teachers Insurance had denied its liability to Johnson and that neither La. R.S. 22:1220 nor 658 are limited to UM insurers, as of April 8, 2005, when Johnson's attorney certified the pleadings, the broad claim for penalties and an attorney's fee conceivably may have been directed at Teachers Insurance rather than State Farm. The trial court's implicit finding that Johnson's attorney appropriately certified her pleadings is not manifestly erroneous. Thus, the trial court correctly denied State Farm's motion for sanctions.

Turning now to State Farm's contention that the trial court erred in imposing a sanction against it for filing the motions to strike and for sanctions, we must scrutinize the appropriateness of the certification of those motions by State Farm's attorney.

The court on motion of a party may at any time and after a hearing order stricken from any pleading any insufficient demand or defense. La. C.C.P. art. 964. State Farm points out that by March 6, 2006, when it filed its motion to strike, Lobrano and Teachers Insurance had been dismissed from the lawsuit. Johnson's UM insurer attached to its motions copies of correspondence between its attorney and counsel for Johnson indicating that on June 22, 2005, after the dismissal of the other named defendants, State Farm first requested that the claim for penalties and

an attorney's fee be removed from the pleadings. Several other letters followed prior to the time State Farm filed the motions to strike and for sanctions.

In light of the broad request for penalties and attorney's fees initially asserted by Johnson in the original and first amended and supplemental petition and the subsequent dismissal of Lobrano and Teachers Insurance from the lawsuit, the sufficiency of Johnson's allegations asserting entitlement to penalties and an attorney's fee was suspect. As such, under Article 964, State Farm was clearly entitled to test the sufficiency of the allegations by filing the motion to strike. Thus, the trial court erred in concluding that State Farm's certification of the motion to strike was in violation of the provisions of Article 863. And given the several requests by State Farm's attorney for a copy of the underlying coverage provided in the Teachers Insurance policy, commencing on June 22, 2005 with its letter to Johnson's attorney, we cannot say this is one of the exceptional circumstances which rises to the level that warrants imposition of a sanction since there was, at a minimum, a justification for the assertion of its legal right. Accordingly, we find that the trial court clearly erred in imposing sanctions against State Farm.

DECREE

For these reasons, that portion of the judgment which denies State Farm's motions to strike and for sanctions is affirmed; and that portion which grants Johnson's motion for sanctions is reversed. Appeal costs are assessed one-half against defendant-appellant, State Farm Mutual Automobile Insurance Company, and one-half against plaintiff-appellee, Vanessa B. Johnson.

AFFIRMED IN PART; REVERSED IN PART.