2018 WL 2123564



Court of Appeal of Louisiana, Third Circuit.

Harold FILS
v.
STARR INDEMNITY & LIABILITY COMPANY, et al.

17–896
|
05/09/2018

**Synopsis**

**Background:** Employee injured in motor vehicle accident brought action against employer's insurer, seeking additional uninsured motorist (UM) benefits after having received two UM payments totaling $45,000. Employee subsequently supplemented his petition, seeking penalties and attorney fees for insurer's alleged bad faith refusal to pay his UM claim. Insurer filed a peremptory exception of prescription. The 15th Judicial District Court, Parish of Lafayette, No. C-20154212, Marilyn C. Castle, J., ruled in favor of insurer and bad faith claims were dismissed with prejudice. Employee appealed.

**Holdings:** The Court of Appeal, Cooks, J., held that:

[1] employee's amended petition did not relate back to original petition so as to serve as an interruption of prescription;

[2] one-year prescriptive period applied to employee's bad faith claims; and

[3] prescriptive period on bad faith claims began running on the date of the filing of the original petition.

Affirmed.

West Headnotes (8)

[1] **Limitation of Actions**
Burden of proof in general

The burden of proof generally rests with the party pleading prescription.

Cases that cite this headnote

[2] **Limitation of Actions**
Burden of proof in general

If a claim is prescribed on its face, the burden then shifts to the plaintiff to negate the presumption by establishing a suspension or interruption of the prescriptive period.

Cases that cite this headnote

[3] **Limitation of Actions**
Amendment Restating Original Cause of Action

Statute governing relation back of amendments permits amendment despite technical prescriptive bars where the original pleading gives fair notice of the general fact situation out of which the amended claim or defense arises. La. Code Civ. Proc. Ann. art. 1153.

Cases that cite this headnote

[4] **Limitation of Actions**
Actions on contract

Employee's amended petition against employer's insurer alleging insurer acted in bad faith in refusing to pay his uninsured motorist (UM) claim did not relate back to original petition so as to serve as an interruption of

  

prescription; employee did not allege in his original petition any facts which would constitute acts of bad faith on insurer's part, and amended pleading added new factual allegations of bad faith that were not previously called to company's attention. La. Code Civ. Proc. Ann. art. 1153.

Cases that cite this headnote

[5] **Insurance**
Time to sue and limitations

One-year prescriptive period applied to employee's bad faith claims against employer's insurer in action arising from motor vehicle accident in which employee alleged insurer acted in bad faith in refusing to pay his uninsured motorist (UM) claim; duties owed by insurer were established by statute and were not rights derived by contract. La. Rev. Stat. Ann. §§ 22:1892, 22:1973.

1 Cases that cite this headnote

[6] **Insurance**
Bad faith in general

A contract is not necessary to bring a bad faith claim against an insurer under Louisiana's penalty statutes. La. Rev. Stat. Ann. §§ 22:1892, 22:1973.

1 Cases that cite this headnote

[7] **Limitation of Actions**
Contracts; warranties

Prescriptive period on employee's bad faith claims against employer's insurer in action arising from motor vehicle accident in which employee alleged insurer acted in bad faith in refusing to pay his uninsured motorist (UM) claim began running on date of filing of original petition; insurer's denial of any further liability to employee and its discontinuation of payments was known to employee at time he filed original petition.

Cases that cite this headnote

[8] **Limitation of Actions**
Nature of harm or damage, in general

Prescription begins when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is a victim of a tort.

1 Cases that cite this headnote

APPEAL FROM THE FIFTEENTH JUDICIAL DISTRICT COURT, PARISH OF LAFAYETTE, NO. C–20154212, HONORABLE MARILYN C. CASTLE, DISTRICT JUDGE

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Court composed of Sylvia R. Cooks, Billy Howard Ezell, and D. Kent Savoie, Judges.

COOKS, Judge.

## FACTS AND PROCEDURAL HISTORY

***1 **2** On August 28, 2013, Plaintiff, Harold Fils, was

operating a vehicle owned by his employer, Bilfinger Salamis, Inc., when he was struck by a vehicle driven by an uninsured motorist (UM). Bilfinger's UM insurer was Starr Indemnity & Liability Insurance Company. Plaintiff submitted a claim to Starr for compensation of his personal injuries and other damages.

Starr evaluated the claim, and in 2014 tendered two separate UM payments to Plaintiff totaling $45,000.00. Following these two payments, citing what it believed to be legitimate defenses regarding Plaintiff's pre-existing injuries and medical history, Starr refused to make any additional payments.

Plaintiff, claiming injuries and personal damages as a result of the accident, filed suit on August 27, 2015, against Starr seeking additional UM benefits. Plaintiff alleged his medical expenses alone exceeded the $45,000.00 amount tendered to him by Starr. Believing that Starr was acting in bad faith, Plaintiff supplemented his petition on January 26, 2017. He sought penalties and attorney fees under La.R.S. 22:1973 and La.R.S. 22:1892 for Starr's alleged bad faith refusal to pay his UM claim. Plaintiff's original petition had not included any allegations of bad faith on the part of Starr.

In response to Plaintiff's supplemental and amended petition, Starr filed a peremptory exception of prescription. Starr maintained the bad faith claim was barred by the prescriptive period of one year from the time suit was filed seeking damages under the UM policy provisions.

A hearing on the exception of prescription was heard on March 27, 2017. After considering the parties pre-trial briefs and listening to oral argument, the trial court requested further briefing. On April 20, 2017, the trial court ruled in favor of Starr and maintained its exception of prescription as to the bad faith claims **3 asserted in Plaintiff's First Supplemental and Amending Petition. The bad faith claims were dismissed with prejudice and the court designated that ruling as a final, appealable judgment.

Plaintiff appealed the trial court's judgment maintaining Starr's exception of prescription, asserting the following assignments of error:

> 1. The trial court erred in finding that a claim for bad faith damages arising out of the same transaction or occurrence as asserted in the original petition, and against the same defendant, did not relate back to the date of the original petition.
>
> 2. The trial court erred in finding that a claim for bad faith damages under an uninsured motorist policy is subject to a one-year statute of limitations.
>
> 3. The trial court erred in finding that prescription began to run upon the filing of the original petition.

## ANALYSIS

### *I. Does the Amending Petition Relate Back?*

[1] [2]In his first assignment of error, Plaintiff contends the bad faith claims in his amended petition "relate back" to the filing of his original petition. Generally, the burden of proof rests with the party pleading prescription. *Allain v. Tripple B Holding, LLC*, 13-673 (La.App. 3 Cir. 12/11/13), 128 So.3d 1278. However, if the claim is prescribed on its face, the burden then shifts to the plaintiff to negate the presumption by establishing a suspension or interruption of the prescriptive period. *Id.* Louisiana Code of Civil Procedure Article 1153, which provides for an amending petition to relate back to an original petition in certain circumstances, can serve as an interruption of prescription.

**2 [3]Article 1153 provides "[w]hen the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading." "It is well established that **4 Louisiana Code of Civil Procedure Article 1153 permits amendment despite technical prescriptive bars where the original pleading gives fair notice of the general fact situation out of which the amended claim or defense arises." *Baker v. Payne and Keller of Louisiana, Inc.*, 390 So.2d 1272, 1275 (La.1980).

"In interpreting Article 1153, Louisiana courts have taken a case by case approach focusing on fair notice." *Oliver v. Orleans Parish School Bd.*, 12-1520, p. 28 (La.App. 4 Cir. 1/15/14), 133 So.3d 38, 58, *reversed on other grounds*, 14-329, 14-330 (La. 10/31/14), 156 So.3d 596 (citing *Gunter v. Plauche*, 439 So.2d 437 (La.1983) ). The jurisprudence has consistently found that when an amended petition simply adds a new claim based on the *same factual situation as the claim set forth in the original petition*, and both claims are made against the same defendant, the filing of the amendment relates back

  

to the date of the filing of the original petition. See *Giron v. Hous. Auth. of Opelousas*, 393 So.2d 1267 (La.1981); *Gunter*, 439 So.2d 437; *Merrit v. Admin. of Tulane Educ. Fund*, 94-816 (La.App. 4 Cir. 7/8/94), 639 So.2d 881. The appellate court in *Miller v. New Orleans Home and Rehabilitation Center*, 449 So.2d 133 (La.App. 4 Cir. 1984) also allowed an amended petition setting forth a different legal theory of recovery against an existing defendant to relate back, because that amended pleading did not add any new factual allegations that had not already been called to the defendant's attention.

[4]In the instant case, Plaintiff did not allege any facts in his original petition alleging acts of bad faith on Starr's part. Unlike the *Miller* case, the amended pleading added new factual allegations of bad faith that were not previously called to Starr's attention. As Starr argued to the trial court, the amending petition elaborated on the factual setting set forth in the original petition. In situations such as that, the jurisprudence has not allowed the amending petition to relate back to the original petition and interrupt the running of prescription.

****5** In *Gunter*, 439 So.2d 437, the issue was whether an amended petition that asserted, for the first time, the issue of the dangers of a lack of informed consent, related back to the original petition alleging surgical malpractice. The Louisiana Supreme Court discussed what Article 1153 requires, explaining as follows:

> Article 1153 requires only that the amending petition's thrust factually relate to the conduct, transaction or occurrence originally alleged. While the original petition did not mention lack of informed consent, the factual events during June 1976 of the consultations and defendant's advising plaintiff that surgery was necessary were explicitly set forth. The essence of interruption of prescription by suit is notice. Here, defendant had actual notice that judicial relief was being sought arising from that general factual situation of defendant's June 1977 conduct, and he thus was put on notice that his evidence concerning it should be collected and preserved. Both causes of action arose out of the conduct, transaction, or occurrence set forth in the original petition. Plaintiff will not be held to a burden of separating out in his initial pleading the defendant's actions during that month's medical service merely because two theories of recovery are possible out of that factual setting. **The amending petition did not elaborate at all on the factual setting**, and no challenge to its sufficiency was made; the factual allegations made originally met the notice requirement to defendant under art. 1153. The transaction or occurrence giving rise to the demand or object of the suit remained unchanged by the amendment, and, even if the state of facts which constitute the defendant's wrong differ [sic] enough so that two causes of action exist, the facts of the transaction which created both duties is [sic] similar enough to support a relation back of the amending petition under art. 1153.

***3** *Id.* at 440–41 (citations omitted) (emphasis added). In *Gunter*, the supreme court allowed the amending petition to relate back because it found "it did not elaborate at all on the factual setting," and thus the factual allegations made originally met the notice requirement to defendant under Article 1153. *Id.* at 441. That is not the situation in the instant case.

In a similar situation, the appellate court in *Roba, Inc. v. Courtney*, 09-508 (La.App. 1 Cir. 8/10/10), 47 So.3d 500, held that the plaintiff's claim for bad faith damages and attorney fees, first set forth in an amended petition, did not relate ****6** back to the filing of the original petition. The court in *Roba* noted "the absence of any allegation in the [original] petition that the [defendants] intentionally and maliciously failed to perform their obligation." *Id.* at 508. The *Roba* court determined, in the absence of allegations in the original petition asserting acts of bad faith on the part of the defendants, it was "unable to find that the allegations of the [original] petition were sufficient to notify" the defendants of the plaintiff's possible claim for bad faith damages. *Id.* at 508. Thus, the *Roba* court reasoned the amended petition could not relate back to the original pleading.

We cannot say the trial court erred in finding the

  

amending petition elaborated on the factual setting, because Plaintiff did not allege in his original petition any facts which would constitute acts of bad faith on Starr's part. Thus, under Louisiana law the amending petition cannot relate back to the original petition.

As Starr notes, many of the cases cited by Plaintiff involved adding new parties in the amending petition, which is not applicable to this matter, as the parties were the same in both the original and amending petition. Other cases cited by Plaintiff do not address the legal issue of prescription of a bad faith claim. In *Guillory v. Lee*, 09-75 (La. 6/26/09), 16 So.3d 1104, and *Krygier v. Vidrine*, 10–121 (La.App. 1 Cir. 9/10/10), 2010 WL 3834625 (unpublished opinion), an exception of prescription was never filed or considered.

For the reasons set forth above, we find the trial court did not err in finding the amending petition did not relate back to the original petition so as to serve as an interruption of prescription.

***II. Applicable Prescriptive Period.***

[5]In his second assignment of error, Plaintiff asserts the trial court erred in finding his bad faith claims for penalties and attorney fees were subject to a one-year prescriptive period.

**7 [6]There are two statutes available to an insured to file suit against an insurer for bad faith damages; La.R.S. 22:1892 (penalties) and La.R.S. 22:1973 (attorney fees). Contrary to Plaintiff's arguments, these duties owed by the insurer are established by statute and are not rights derived by contract. As Starr notes, a third-party claimant can assert a bad faith claim against an insurer, even though no contract exists between the claimant and the insurer. Thus, a contract is not necessary to bring a bad faith claim against an insurer under Louisiana's penalty statutes. Accordingly, we find no merit in Plaintiff's argument that a ten-year prescriptive period is applicable here.

In *Zidan v. USAA Property and Casualty Insurance Co.*, 622 So.2d 265 (La.App. 1 Cir.), *writ denied*, 629 So.2d 1138 (La.1993), the appellate court applied the one-year liberative prescription period found in La.Civ.Code art. 3492 to an insured's action brought pursuant to La.R.S. 22:1220 (now La.R.S. 22:1973). More recently, the court in *Labarre v. Texas Brine Company, LLC*, 16–265 (La.App. 1 Cir. 12/2/16), 2016 WL 7031633 (an unpublished writ decision), granted writs and reversed the lower court's finding that "a ten-year prescriptive period was available" on the "claims of the breach of the insurer's duty of good faith and fair dealing." The court specifically held bad faith claims were subject to a one-year prescriptive period. In that case, the plaintiff filed a claim against its insurer via a third-party demand, then added bad faith claims through an amending third-party demand. The Louisiana Supreme Court subsequently denied writs on the case. *Labarre v. Texas Brine Company, LLC*, 17-1761 (La. 12/5/17), 231 So.3d 631.

*4 In support of his position that a one-year prescriptive period does not apply in this case, Plaintiff cited the United States Western District Court case of *Aspen Specialty Ins. Co. v. Technical Indus., Inc.*, 2015 WL 339598 (W.D. La. 1/22/15), wherein the court held that a ten-year prescriptive period applied to bad faith claims. The opinion in *Aspen* is contrary to several federal cases, which found **8 claims under La.R.S. 22:1973 are delictual in nature and subject to a liberative prescription of one year. See *Ross v. Hanover Ins. Co.*, 09–3501, 2009 WL 2762713 (E.D. La. 2009); *Brown v. Protective Life Ins. Co.*, 353 F.Supp.2d 739 (E.D. La. 2004). As Starr notes, neither the Louisiana Supreme Court nor this court have adopted the ruling in *Aspen*. Further, the Louisiana Supreme Court denied writs on the *Labarre* case, which applied a one-year prescriptive period to bad faith claims. Therefore, we find the trial court did not err in finding a one-year prescriptive period applied to Plaintiff's bad faith claims against Starr.

***III. When did the Prescriptive Period Begin to Run?***

[7]In his final assignment of error, Plaintiff contends prescription did not begin to run upon the filing of the original petition. Plaintiff now argues Starr was not in bad faith in 2014 or when suit was originally filed in August of 2015; but the acts of bad faith did not occur until 2016. However, the record does not support this argument.

The facts reveal Plaintiff was aware of the UM payments, in the amount of $45,000.00, made to him in 2014, despite the fact that Plaintiff maintained his injuries suffered from the accident (which Starr has always denied) required sugery and medical expenses well in excess of $45,000.00. Plaintiff has acknowledged he was forced to bring his suit in August of 2015, because his "medical expenses alone exceeded the tenders made by Starr."

[8]Prescription begins when a plaintiff obtains actual or

  

constructive knowledge of facts indicating to a reasonable person that he or she is a victim of a tort. *Campo v. Correa*, 01-2707 (La. 6/21/02), 828 So.2d 502. The supreme court in *Campo* explained what constitutes constructive knowledge as follows:

> Constructive knowledge is whatever is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ****9** ought to reasonably put the alleged victim on inquiry is sufficient to start the running of prescription.

*Id.* at 510–11.

Plaintiff now claims Starr did not commit any bad faith acts until 2016 in an effort to delay the prescriptive period from running. However, as Starr notes the decision to dispute medical causation and cease unconditional payments has remained the same since Plaintiff filed suit in August 2015. By that time (and actually earlier in 2014), Starr had already disputed the full nature and extent of Plaintiff's alleged damages and refused to make additional payments based on the medical causation defense. The trial court stated in its reasons for judgment:

> At some point after September 15, 2014, Starr denied any further liability to Plaintiff, as evidenced by its ceasing of payments. That denial, at the latest, was known to Plaintiff on August 26, 2015 when Plaintiff was required to file suit against Starr. The original suit was timely filed less than a year after the last *McDill* tender. Therefore, when the original suit was filed, the one-year prescription on the bad faith tort claim had not run. However, as of August 27, 2016, more than a year after Plaintiff was required to file suit, and with no additional payments having been made, the bad faith tort claim prescribed.

We find no merit in Plaintiff's contention that the prescriptive period on the bad faith claims did not begin running on the date of the filing of the original petition.

**DECREE**

***5** For the foregoing reasons, the judgment of the lower court granting the exception of prescription is affirmed. Costs of this appeal are assessed to Plaintiff–Appellant, Harold Fils.

**AFFIRMED.**

**ON REHEARING**

COOKS, Judge.

Plaintiff-appellant, Harold Fils, filed this Motion for Rehearing, asking this court to reconsider our prior ruling affirming the trial court's judgment that bad faith claims against insurers are subject to a one-year prescriptive period.[1] We granted Plaintiff's Motion for Rehearing. After further review, we now hold the appropriate prescriptive period for bad faith claims arising out of a contract of insurance is the ten-year prescriptive period found in La.Civ.Code art. 3499.

Plaintiff claimed injuries and personal damages as a result of an August 28, 2013 accident and filed suit on August 27, 2015, against Starr Indemnity & Liability Insurance Company seeking additional UM benefits. Plaintiff alleged his medical expenses alone exceeded the $45,000.00 amount tendered to him by Starr. Asserting that Starr was acting in bad faith, Plaintiff supplemented his petition on January 26, 2017, to seek penalties and attorney fees pursuant to La.R.S. 22:1973 and La.R.S. 22:1892 for Starr's alleged bad faith refusal to pay his UM claim. Plaintiff's original petition had not included any allegations of bad faith on the part of Starr.

  

In response, Starr filed a peremptory exception of prescription, maintaining the bad faith claim was barred by the prescriptive period of one year from the time suit was filed seeking damages under the UM policy provisions. The trial court ruled in favor of Starr and maintained the exception of prescription as to the bad faith claims asserted in Plaintiff's First Supplemental and Amending Petition. The bad faith claims were dismissed with prejudice, and the court designated that ruling as a final, appealable judgment. In our previous opinion, we held the trial court did not err in finding a one-year prescriptive period applied to Plaintiff's bad faith claims against Starr.

***I. Review of Applicable Jurisprudence.***

Even before the creation of a statutory cause of action for the bad faith handling of claims by an insurer, courts have imposed liability for an insurer's failure to act in good faith in the interests of its insureds. The Louisiana Supreme Court in *Roberie v. Southern Farm Bureau Casualty Insurance Co.*, 250 La. 105, 194 So.2d 713, 716 (1967), found the insurer was liable for its failure to inform its insurer as to settlement negotiations and the insurer's failure to provide "information and advice on the point of his potential liability." The insurer rejected a settlement demand unilaterally when the potential liability exceeded the policy limits. As a result, the court found the insurer liable to its insured for the amount in excess of the policy limits that he was required to pay as part of the judgment in the original litigation.

In 1970, La.R.S. 22:1220 [now La.R.S. 22:1973] was enacted. It created a statutory cause of action for bad faith by an insurer. Discussing the duties imposed on the insurer by La.R.S. 22:1220, the supreme court in *Theriot v. Midland Risk Ins. Co.*, 95-2895, pp. 5-6 (La. 5/20/97), 694 So.2d 184, 187 (emphasis added), stated "the statute recognizes the jurisprudentially established duty of good faith and fair dealing owed to the insured, which is an ***outgrowth of the contractual*** and fiduciary relationship between the insured and insurer." Louisiana Revised Statutes 22:658 [now La.R.S. 22:1892] provided additional causes of action for an insurer's violations of good faith and fair dealing, including a bad faith failure to settle claims. Neither statute sets forth a specific prescriptive period.

In 1989, the appellate court in *Cantrelle Fence and Supply Co. v. Allstate Insurance Co.*, 550 So.2d 1306 (La.App. 1 Cir. 1989), *writ denied*, 559 So.2d 123 (La.1990), applied the ten-year prescriptive period of La.Civ.Code art. 3499 to the insurer's claim under La.R.S. 22:658 [now La.R.S. 22:1892]. The court stated "[f]inding no other prescriptive period specifically established for La.R.S. 22:658 actions, we apply the prescriptive period of ten years, established by La.[Civ.Code] art. 3499." *Cantrelle*, 550 So.2d at 1308.

Similarly, in 1991, the court in *Keith v. Comco Insurance Co.*, 574 So.2d 1270 (La.App. 2 Cir.), *writ denied*, 577 So.2d 16 (La.1991), found the ten-year prescriptive period was applicable to an insurer's bad faith failure to settle under La.R.S. 22:1220 [now La.R.S. 22:1973]. The court stated as follows:

> An action against an insurer for failure to defend a claim or settle within policy limits is in contract. *Wooten v. Central Mut. Ins. Co.*, 182 So.2d 146 (La.App. 3d Cir.1964 [1966] ); Comment, "Duty of Insurer to Settle," 30 La.L.Rev. 622, 628-633 (1970). It therefore prescribes in 10 years. La.[Civ.Code] art. 3499.

*Keith*, 574 So.2d at 1276.

In 1993, the First Circuit Court of Appeal (which authored the *Cantrelle* opinion) in *Zidan v. USAA Property and Casualty Insurance Co.*, 622 So.2d 265 (La.App. 1 Cir.), *writ denied*, 629 So.2d 1138 (La.1993), found the one-year prescriptive period applied to a claim made by a guest passenger alleging the insurer had concealed the fact that coverage existed. In *Zidan* the plaintiff, Ali Zidan was a guest passenger in a vehicle driven by Mohammed Rawashdeh and insured by Liberty Lloyds. That vehicle was involved in a collision on September 17, 1990, with a vehicle driven by Richard Bengston and insured by USAA Property and Casualty Insurance Company. Zidan filed suit against Bengston and his insurer, USAA, as well as Rawashdeh and his insurer, Liberty Lloyds. That suit was not filed until September 18, 1991, one year and one day from the date of the injury. Thus, on its face the action had prescribed. Liberty Lloyds filed a peremptory exception of prescription. Zidan contended his action had not prescribed because Liberty Lloyds misrepresented or concealed the fact that coverage existed on Rawashdeh's vehicle in violation of a duty imposed by La.R.S. 22:1220 [now La.R.S. 22:1973]. The trial court granted the

  

insurer's exception of prescription.

On appeal, Zidan again argued the tort claims had not prescribed because the insurer concealed the fact coverage existed in violation of La.R.S. 22:1220. The plaintiff argued this violation triggered the application of *contra non valentum*, preventing the running of prescription on the underlying tort claim. The first circuit recognized the plaintiff's tort claims and bad faith claims arose separately and were, in fact, two separate claims. The court noted the tort claim could have prescribed even though the bad faith claim could still be viable. The *Zidan* court did not specifically address the applicable prescriptive period for a bad faith claim, but found only the alleged violation of La.R.S. 22:1220 did not toll prescription of the plaintiff's tort claim. The failure of the plaintiff in *Zidan* was that he failed to timely file ***any tort claim*** against any insurer and was attempting to "piggy-back" his underlying tort claim to his bad faith claim. *Zidan* has since been extended by several federal courts to hold that the one-year prescriptive period applies to all bad faith claims brought under La.R.S. 22:1973 and La.R.S. 22:1892. Other federal courts have distinguished *Zidan* on the grounds it involved a third-party claim.

In 1998, the appellate court in *We Sell Used Cars, Inc. v. United National Insurance Co.*, 30,671 (La.App. 2 Cir. 6/24/98), 715 So.2d 656, again held the insured's claim for penalties and attorney fees under La.R.S. 22:658 [now La.R.S. 22:1892] was ten years.

In the aftermath of the above cases, the federal district courts have been split on the issue of prescription for first-party claims arising from alleged violations of La.R.S. 22:1973 and La.R.S. 22:1892. In 2004, the Eastern District of Louisiana in *Brown v. Protective Life Insurance Co.*, 353 F.Supp.2d 739, 743 (E.D. La. 2004), found La.R.S. 12:1220 "is subject to a one-year liberative prescription." It gave no analysis for this finding, but only cited *Zidan* in support of its conclusion. In 2008, the eastern district in *Harrell v. Fid. Sec. Life Ins. Co.*, 17-1439, 2008 WL 170269 (E.D. La. 2008), held "that a violation of [La.R.S. 22:1220] is delictual in nature and therefore subject to the one year prescriptive period." It cited *Brown*, which relied on *Zidan*, in support of this proposition. In 2009, the eastern district in *Ross v. Hanover Insurance Co.*, 09-3501, 2009 WL 2762713 (E.D. La. 2009), again applied the one-year prescriptive period relying on the *Brown* case for jurisprudential support.

In contrast, the Western District of Louisiana has concluded, in line with the decisions in *Cantrelle*, *Keith*, and *We Sell Used Cars, Inc.*, that a claim against an insurer for violations of La.R.S. 22:1973 and La.R.S. 22:1892 is subject to a ten-year prescriptive period. In 2015, the federal court in *Aspen Specialty Insurance Co. v. Technical Industries, Inc.*, 2015 WL 339598 (W.D.La. 2015), noting the facts in *Zidan* involved a third-party claim, declined to follow the *Zidan* line of cases and concluded a ten-year prescriptive period applies to the bad faith claim against the insurer. The *Aspen Specialty* court set forth the following analysis:

> It is logical that the claim by a third-party to an insurance contract against an insurer would be classified as a tort and subject to the one-year prescriptive period for delictual actions, but it is not logical that a first-party claim, that is, a claim by an insured against its insurer, would be classified as a delictual claim. A first-party claim arises out of the relationship created by the insurance contract and, therefore, is either contractual or quasi-contractual in nature. Indeed, Section 1973 "recognizes the jurisprudentially established duty of good faith and fair dealing owed to the insured, which is an outgrowth of the contractual and fiduciary relationship between the insured and the insurer." Both contractual and quasi-contractual claims are classified, under Louisiana law, as personal actions subject to a liberative prescription of ten years.

Later that same year in *Prudhomme v. Geico Insurance Co.*, 15-98, 2015 WL 2345420 (W.D. La. 2015), the federal court followed *Aspen Specialty* in finding the ten-year prescriptive period applied to an insured's claim under La.R.S. 22:1973. The court reasoned:

> La.R.S. 22:1973 does not include a provision establishing a prescriptive period for asserting bad faith claims arising under that statute. In support of their contention that the appropriate prescriptive period is the one-year period for delictual claims, Defendants cite *Zidan v. USAA Prop. & Cas. Co.*, 622 So.2d 265, 266 (La.App. 1 Cir. 1993) and a line of cases following *Zidan.* Defendants note however, in *Aspen Specialty Ins. Co. v. Technical Industries, Inc.*, 2015 WL 339598, *2 (W.D.La., 2015), Magistrate Judge Hanna recently held that a ten-year prescriptive period applies to Section 1973 claims. The Court

  

> agrees with Judge Hanna's reasoning in [*Aspen Specialty* ].

*Id.* at p. 5.

The first circuit court of appeal recently in *Labarre v. Texas Brine Company, LLC*, 16-265 (La.App. 1 Cir. 12/2/16), 2016 WL 7031633 (unpublished writ decision), granted writs and reversed the lower court's finding that "a ten-year prescriptive period was available" on the "claims of the breach of the insurer's duty of good faith and fair dealing." In that case, the plaintiff filed a claim against its insurer via a third-party demand, then added bad faith claims through an amending third-party demand. The court specifically held bad faith claims were subject to a one-year prescriptive period. The Louisiana Supreme Court subsequently denied writs on the case. *Labarre v. Texas Brine Company, LLC*, 17-1761 (La. 12/5/17), 231 So.3d 631. The first circuit granted certiorari and, in a May 31, 2018 order, set full briefing on a pending writ application filed in the case on the issue of whether bad faith claims by an insured against its insurer are subject to a one-year or ten-year prescriptive period. The court concluded, "[u]pon review, we cannot say that our colleagues committed palpable error in determining a one-year prescriptive period applied to Texas Brine Company, LLC's claims of bad faith under La.R.S. 22:1973." *Labarre v. Texas Brine Company, LLC*, 17-1676, pp. 1-2 (La.App. 1 Cir. 8/30/18), (unpublished opinion). One judge dissented, and offered the following reasoning in support of a ten-year prescriptive period:

> Louisiana Revised Statutes 22:1973 (formerly La. R.S. 22:1220) and 22:1892 (formerly La. R.S. 22:658) codified the insurer's pre-existing duty of good faith and fair dealing and provide for damages when an insurer acts in bad faith. Though this duty has been codified, an abundance of legal analysis from the Louisiana Supreme Court indicates that this duty 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. *Theriot v. Midland Risk Ins. Co.*, 95-2895 (La. 5/20/97), 694 So.2d 184, 187; *Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 423 (La. 1988); *Langsford v. Flattman*, 2003-0189 (La. 1/21/04), 864 So.2d 149, 151; *Kelly v. State Farm Fire & Cas. Co.*, 2014-1921 (La. 5/5/15), 169 So.2d 328. Since the duty emanates from the contract and would not exist but-for the contract, I find it appropriate to apply the ten-year prescriptive period for contracts to this claim. Furthermore, finding no specific prescriptive period established for bad faith claims, this court has previously held that the default ten-year prescriptive period for personal actions established by Louisiana Civil Code article 3499 applies to first-party claims against an insurer. *Cantrelle Fence & Supply Co. v. Allstate Ins. Co.*, 550 So.2d 1306, 1308 (La.App. 1st Cir.1989), *writ denied*, 559 So.2d 123 (La. 1990). I would refuse to deviate from this jurisprudence.

Very recently, in *Naz, LLC v. United National Insurance Co.*, 2018 WL 3997299 (E.D. La. 2018), the eastern district again addressed the "unsettled" judicial pronouncements "regarding whether an insured's claim for an insurer's bad faith are subject to a prescriptive period of one or ten years." In holding that such bad faith claims are subject to a one-year prescriptive period, the court in *Naz* cited our earlier statement in this case that "a contract is not necessary to bring a bad faith claim against an insured under Louisiana's penalty statutes."

***II. Analysis.***

An insured's claim for bad faith ordinarily is based upon the obligation that arises from the relationship between the insurer and insured. Plaintiff argues because bad faith claims are derived from contractual obligations and fiduciary duties owed by the insurer pursuant to the contract of insurance between the parties, they are appropriately governed by the ten-year prescriptive period which governs contracts. Plaintiff cites *Cantrelle Fence and Supply Co.*, 550 So.2d 1306, *Keith*, 574 So.2d 1270, *We Sell Used Cars*, 715 So.2d 656, *Aspen Specialty*

  

*Insurance Co.*, 2015 WL 339598 and *Prudhomme*, 15-98, in support of this contention.

It follows, but for the existence of the insurance contract between Plaintiff and Starr, there would be no claim. Likewise, all obligations of the UM insurer in this case originate and flow from the insurance contract. We note in *Kelly v. State Farm Fire & Casualty Co.*, 14-1921, pp. 12-13 (La. 5/5/15), 169 So.2d 328, 336 (emphasis added) (alteration in original), the Louisiana Supreme Court stated:

> Why only an insured may have a cause of action under La. R.S. 22:1973(A) was suggested in *Theriot* [*v. Midland Risk Ins. Co.*, 95-2895 (La. 5/20/97), 694 So.2d 184]. "The first sentence of Subsection A of the statute ***recognizes the jurisprudentially established duty of good faith and fair dealing owed to the insured, which is an outgrowth of the contractual and fiduciary relationship between the insured and insurer***." *Theriot*, 95-2895 at 5-6, 694 So.2d at 187. Or, as our federal judicial colleagues later explained in *Stanley*, "[i]nasmuch as it is not the statute that creates the *insured's* cause of action against the insurer, the basis for an insured's cause of action for a breach of the implied covenant of good faith and fair dealing are not limited to the prohibited acts listed in La. R.S. 22:[1973](B)." *Stanley* [*v. Trinchard* ], 500 F.3d 411, 427. (emphasis in original)

Because any bad faith on an insurer's part is a breach of a contractual duty, it necessarily follows the cause of action is personal and subject to the ten-year prescriptive period found in La.Civ.Code art. 3499. Louisiana Civil Code Article 1759 provides that "[g]ood faith shall govern the conduct of the obligor and obligee in whatever pertains to the obligation." Thus, the breach of the duty of good faith, which the insurer owes, is the breach of an obligation that flows from the insurance contract.

Moreover, the statutory law provides that UM claims are subject to a two-year prescriptive period. La.R.S. 9:5629. Thus, it would be nonsensical to find that UM bad faith claims prescribe after one year from the first act of bad faith. To do so would potentially force plaintiff attorneys to file suit in order to protect their client's interests against a UM carrier within the one-year period from the accident or the ****10** date the defendant possibly acted in bad faith, even though the two-year prescriptive period on the underlying claim has not run. It would also require a plaintiff to "pierce the corporate mind" of the insurer to determine a "fixed" date when the bad faith occurred to avoid the short one-year prescriptive period as opposed to relying on the cumulation of acts or failure to act by the insurer over the course of time.

In *Mentz Construction Services, Inc. v. Poche*, 11-1474, p. 5 (La. App. 4 Cir. 4/17/12), 87 So.3d 273, 276-77, the appellate court stated "the main distinction between an action on a contract and a tort action is that the former flows from the breach of a special obligation contractually assumed by the obligor, whereas the latter flows from the violation of a general duty owed to all persons. *Certain Underwriters at Lloyd's, London*, 00-1512 at p. 7 (La.App. 4 Cir. 5/9/01), 787 So.2d at 1075, *citing Ridge Oak Development, Inc. v. Murphy*, 94-0025 (La.App. 4 Cir. 6/30/94), 641 So.2d 586." As Plaintiff notes, to find his bad faith claims to be delictual, the claims must "flow[ ] from violation of a general duty owed to all persons," and thus available to all persons. However, the Louisiana Supreme Court in *Langsford v. Flattman*, 03-189 (La. 1/21/04), 864 So.2d 149, stated these claims are only available to insureds. In that case, the court specifically held third-party claimants have no cause of action against an insurer under La.R.S. 22:1220(B) [now La.R.S. 22:1973(B) ] for a bad faith failure to pay within sixty days of satisfactory proof of loss. See also *Howard v. United Services Automobile Ass'n*, 14-1429, p. 18 (La.App. 1 Cir. 7/22/15), 180 So.3d 384, 399 (emphasis added), wherein the plaintiffs were third-party claimants, and the court held they "do not fall within the category of individuals who can bring a 'bad faith handling of a claim' cause of action against [the insurer], with whom plaintiffs *have no contractual relationship*."

In our original opinion, we relied upon *Zidan*, 622 So.2d 265, to affirm the trial court's judgment that the one-year prescriptive period applied. Upon further ****11** reflection, we find this was error. We find persuasive the federal court's later discussion of *Zidan* in *Aspen Specialty Insurance Co.*, 2015 WL 339598, pp. 2-3 (footnotes omitted), which follows:

> First, *Zidan* is a case in which a guest passenger who was injured in an automobile accident failed to assert a claim against the driver and the driver's insurer until more than one year after the accident occurred. The plaintiff in *Zidan* argued that the claim had not prescribed because an insurer had misrepresented or concealed the fact that coverage existed, in violation of the penalty statute. Thus, the claim asserted was a third-party claim and not a claim by an insured against his own insurer. None of the cases cited by Evanston analyze the basis for the ruling in *Zidan* or use any reasoning to reach the conclusion that the one-year prescriptive period is equally applicable when an insured asserts a bad faith claim against its insurer. Instead, they simply rely upon the conclusion reached in *Zidan* and fail to cite any other Louisiana appellate court decisions that might be relevant.

  

> "The proper prescriptive period to be applied in any action depends upon the nature of the cause of action." It is logical that the claim by a third-party to an insurance contract against an insurer would be classified as a tort and subject to the one-year prescriptive period for delictual actions, but it is not logical that a first-party claim, that is, a claim by an insured against its insurer, would be classified as a delictual claim. A first-party claim arises out of the relationship created by the insurance contract and, therefore, is either contractual or quasi-contractual in nature. Indeed, Section 1973 "recognizes the jurisprudentially established duty of good faith and fair dealing owed to the insured, which is an outgrowth of the contractual and fiduciary relationship between the insured and the insurer." Both contractual and quasi-contractual claims are classified, under Louisiana law, as personal actions subject to a liberative prescription of ten years.
>
> Second, at least two Louisiana appellate court decisions have applied a ten-year prescriptive period to Section 1892 claims, one of which came out of the same circuit that decided the *Zidan* case. In *Cantrelle Fence & Supply Co. v. Allstate Ins. Co.*, 550 So.2d 1306, 1308 (La.App. 1 Cir.1989), *writ denied*, 559 So.2d 123 (La.1990), the court said: "Finding no other prescriptive period specifically established for La. R.S. 22:658 [now 22:1892] actions, we apply the prescriptive period of 10 years, established by La. C.C. art. 3499." Similarly, in *We Sell Used Cars, Inc. v. United Nat'l Ins. Co.*, [30,671 (La.App. 2 Cir. 6/24/98), 715 So.2d 656], the court held that an insured's claim for penalties and attorneys' fees under La. R.S. 22:658 [now 22:1892] was ten years. The Louisiana Supreme Court has stated that "[t]he conduct prohibited in LSA-R.S. 22:658(A)(1) [now 22:1892] is virtually identical to the conduct prohibited in LSA-R.S. 22:1220(b)(5) [now 22:1973]." Evanston has provided no justification for why virtually identical conduct should be subject to a one-year ****12** prescriptive period under one penalty statute but subject to a ten-year prescriptive period under another penalty statute.
>
> With these two critical distinctions in mind, the Court declines to follow the *Zidan* line of cases and concludes that a ten-year prescriptive period applies to Technical's Section 1973 bad faith claim against Evanston.

We agree with the reasoning of the court in *Aspen Specialty Insurance Co.*, that the facts in *Zidan* are distinguishable, as the plaintiff in that case was a third-party claimant and not a party to the contract of insurance at issue. Thus, it was appropriate in *Zidan* to apply the one-year prescriptive period. Likewise, we find the federal cases of *Ross v. Hanover Insurance Co.*, 09-3501, 2009 WL 2762713 (E.D. La. 2009) and *Brown v. Protective Life Ins. Co.*, 353 F.Supp.2d 739 (E.D. La. 2004), unpersuasive because they too erroneously relied on *Zidan to* apply the one-year prescriptive period.

Similarly, we find our earlier reliance on *Labarre*, which held bad faith claims were subject to a one-year prescriptive period was also misplaced, and find the reasoning set forth in that case's dissenting opinion to be a more accurate application of the law.

Starr relies on *Manuel v. Louisiana Sheriff's Risk Management Fund*, 95-406 (La. 11/27/95), 664 So.2d 81, where the court addressed whether the source of the duty to avoid bad faith was the insurance contract or the statute. Starr argues the "bad faith statute 'establishes penalties for the commission of certain acts, none of which are covered in the contract.' " *Id.* at 84. Starr further argues the court in *Manuel* concluded "the subject matter of the statute is unrelated to that of the contract." *Id.*

Initially, we note *Manuel* did not address the issue of prescription, but rather addressed whether application of the provisions of the bad faith statute impaired the insurance contract. The court specifically found the application of La.R.S. 22:1220 ****13** [now La.R.S. 22:1973] "does not impair the contract." *Id.* Further, there may be instances where the duty the insurer allegedly violates is one based in tort, i.e., an abuse of the investigative process that violates a plaintiff's right to privacy, misrepresentations or undue influences to force the plaintiff to settle, something that goes beyond the four corners of the insurance contract. However, in this case the bad faith alleged was Starr's unconditional tender of only $45,000.00, a sum not even sufficient to cover Plaintiff's medical expenses. The obligation to insure Plaintiff from the harm suffered in the accident is an outgrowth of the contractual and fiduciary relationship of good faith required of the insurer in its dealings with its insured. This obligation clearly stems from the four corners of the insurance contract. As such, it is a duty imposed on the insurer based in contract. Moreover, as Plaintiff points out the Louisiana Supreme Court in *Sultana Corp. v. Jewelers Mutual Insurance Co.*, 03-0360, p. 8 (La. 12/3/03), 860 So.2d 1112, 1118, noted "the principle that an insurer's duty of fair dealing emanates from the contractual and fiduciary relationship between the insured and insurer. See *Manuel v. Louisiana Sheriff's Risk Management Fund*, 95-0406 (La. 11/27/95), 664 So.2d 81." The court relied on its previous decision in

*Manuel* for the proposition that the duty of good faith derives from the contact of insurance.

The nature of the duty breached determines whether the action is in tort or in contract. *Roger v. Dufrene*, 613 So.2d 947 (La.1993). "The classical distinction between 'damages ex contractu' and 'damages ex delicto' is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty to all persons. *State v. Murphy Cormier Gen. Contractors, Inc.*, 15-111, p. 10 (La.App. 3 Cir. 6/3/15), 170 So.3d 370, 380-81, *writ denied*, 15-1297 (La. 9/25/15), 178 So.3d 573, (*citing Harrison v. Gore*, 27,254 (La.App. 2 Cir. 8/23/95), 660 So.2d 563, *writ denied*, ****14** 95-2347 (La. 12/8/95), 664 So.2d 426). In this case, Plaintiff's "bad faith" claims are derived from the obligations Starr assumed by nature of the insurance contract between the two parties--a duty the Louisiana Supreme Court stated "is an outgrowth of the contractual and fiduciary relationship between the insured and insurer." *Theriot*, 694 So.2d at 187. Accordingly, the ten-year prescriptive period applies, and the trial court erred in dismissing Plaintiff's bad faith claims.

For the foregoing reasons, on rehearing we reverse our earlier ruling, affirming the trial court's judgment holding the one-year prescriptive set forth in La.Civ.Code art. 3492 is applicable to Plaintiff's bad faith claims. We find the UM insurer's duty of good faith arises out of the contract of insurance between the two parties; and, thus, is subject to the ten-year prescriptive period of La.Civ.Code art. 3499. Accordingly, the trial court's judgment finding Plaintiff's bad faith claims have prescribed is reversed and the case remanded for further proceedings.

**MOTION FOR REHEARING GRANTED; REVERSED AND REMANDED.**

**All Citations**

--- So.3d ----, 2018 WL 2123564, 2017-896 (La.App. 3 Cir. 5/9/18)

Footnotes

1 Several interested parties were granted permission to file amicus briefs, both in support of, and in opposition to, Plaintiff's motion for rehearing.