Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **25th day of March, 2022** are as follows:

PER CURIAM:

2021-C-00566 COX, COX, FILO, CAMEL & WILSON, LLC VS. LOUISIANA WORKERS' COMPENSATION CORPORATION (Parish of Calcasieu)

AFFIRMED AS AMENDED. SEE PER CURIAM.

Weimer, C.J., dissents and assigns reasons.

Crichton, J., concurs in the result and assigns reasons.

Crain, J., dissents in part and assigns reasons.

McCallum, J., concurs in the result for the reasons assigned by Justice Crichton.

SUPREME COURT OF LOUISIANA

No. 2021-C-00566

COX, COX, FILO, CAMEL & WILSON, LLC

VS.

LOUISIANA WORKERS' COMPENSATION CORPORATION

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Calcasieu

PER CURIAM

We granted certiorari in this case for the purpose of deciding whether the district court has jurisdiction over a claim for penalties against an insurer arising from its failure to provide a defense in workers' compensation proceedings, and, if so, whether the insurer violated its duties of good faith and fair dealing, thereby making it liable for damages and penalties. For the reasons that follow, we conclude the district court has jurisdiction over the claim and correctly found that the insurer breached its duties to its insured, but we find the district court's damage award rises to the level of an abuse of discretion.

UNDERLYING FACTS

Polly Pousson (hereinafter referred to as "claimant") had been employed by the law firm of Cox, Cox, Filo, Camel & Wilson, LLC ("Cox") since 1971 as the firm's office manager. By 2018, claimant's vision became increasingly impaired, and her doctor recommended that she limit her work on a computer screen to four hours a day due to aggravation of an eye condition that was rendered symptomatic by this type of work.

On October 24, 2018, claimant submitted a request for supplemental earning benefits along with proof of loss to Cox's workers' compensation insurer, Louisiana Workers' Compensation Corporation ("LWCC"). On January 7, 2019, LWCC denied the claim, taking the position that her claim was not compensable under the

Workers' Compensation Act. On January 15, 2019, claimant filed a disputed claim for compensation with the Office of Workers' Compensation ("OWC"), naming Cox and LWCC as defendants.

The next day, Cox's managing partner, Thomas A. Filo, though his assistant, Amy Maynard, sent an email to the adjuster for LWCC to inform LWCC of the claim and request the name of the counsel who would be assigned to represent Cox in the matter. The adjuster acknowledged the filing of the claim, but advised that counsel had not yet been assigned.

On January 22, 2019, the adjuster emailed Ms. Maynard to advise that LWCC would assign outside counsel to the firm's defense "due to the apparent conflict that has arisen."[1] One week later, Mr. Filo's assistant forwarded discovery requests received by the firm to LWCC and again requested the name of counsel retained to defend the firm. Over the course of several phone conversations and email exchanges, LWCC's counsel, Gregory Bodin, explained to Mr. Filo that LWCC was struggling to obtain counsel due to Cox's conflict of interest with other firms. He informed Mr. Filo that he had obtained an extension for Cox to file responsive pleadings in the workers' compensation case until February 22, 2019, and discussed the possibility of obtaining Cox's dismissal without prejudice in the workers' compensation case. On March 1, 2019, Mr. Bodin obtained an indefinite extension of time to answer discovery, but did not communicate this fact to Mr. Filo or Cox.

On March 19, 2019, Mr. Filo, believing that the delay for filing an answer was approaching, filed an answer and cross claim in the workers' compensation matter on behalf of Cox. In this filing, Cox did not dispute that claimant had sustained an

[1] Normally, LWCC assigns in-house staff lawyers to represent its insureds. However, in this case, LWCC was unable to do so because Cox's position that claimant was entitled to supplemental earnings benefits conflicted with LWCC's position that such benefits were not covered.

occupational injury or disease and asserted that LWCC had breached its obligations under the policy to defend and indemnify Cox.

On January 29, 2019, Cox filed the instant petition against LWCC, alleging LWCC breached its duty of good faith and fair dealing pursuant to La. R.S. 22:1973 by failing to provide a timely and proper defense to the firm. The petition sought damages in the form of lost revenue that would have been generated by Mr. Filo had he not been required to defend the workers' compensation claim himself.

LWCC filed exceptions of no cause of action and lack of subject matter jurisdiction. The district court denied both exceptions.

The matter then proceeded to a bench trial. Cox offered three witnesses: Mr. Filo, Bray Williams (claimant's attorney), and Robert Ehler, a certified public accountant.

Mr. Filo testified that he is the managing partner of Cox and first became aware of claimant's eye condition well before she filed her disputed claim for compensation. He and Kevin Camel, another partner in the firm, advised her that she may be eligible to receive supplemental earnings benefits because her hours had been restricted by her doctor. Mr. Camel prepared the report to the Office of Workers' Compensation and reported the matter to LWCC.

Mr. Filo testified regarding his discussions with the adjuster beginning in November. According to Mr. Filo, he filed the instant petition to "get [LWCC] off center." Mr. Williams spoke to Mr. Filo on several occasions and suggested the firm should pay claimant's benefits and demand reimbursement from LWCC. Mr. Filo was particularly concerned because the firm's policy did not allow it to make voluntary payments to claimant. Nonetheless, Mr. Filo was aware that employers and insurers are liable for workers' compensation benefits, and could be assessed penalties and attorney fees for failure to pay.

Mr. Filo testified that his law practice concentrates on representing personal injury claimants. Because his work focuses on this area, he does not maintain time sheets or other such records. His productivity to the firm is strictly gauged by the revenue he generates. The only way he knows to determine the value of the time he spent in taking legal action to defend the firm is to look at his revenue history and extrapolate based on the time he devoted to the workers' compensation case. To this end, he estimated the time he spent and created a document reflecting his estimate of 68.5 hours spent in defending the firm in the workers' compensation matter.

Mr. Ehler, an expert in accounting, examined the revenue Mr. Filo generated for the ten years preceding the claim. If Mr. Filo worked 2,080 hours per year, his hourly rate would be $2,080.50 based upon his ten-year history. Based on Mr. Filo's five-year average, his hourly rate would be $2,107.00. His average over the three years prior to trial would be $2,386.50 per hour.

Bray Williams testified he represented claimant in her workers' compensation claim. He was aware of the difficulties Cox had because it was without an attorney for several months. He and Mr. Filo spoke several times during those months, and Mr. Filo expressed his opinion that the claim was compensable, but Cox could not pay any benefits to her voluntarily because the policy language would absolve LWCC of having to reimburse it. Mr. Williams explained he declined to dismiss Cox without prejudice and proceed against the LWCC alone because the law imposes a duty to pay benefits on both the employer and the insurer.

LWCC presented the testimony of Jamie Bourg, its assistant vice president of claims. Ms. Bourg testified that LWCC struggled to find an attorney willing to defend Cox. These efforts began on January 19, 2019, one day after claimant filed the disputed claim for compensation against the firm. Every attorney LWCC contacted indicated that representing Cox would create a conflict of interest. Due to the struggle to obtain counsel, LWCC convinced Mr. Williams to grant Cox an

indefinite extension for responding to the disputed claim. Eventually, LWCC retained attorney Ted Williams to represent Cox.

At the conclusion of the bench trial, the district court rendered judgment in favor of Cox, finding LWCC breached its obligation of good faith and fair dealing in failing to procure counsel to defend Cox in the worker's compensation matter. Based on the testimony of Mr. Ehler and Mr. Filo, the district court awarded damages to Cox in the amount of $150,083.50, representing the 68.5 hours worked by Mr. Filo at a rate of $2,386.50 per hour. The court further awarded penalties of $300,167.00, which was double the amount of damages.

LWCC appealed. The court of appeal affirmed the judgment of the district court in its entirety. *Cox, Cox, Filo, Camel & Wilson, LLC v. Louisiana Workers' Comp. Corp*., 20-0408 (La. App. 3 Cir. 3/31/21), 318 So.3d 964.

Upon application of LWCC, we granted certiorari to review the correctness of this judgment. *Cox, Cox, Filo, Camel & Wilson, LLC v. Louisiana Workers' Compensation Corp.*, 21-566 (La. 6/29/21), 319 So.3d 279.

DISCUSSION

Pending Motions

Prior to addressing the merits, we must first address motions filed by LWCC and Cox, which we previously referred to the merits.

After LWCC's initial brief was filed, it filed a motion captioned "Motion to Substitute Its Brief on the Merits." LWCC explains there was an error in both its initial brief on the merits and its original writ application, in which it stated that Cox conceded it was aware LWCC had obtained an unlimited extension of time from claimant's attorney to respond to the workers' compensation claim. In fact, LWCC states Cox did not admit or deny information regarding the unlimited extension.

In response to LWCC's motion, Cox filed a "Motion to Recall Writ of Certiorari." Cox asserts LWCC's motion to substitute represents an acknowledgment that LWCC made false statements in its writ application and brief. According to Cox, LWCC's failure to correct this misstatement earlier shows LWCC's attorney violated duties of candor to the court. Cox asserts that had the court "known of said misinformation, it would have been incumbent on the Court to deny LWCC's application." Accordingly, Cox requests that we recall our order granting LWCC's writ of certiorari and deny the writ.

Given the factual complexity of this case, we believe any misstatement concerning the unlimited extension was inadvertent and not made in an effort to mislead the court. Moreover, this statement did not factor into our decision to grant certiorari in the case.

Accordingly, we grant LWCC's motion and deny Cox's motion.

Subject Matter Jurisdiction

Article V, §16 of the Louisiana Constitution grants the district courts "original jurisdiction of all civil and criminal matters," but provides a limited exception "as heretofore or hereafter provided by law for administrative agency determinations in worker's compensation matters. . . ." Pursuant to this article, the legislature enacted La. R.S. 23:1310.3(F), which sets forth the jurisdiction of the Office of Workers' Compensation ("OWC") as follows:

> F. Except as otherwise provided by R.S. 23:1101(B), 1361, and 1378(E), the workers' compensation judge shall be vested with original, exclusive jurisdiction over all claims or disputes **arising out of this Chapter, including but not limited to workers' compensation insurance coverage disputes,** group self-insurance indemnity contract disputes, employer demands for recovery for overpayment of benefits, the determination and recognition of employer credits as provided for in this Chapter, and cross-claims between employers or workers' compensation insurers or self-insurance group funds for indemnification or contribution, concursus proceedings

pursuant to Louisiana Code of Civil Procedure Articles 4651 et seq. concerning entitlement to workers' compensation benefits, payment for medical treatment, or attorney fees arising out of an injury subject to this Chapter. [emphasis added].

The question in this case is whether the dispute between Cox and its workers' compensation insurer falls under the limited grant of jurisdiction to the OWC. We have not had occasion to pass on this specific issue in our prior jurisprudence. Nonetheless, a plain reading of La. R.S. 23:1310.3(F) reveals it requires that the claim must "arise out of" the chapter containing the Workers' Compensation Act. Following this reasoning, we have held that disputes between employers, insurers and preferred provider networks do not "arise out of" the Act, "even where the relevant claims involve the payment of third party medical bills required under the Act." *Broussard Physical Therapy v. Family Dollar Stores, Inc.*, 08-1013 (La. 12/2/08), 5 So.3d 812, 816-18. *See also Gunderson v. F.A. Richard & Associates*, 07-0331 (La. App. 3 Cir. 2/27/08), 977 So.2d 1128, 1135 (finding OWC possesses jurisdiction only over claims that are actually brought to recover benefits under the Workers' Compensation Act).

Cox's claim for penalties pursuant to the provisions of La. R.S. 22:1973 does not "arise out of" the workers' compensation laws. Rather, the "duty of good faith is an outgrowth of the contractual and fiduciary relationship between the insured and the insurer, and the duty of good faith and fair dealing emanates from the contract between the parties." *Smith v. Citadel Ins. Co.*, 19-0052 (La. 10/22/19), 285 So.3d 1062, 1069.

Therefore, it follows subject matter jurisdiction over Cox's claim for penalties against its insurer properly rests with the district court. The district court correctly denied LWCC's exception of lack of subject matter jurisdiction.

Exception of No Cause of Action

LWCC urged exceptions of no cause of action in both the district court and in this court. In essence, it contends Cox's claim for penalties is in fact a disguised claim for attorney fees, which are not available under La. R.S. 22:1973.

It is undisputed that La. R.S. 22:1973 does not provide for an award of attorney fees. *See Calogero v. Safeway Ins. Co. of Louisiana*, 99-1625 (La. 1/19/00), 753 So.2d 170, 174 (explaining that La. R.S. 22:1220, a precursor of La. R.S. 22:1973, "does not provide for attorney fees. . ."). However, Cox denies that its petition seeks attorney fees. Instead, it argues its petition seeks to recover revenues lost by the firm resulting from Mr. Filo's handling of the defense of the workers' compensation litigation while LWCC searched for counsel.

In deciding an exception raising the objection of no cause of action, this court is guided by the well-settled principle that the function of an exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading. *Darville v. Texaco, Inc.*, 447 So.2d 473, 474-75 (La. 1984). No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. Code Civ. P. art. 931. Therefore, the court reviews the petition and accepts well-pleaded allegations of fact as true, and the issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1235 (La. 1993).

Cox's petition alleges its damages "consist of **lost revenue** which would have been generated by its managing partner for each and every hour expended in defending and dealing with the workers' compensation claim for which LWCC provides coverage." [emphasis added]. La. R.S. 22:1973(C) permits recovery of "any general or special damages to which a claimant is entitled for breach of the imposed duty." Loss of business income or profits is a type of special damages.

Nick Farone Music Ministry v. City of Bastrop, 50,066 (La. App. 2 Cir. 9/30/15), 179 So.3d 629, 631.

We acknowledge that in a broad sense, any revenue derived from a law firm's representation of clients may be termed to be attorney fees. However, it is obvious our discussion of the term "attorney fees" in *Calogero*, *supra*, did not refer to such fees in their broadest general sense, but instead focused on the ability of the attorney to recover fees occasioned by prosecution of the penalty claim.[2] It is clear Cox's petition is not seeking to recover any fees incurred as a result of its pursuit of the penalty claim.

In sum, accepting Cox's allegations as true for purposes of the exception, we conclude Cox's petition states a cause of action for loss of business income. Accordingly, LWCC's exception of no cause of action is denied.

Breach of Duties under La. R.S. 22:1973

Having found Cox stated a cause of action under La. R.S. 22:1973, we must now determine whether Cox established LWCC breached its duties under this statute. The statute provides, in pertinent part:

> 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. [emphasis added].

This statute codified the implied covenant of good faith and fair dealing existing between insureds and insurers. *Kelly v. State Farm Fire & Cas. Co.*, 14-

[2] In our opinion in *Calogero*, we explained that although the attorney could not recover attorney fees under La. R.S. 22:1220 (now La. R.S. 22:1973), he could recover such fees pursuant to La. R.S. 22:658 (now La. R.S. 22:1892), which provided for penalties "together with all reasonable attorney fees for the prosecution and collection of such loss. . . ." *Calogero,* 753 So.2d at 174.

1921 (La. 5/5/15), 169 So.3d 328, 336; *Theriot v. Midland Risk Ins. Co*., 95-2895 (La. 5/20/97), 694 So.2d 184, 187.

In finding LWCC breached its duty of good faith and fair dealing, the district court found LWCC should have known its delay in appointing counsel could cause harm to Cox. In particular, the court explained, "LWCC knew that this was developing to an undesirable situation and potentially getting worse quite early, under the circumstances."

A district court's factual findings in connection with an award of penalties is subject to the manifest error standard of review. *See Guillory v. Lee*, 09-0075 (La. 6/26/09), 16 So.3d 1104, 1127; *Reed v. State Farm Mut. Auto. Ins. Co*., 03-0107 (La. 10/21/03), 857 So.2d 1012, 1021.

Based on our review of the record, we cannot say the district court's factual findings are clearly wrong. The record demonstrates that Cox, through Mr. Filo, advised LWCC of the claim one day after it was filed on January 15, 2019. Although Cox made multiple demands for representation from LWCC, LWCC ultimately did not assign counsel until April 22, 2019, over four months later.

LWCC's communications with Cox during this time were incomplete. Although LWCC advised Cox it had obtained an extension until February 22, 2019 for the filing of responsive pleadings in the workers' compensation case, it did not advise Cox that it obtained a second unlimited extension on March 1, 2019. This omission left Cox justifiably concerned that its lack of representation could expose it to adverse consequences in the OWC proceeding, such as a default judgment or penalties and attorney fees.

Considering these facts, the district court's finding that LWCC breached its duty of good faith and fair dealing is not manifestly erroneous.

Damages

Finally, we turn to the question of damages. As discussed earlier, La. R.S. 22:1973 provides for an award of "general or special damages" in addition to penalties. In this case, the district court's damage award was limited to special damages in the form of lost revenue.

Special damages are those damages which either must be specially pled or have a "ready market value," i.e., the amount of damages supposedly can be determined with relative certainty. *Prest v. Louisiana Citizens Prop. Ins. Corp.*, 12-0513 (La. 12/4/12), 125 So.3d 1079, 1090; *Wainwright v. Fontenot*, 00–0492 (La. 10/17/00), 774 So.2d 70, 74. The jurisprudence has recognized loss of business income or profits is a type of special damages that must be proved with reasonable certainty and cannot be based on speculation or conjecture. *Bailes v. U.S. Fidelity & Guar. Co.*, 512 So.2d 633, 643 (La. App. 2 Cir. 1987); *Rosenblath v. Louisiana Bank & Trust Co.*, 432 So.2d 285, 290 (La. App. 2 Cir. 1983). The plaintiff bears the burden of proving entitlement to special damages by a preponderance of the evidence. *Breaux v. Woods*, 20-0161 (La. App. 3 Cir. 11/18/20), 307 So.3d 395, 402; *Caruso v. Academy Sports & Outdoors*, 18-0496 (La. App. 5 Cir. 4/24/19), 271 So.3d 355, 362.

The difficulty of proving a loss of business revenue under the facts of this case is readily apparent. Mr. Filo testified that his law practice concentrates on representing personal injury claimants, and, as a result, he does not maintain time sheets or other such records. Rather, his productivity to the firm is strictly gauged by the revenue he generates. As shown by Mr. Ehler's testimony, the amount of revenue he generated varied considerably over the ten-year period selected by Mr. Ehler. Thus, Mr. Ehler's attempt to calculate a theoretical hourly rate for Mr. Filo's services was speculative at best.

Moreover, putting aside the difficulty of calculating the value of Mr. Filo's services, we question whether it was a wise decision for him to forsake his ordinary

practice to concentrate on the defense of the firm in the workers' compensation matter. It is well settled that "if the plaintiff could readily avoid or mitigate the damage caused by defendant's conduct and he knows how to do so, he cannot act in such a manner as to invite injury." *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 1087, 249 So.2d 133, 141 (1971). Under the facts of this case, Cox could have mitigated any harm caused by LWCC's conduct by simply retaining separate counsel to represent the firm in the pending workers' compensation proceeding.

By retaining separate counsel, Cox would have minimized any impact on its revenues, as Mr. Filo would have been free to pursue his ordinary practice. Special damages could then be determined based on the amount billed by an average workers' compensation attorney, which would certainly be well below the $2,386.50 per hour figure calculated by Mr. Ehler.

We further find the costs of substitute counsel is a better and more consistent measure of damages for the harm caused by LWCC's conduct. Cox, as a law firm, was in the unique position of being able to represent itself. An entity consisting of non-lawyers would not have a similar option and would be required to retain counsel. Cox's position as a law firm should not entitle it to damages which would be unavailable to non-lawyer defendants under identical circumstances.

Considering these circumstances, we must conclude the district court's award of lost revenues in the amount of $150,083.50, representing the 68.5 hours worked by Mr. Filo at a rate of $2,386.50 per hour, represents an abuse of discretion. The proper measure of damages should be based on the costs Cox would have incurred in hiring separate counsel to represent it in the workers' compensation proceeding.

Pursuant to La. Code Civ. P. art. 2164, we are authorized to "render any judgment which is just, legal, and proper upon the record on appeal." As noted in the Official Revision Comments under that article, an appellate court has "complete freedom to do justice on the record irrespective of whether a particular legal point

or theory was made, argued, or passed on by the court below." *Georgia Gulf Corp. v. Board of Ethics for Public Employees*, 96-1907 (La. 5/9/97), 694 So.2d 173, 176.

In addition to our authority under La. Code Civ. P. art. 2164, this court, pursuant to its inherent judicial power and its original jurisdiction, has exclusive authority to regulate the practice of law in this state. La. Const. art. V, § 5(B); *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96), 683 So.2d 697, 700. Regardless of the language of the statutory authorization for an award of attorney fees or the method employed by a district court in making an award of attorney fees, we may inquire as to the reasonableness of attorney fees as part of our prevailing, inherent authority to regulate the practice of law. *Smith v. State, Dept. of Transp. & Dev.*, 04-1317 (La. 3/11/05), 899 So.2d 516, 527–28; *Rivet v. State, Dept. of Transp. & Dev.*, 96-0145 (La. 9/5/96), 680 So.2d 1154, 1161.

Considering the facts and circumstances of this case, we conclude a reasonable fee for an attorney defending Cox in the workers' compensation matter is $300 per hour. Accepting the district court's finding that the defense of the workers' compensation case would have required a total of 68.5 hours, we conclude an award of $20,550.00 in special damages is appropriate to compensate Cox for the loss it sustained as a result of LWCC's failure to appoint counsel in a prompt manner. We will further award penalties in the amount of $41,100.00 (representing a doubling of the damage award) as authorized by La. R.S. 22:1973.

DECREE

For the reasons assigned, the judgment of the court of appeal is amended to award damages in favor of Cox, Cox, Filo, Camel & Wilson, LLC and against Louisiana Workers' Compensation Corporation in the total amount of $61,655.00, representing $20,550.00 in special damages and $41,100.00 in penalties. In all other respects, the judgment of the court of appeal, as amended, is affirmed.

SUPREME COURT OF LOUISIANA

No. 2021-C-0566

COX, COX, FILO, CAMEL & WILSON, LLC

VS.

LOUISIANA WORKERS' COMPENSATION CORPORATION

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Calcasieu

WEIMER, C.J., dissenting.

The majority opinion of this court affirms the trial court's ruling that LWCC breached its duty of good faith and fair dealing under La. R.S. 22:1973, finding the ruling was not manifestly erroneous. After review of the record, I am compelled to respectfully dissent.

Liability under La. R.S. 22:1973 is dependent on a finding that an insurer's actions are "arbitrary, capricious, and without probable cause." This court has held that the phrase is synonymous with "vexatious." **Guillory v. Lee**, 09-0075, p. 31 (La. 6/26/09), 16 So.3d 1104, 1127 (citing **Reed v. State Farm Mut. Auto. Ins. Co.**, 03-0107, pp. 13-14 (La. 10/21/03), 857 So.2d 1012, 1021). An insurer's action is "vexatious" when it is unjustified, without reasonable or probable cause or excuse, and is not based on a good-faith defense. See **Reed**, 03-0107 at 14, 857 So.2d at 1021. Moreover, a determination of whether an insurer acted arbitrarily, capriciously, or without probable cause must focus on the facts known to the insurer at the time of its action. ***Id.***

The majority opinion does not properly take into account the record evidence that despite appropriate and adequate efforts, LWCC was unable to immediately

obtain counsel for Cox due to the nature of Cox's extensive workers' compensation practice, which created a conflict of interest with attorneys qualified to work on the case. The record demonstrates that while attempting to retain counsel for Cox, LWCC's in-house counsel remained in contact with Cox, as well as the workers' compensation counsel for the claimant, to ensure that Cox was not unfairly prejudiced in the workers' compensation proceeding. To that end, LWCC contacted claimant's counsel and obtained several extensions of time, both for the answer and discovery, and Cox was never in danger of having a default judgment rendered against it and was never required to represent itself in the OWC matter to protect its interests. The record also demonstrates that LWCC kept Cox informed of its actions both by phone and email.

I acknowledge that the determination of whether an insurer acted arbitrarily, capriciously, or without probable cause is a factual question and the trial court's factual findings are entitled to deference; however, when the record does not support its determination on this issue, the trial court's decision must be reversed. **Reed**, 03-0107 at 14, 857 So.2d at 1021 (citing **Darby v. Safeco Insurance Company of America**, 545 So.2d 1022, 1028 (La. 1989)). Based on the record before the court, I would hold that the trial court was clearly wrong in finding LWCC breached its duty of good faith and fair dealing in denying a defense to Cox. Therefore, I respectfully dissent.[1]

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[1] Based on my dissent, I would not address the amount of damages awarded. However, I do agree with the majority's finding that the amount awarded by the trial court is excessive.

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LOUISIANA WORKERS' COMPENSATION CORPORATION

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Calcasieu

CRICHTON, J., concurs in the result and assigns reasons:

I concur in the result reached in this opinion. However, I write separately to note that because there is no clear majority in agreement with the reasoning utilized herein, the matter is considered a plurality opinion and not a majority. *See* Linda Novak, "The Precedential Value of Supreme Court Plurality Decisions," Columbia L. Rev., Vol. 80, No. 4 (May, 1980), n. 1. ("Plurality decisions, also called no-clear-majority opinion, are those in which a majority of the Court agrees upon the judgment but not upon a single rationale to support the result. Thus, there is no "opinion of the Court" in the ordinary sense.") and *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations omitted) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

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CRAIN, J. dissents in part and assigns reasons.

I respectfully dissent from that part of the majority opinion finding LWCC breached its duty of good faith to Cox. Louisiana Revised Statutes 22:1973(A) imposes "a duty of good faith and fair dealing" on insurers. This extends to an insurer's duty to defend its insured against covered claims, which is the basis of Cox's suit against LWCC. *See Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 423 (La. 1988). Thus, to prove liability under Section 1973, Cox was required to prove, as a threshold element, a breach of the duty to defend. While there is no jurisprudential or statutory definition of a "duty to defend," cases have generally held it requires acting in good faith and with due regard for the insured's best interest and to protect the interest of the insured, especially from exposure to excess liability. *Id; see also Holtzclaw v. Falco, Inc.*, 355 So.2d 1279, 1283-84 (La. 1977).

The facts of this case are unusual. The insured is a law firm. The workers' compensation claimant was the insured's office manager, Ms. Pousson. Due to her progressive vision loss, she was demoted to assistant office manager at a reduced salary. With encouragement and assistance from Cox, she claimed supplemental earnings benefits under the worker's compensation law due to her salary reduction. Cox clearly believed the benefit was owed. LWCC believed progressive vision loss

was not compensable under the act. That issue continues to be litigated in the workers' compensation courts.

Faced with the disagreement over whether the claim is compensable or not and, thus, whether it should be paid or defended, LWCC chose to retain outside, as opposed to in-house, counsel to defend Cox. Although LWCC denied the claim, they never denied Cox a defense.

As explained by Chief Justice Weimer in his dissent, retaining separate counsel for Cox proved difficult. LWCC contacted lawyers all over the state, but because of the breadth of the Cox firm's law practice, all had conflicts preventing them from representing Cox. The district court even took judicial notice of the difficulty in finding conflict-free counsel due to Cox's extensive workers' compensation practice. That process took approximately four months. It is for that time period that Cox claims it was denied a timely defense.

While seeking counsel for Cox, LWCC obtained an extension of time for both LWCC and Cox to answer the workers' compensation claim. Despite that extension being in place, Cox unilaterally filed discovery responses in the compensation case. In the context of the workers' compensation litigation, the responses were not compelled, but gratuitous.

When the initial extension to answer the compensation claim expired, LWCC obtained an indefinite extension of time. Nevertheless, Cox unilaterally filed an answer in the workers' compensation case. The answer was filed while the indefinite extension of time was in place. Just like the discovery responses, in the context of the workers' compensation litigation, the answer was not compelled, but gratuitous.

These extensions prevented the possibility of any adverse actions or default judgment against Cox. By any definition, that is defending Cox. Cox was never required to either provide its own defense or represent itself in the compensation case.

Counsel was ultimately procured for Cox four months after the workers' compensation claim was filed, and with no adverse actions having been taken against Cox. Cox's concern was that not paying the claim would expose it to damages and penalties. But, the time required to hire counsel did not adversely affect the handling of the Pousson claim, as LWCC had months earlier made, and conveyed to Cox, its decision to deny that claim as not compensable under the act. Any breach of the duty to defend must be prejudicial to be actionable. Cox suffered no prejudice by the delay. *See Smith v. Audubon Ins. Co.*, 95-2057 (La. 9/5/96), 679 So. 2d 372, 377 n.10. ("While the insurer still had the duty to act in good faith in protecting the insured against excess exposure, no prejudice has been shown to the [insured] because the insurer failed to inform him of settlement offers or to seek his participation in offering a compromise.").

The record establishes that LWCC, at all times, protected Cox from having to file pleadings in the compensation case and from being exposed to an adverse judgment. It is not clear what more LWCC could have done to defend Cox, other than immediately tendering payment and admitting a compensable injury. LWCC has a right to defend what it believes is a non-compensable injury under the act. In fact, Cox stands to benefit from that defense. This is not a failure to defend. It is a disagreement over strategy. Awarding damages under Section 1973 for that has no precedent in our jurisprudence.[1]

The majority adopts the district court's "factual findings" to conclude that the four-month delay in procuring counsel, alone, is sufficient to constitute a breach of

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[1] Other jurisdictions have expressly recognized that a disagreement over defense strategy is not sufficient to override the insurer's right to control the defense. *See OneBeacon Am. Ins. Co. v. Celanese Corp.*, 92 Mass. App.Ct. 382, 392; 84 N.E.3d 867, 875 (2017) ("[O]pposing tactics of defense . . . do not give rise to a sufficient conflict of interest under our law to justify [the insured's] refusal of [the insurer's] control of the defense."); *Northern County. Mutual Ins. Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004) ("Every disagreement about how the defense should be conducted cannot amount to a conflict of interest . . . . If it did, the insured, not the insurer, could control the defense by merely disagreeing with the insurer's proposed actions.")

the duty of good faith and fair dealing. I cannot find either factual or legal support for that conclusion. For factual support the majority cites Cox's unawareness of the second, indefinite extension, which "left Cox justifiably concerned that its lack of representation could expose it to adverse consequences in the OWC proceeding. . ." The record establishes that notice was sent to Cox, but was unread because it went to an email address that is not checked often. In any event, that concern could have been relieved by getting a report of the case status from Mrs. Pousson, who remained employed by Cox, or her attorney, Mr. Williams, who continued to talk to Cox about the case, if not from LWCC. I find that the threshold element of breach of the duty to defend was not proven.

Nevertheless, the majority awards penalties under Section 1973. That requires finding that LWCC committed a *bad faith* breach of its duty to defend. Facts to support bad faith do not exist in this record. Bad faith is an essential element of any claim under Section 1973(A), which is premised on the insurer's "duty of good faith and fair dealing." *See* La. R.S. 22:1973A. A simple breach of the contract is not sufficient to trigger penalties. The duty to defend is provided in the insurance contract; therefore, its breach is determined by ordinary contract law principles, and for damages the insurer is liable for the insured's reasonable defense costs. *Arceneaux v. Amstar Corp.*, 10-2329 (La. 7/1/11), 66 So. 3d 438, 452. But, if the breach is in bad faith, statutory penalties are available. *Arceneaux*, 66 So. 3d at 452.[2]

[2] *Arceneaux* applied La. R.S. 22:658, now designated La. R.S. 22:1892. The requirement of a bad faith breach, while never addressed in detail by this court, has been repeatedly acknowledged. *See Baack v. McIntosh*, 20-01054 (La. 6/30/21), ____ So. 3d ____ (2021WL2679825, *7) ("[La. R.S. 22:1973] provides for the imposition of penalties against insurance companies who act in bad faith."); *Smith v. Citadel Ins. Co.*, 19-00052 (La. 10/22/19), 285 So. 3d 1062, 1069 (The "bad faith cause of action" under Section 22:1973 is subject to a 10-year prescriptive period.); *Kelly v. State Farm Fire & Casualty Co.*, 14-1921 (La. 5/5/15), 169 So. 3d 328, 338 (An insurer can be liable "for a bad-faith failure-to-settle claim" under Subsection 22:1973(A).)

LWCC diligently searched for conflict-free counsel, communicated with Cox's managing partner, negotiated for and obtained legal extensions on behalf of Cox, protected Cox's interests, attempted to obtain a dismissal for Cox, and ensured that Cox was not unfairly prejudiced in the workers' compensation proceeding. But, even if the four-month delay was not timely, Cox was not prejudiced by that delay and nothing suggests LWCC was in bad faith. Absent such proof, penalties cannot be awarded under Louisiana Revised Statutes 22:1973. I respectfully dissent.