GREAT NORTHERN & SOUTHERN NAVIGATION CO LLC FRENCH AMERICA LINE	NO. 22-CA-578
	FIFTH CIRCUIT
VERSUS	COURT OF APPEAL
CERTAIN UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY NUMBER B0621MFALL000216	STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 781-969, DIVISION "F"
HONORABLE MICHAEL P. MENTZ, JUDGE PRESIDING

December 13, 2023

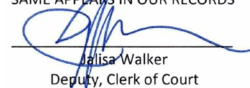
FREDERICKA HOMBERG WICKER
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Jude G. Gravois, and Robert A. Chaisson

AFFIRMED

FHW
JGG
RAC

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS



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WICKER, J.

This litigation arises out of an insurance claim for damages sustained to a vessel owned by plaintiff-appellant, Great Northern & Southern Navigation Co., L.L.C., French American Lines ("FAL"), and insured by defendant-appellee Certain Underwriters at Lloyd's, London Subscribing to Policy Number B0621MFALL000216 ("Underwriters"), following a raw sewage leak on FAL's vessel, the "M/V LOUISIANE", while carrying passengers on a 14-day Mississippi River cruise. At the conclusion of trial, the jury found that the repairs to the vessel could have been completed at a cost of $375,000.00 and that such repairs could have been reasonably performed within 60 days from the date of the incident. The trial court, after deduction of $595,000.00 in previously made payments by Underwriters to FAL, awarded FAL a total of $29,999.80 against Underwriters pursuant to the policy at issue.

On appeal, FAL contends that the trial court improperly instructed the jury that the policy at issue provides that Underwriters is not required to make payments until repairs have been made or expenses incurred. FAL further contends that the trial court erred in granting Underwriters' motion for directed verdict as to FAL's bad faith claims under La. R.S. 22:1892 and 22:1973. Underwriters has filed an Answer to the appeal, assigning as error the jury's award under the policy's loss of hire coverage. Underwriters contends that the jury was manifestly erroneous in finding that FAL could have reasonably repaired the vessel within 60 days when it asserts the evidence presented at trial clearly demonstrates that the vessel should have been repaired within 30 days—or, within the 30-day deductible time period to trigger coverage. Underwriters asks this Court to deny or reduce the amount awarded for FAL's claims under the policy's loss of hire provision.

Upon a thorough review of the record on appeal and for the reasons provided below, we find that the trial court did not err in instructing the jury that the policy at issue is an indemnity policy rather than a liability policy, or in granting, in part, Underwriters' motion for directed verdict as to FAL's bad faith claims. We further find no abuse of the jury's discretion in its award to FAL under the policy's loss of hire provision and we thus affirm the trial court judgment.

Factual and Procedural Background

Christopher Kyte and Ken Grigsby founded FAL in 2015 in Jefferson Parish. In 2016, FAL purchased a vessel, the COLUMBIA QUEEN, and transported the vessel to Bollinger Shipyard in Avondale, Louisiana. Thereafter, FAL renamed the vessel the M/V LOUISIANE and engaged in a multi-million-dollar vessel refurbishment.[1] FAL retained Inland Marine Systems ("IMS") to oversee or manage the LOUISIANE's refurbishment, to thereafter hire and train the vessel's crew, and to ensure that the vessel and operation complied with Coast Guard regulations. While IMS completed vessel refurbishment, FAL marketed the vessel as providing a unique, New Orleans themed river cruise boat for passengers to cruise on the Mississippi River.

To insure the vessel, FAL obtained, through Alliant Insurance Services, a Marine Hull and Machinery Policy underwritten by Lloyd's Underwriters.[2] The policy includes several endorsements, including those at issue in this appeal—(1) the Hull and Machinery (H&M) portion covering physical damage to the vessel subject to a $100,000.00 deductible per incident, including any breakdown or defects to the machinery provided that such damage is not caused by "want of due diligence" by the insured; and (2) the Loss of Earnings and/or Hire endorsement

[1] FAL purchased the COLUMBIA QUEEN vessel with a USDA loan, a JEDCO loan, and funds from investors. The JEDCO loan required the vessel to be docked in Avondale and to utilize the Gretna ferry terminal.

[2] The record reflects that Alliant is the producing broker based in Texas and that Miller Insurance is the London-based broker that secured the Underwriters' policy at issue—which involves thirteen various insurers.

covering economic damages providing a "fixed and agreed" rate of $11,666.66 per day, subject to an initial 30-day deductible. This portion of the policy requires that the insured "effect, or cause to be effected, all repairs…with due diligence and dispatch."

On October 27, 2016, during FAL's first scheduled cruise lodging 148 passengers, Mr. Kyte received a phone call from the captain of the vessel to inform him there had been a "blackwater spill," which indicates a spill of raw sewage on the vessel. Greg Brown, the chief engineer with IMS, and the captain determined quickly that the passengers should disembark the ship, and that the ship should be brought back to Gretna for immediate remediation. FAL determined that IMS should perform the immediate repairs at the Gretna port, rather than transporting the vessel to a shipyard for repair, because time was of the essence as FAL had future cruises scheduled and needed to get the vessel back onto the water.

Mr. Kyte testified that, on the day of the incident, he spoke with Cran Fraser, his insurance agent with Alliant Insurance based in Houston, to report the incident. Two days after the incident, on October 29, 2016, Mr. Fraser traveled to Gretna to meet with FAL, its insured, to discuss the incident and the course of remediation and repair work. That same day, Mr. Wolf Schonborn, a marine engineer and surveyor with London Offshore Consultants (LOC) retained by Underwriters, inspected the vessel. In his initial report, titled "SITREP1," he determined that "a sewage tank was accidentally allowed to overflow which resulted in minor flooding [less than 3/8 of one inch] of parts of the galley, parts of the forward and aft crew[] accommodations." Mr. Schonborn further stated that the likely cause of the sewerage overflow was "the failure of the level controls and alarm signal transmitters" to alert that a sewage tank had reached capacity. He opined that, at that initial stage, he could not place a "reliable value" on the cost of repairs, but advised the insurer to place a reserve on the claim of $250,000.00. He further

opined that the cleaning, decontamination, and other related repairs should "take no longer than 3 weeks, if properly organized and managed."

Mr. Schonborn testified at trial that, after his inspection, Mr. Brown informed him that FAL had plans to equip "both the port and sewage tanks with a state of the art alarm system, and to modernize the controls for the respective transfer pumps between those tanks so as to make sure that overflows become practically impossible."[3] On November 21, 2016, Mr. Schonborn completed a second report, titled "SITREP 2" in which he estimated an approximate repair cost of $113,000.00, which did not include modifications or improvements to the flushing system that he opined would be beneficial but would be considered upgrades likely not covered under the policy.[4] His second report also provided a repair estimate timeframe of 21 working days. At trial, Mr. Schonborn testified again to his opinion that the vessel could have been repaired in a 21-day time frame for $113,000.00 in addition to the cost of 21 consecutive days of fuel at 500 gallons of fuel per day.

On October 29, 2016, Mr. Brown, the project manager for IMS, inspected the vessel. He determined quickly upon inspection that a float sensor in the sanitation system had failed. On November 11, 2016, Mr. Brown prepared a report estimating that the repairs would take at least 21 days to complete with an anticipated cost of $268,387.00 based upon the estimates received to that date.[5] At trial, Mr. Brown testified that the vessel could have been repaired in less than 30 days with proper funding and after an appropriate amount of time for planning,

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[3] At trial, Mr. Schonborn clarified that the 21 days he estimated for repair did not include the time required for the improvements or modifications FAL indicated it planned to do.
[4] Those items that he labeled as upgrades or uncovered modifications totaled $158,000, and included work to modify the alarm system to an automatic alarm to prevent overflow as well as additional filters and modifications to the sanitation system to filter and use potable water rather than river water for the system, which was the type of system which had been placed on the vessel during its recent refurbishment.
[5] The work not estimated in Mr. Brown's report included work for "Reverse Osmosis" water makers, plumbing and equipment and labor necessary to convert the "pumps from non-potable flushing tanks to RO [reverse osmosis] units," and other adaptations required for that modification.

scheduling, and organization of repairs. A joint exhibit introduced at trial supported Mr. Brown's estimate that the repairs could have been completed for a cost of $238,024.82, including IMS labor. He testified that the remediation contractor had completed the initial clean-up and remediation of the vessel by November 8, 2016, and that the vessel was at that point at an "impasse" awaiting decisions to be made concerning additional repairs. He explained that the longer the vessel remained unrepaired, the more expenses accrued while awaiting repairs. On November 23, 2016, Mr. Fraser with Alliant sent email correspondence to FAL advising that the H&M policy at issue is an indemnity policy and explaining that, although FAL had submitted estimates for repair, FAL would be required to submit *invoices* for repairs completed.

Mr. Brown testified to the funding issues FAL faced and acknowledged that FAL had difficulty paying IMS for work which had been performed prior to this incident. At trial, Mr. Kyte acknowledged that, prior to the incident, FAL owed IMS money for work performed during the course of the initial refurbishment for which IMS had not yet been paid. In its brief, FAL acknowledges, and the record supports its statement that FAL "did not have financial resources on hand to complete many necessary repairs and cover the ongoing costs of fuel, crew."

David Pusiak, a claims adjuster for Swiss Re (one of the thirteen underwriters-insurers), testified that Underwriters had retained Mr. Schonborn to inspect the vessel immediately after the incident and to prepare an estimate report. He explained however that, although Mr. Schonborn prepared an estimate and made recommendations to Underwriters, it is the insurers who ultimately determine what is reasonably covered under the policy. [6] Mr. Pusiak explained the

[6] A November 15, 2016 email from Alliant to FAL (Mr. Kyte) instructed that "FAL needed to demonstrate to underwriters that the deductibles were met. I requested … all receipts and we would place them in the correct category between the Hull and Machinery claim and the P&I Claim. I also restated we need to demonstrate deductibles being met before funds start flowing."

insurers' concerns that the claim "wasn't moving" and that, as of December 2016, Mr. Schonborn confirmed that FAL had made "little to no" repairs, other than the initial cleaning/remediation.[7] He further testified that he had never vetoed a repair firm and that FAL could have begun repairs immediately.[8]

A December 21, 2016 email correspondence from Mr. Fraser with Alliant to FAL acknowledged that, after receipt of correspondence from FAL's counsel demanding a $500,000.00 payment, Underwriters had made a payment in that amount. However, in issuing the $500,000.00 payment, Mr. Pusiak presented the following correspondence to FAL's insurance broker:

> We must stress that it is very unusual for underwriters to advance this sort of sum with little or no backup documentation or a recommendation from an average adjuster. It is also usual for the assured to effect repairs and to have full supporting invoices before seeking reimbursement from underwriters. We are making this POA [payment on account] in good faith and without waiving our right to seek our money back should we find it was advanced in error, or to seek credit for any payments made in the face of future demands.

Mr. Pusiak testified that he has worked on thousands of marine hull and machinery claims and that all of the policies are indemnity policies, meaning the shipowner completes the repairs and seeks reimbursement from the insurer under the policy as repairs are completed; he testified this is "standard practice" in the marine industry. It is undisputed that Underwriters paid $595,000.00 to FAL for losses arising out of this claim. The record reflects that the following payments were made by Underwriters to FAL: (1) on December 2, 2016, a $13,000.00 payment ($113,000.00 payment, minus the $100,000.00 deductible, on the H&M

[7] When questioned concerning other expenses, such as the fuel costs, Mr. Pusiak testified that he had been informed that FAL was using 500 gallons per day of fuel but what he "didn't have was the cost [of the fuel] and what was actually being used for repairs" versus modifications, and that he could not calculate the cost of fuel related to repairs.

[8] The policy at issue contained a veto provision, which allowed Underwriters, subject to certain restrictions and procedures, to veto a repair firm selected. Mr. Pusiak, when questioned about the veto provision of the policy, testified that in his 25 years he has never vetoed a repair firm and did not veto IMS as the repair firm in this case.

portion of the claim); (2) on December 7, 2016, a payment of $82,000.00[9] was issued on the loss of hire claim, without prejudice, which represented approximately 37 days of loss of hire, minus the 30-day deductible applied; and (3) prior to January 5, 2017, two payments totaling $500,000.00 on both the H&M and loss of hire portions of the policy, issued in response to FAL counsel's correspondence and efforts to obtain funding to move forward with repairs.

On January 30, 2017, after Underwriters had issued a total of $595,000.00 in payments under the policy to FAL, Alliant communicated to FAL that Underwriters had requested proof that physical repairs to the vessel had begun.[10] On February 1, 2017, FAL's counsel responded to Alliant by email correspondence, wherein counsel referred to Underwriters' most recent payments as "interim payments," and indicated that FAL would expect additional payments under the policy to complete repairs to the vessel. After unsuccessful negotiations and discussions between the parties, FAL filed suit in the 24th Judicial District Court seeking damages for breach of contract under the policy in addition to bad faith claims under La. R.S. 22:1973 and 22:1893.[11] As stated above, following a jury trial, the jury found that the repairs to the vessel could have been completed at a cost of $375,000.00 and that such repairs could have been reasonably performed within 60 days from the date of the incident. The trial court, after deduction of $595,000.00 in previously made payments by Underwriters to FAL, awarded FAL a total of $29,999.80 against Underwriters pursuant to the policy at issue. This timely appeal followed.

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[9] The net payment issued by Underwriters was $52,116.78, which reflected a $29,883.22 unpaid policy premium due.

[10] On January 31, 2017, Alliant submitted email correspondence to FAL, titled "seventh request" informing FAL that Underwriters had requested documentation to prove that physical repairs to the vessel had commenced.

[11] After removal to federal court, Underwriters filed a counterclaim against FAL, denying coverage and further contending that it had overpaid $595,000.00 under the policy. The only payments at issue on appeal are those tendered under the loss of hire provision of the policy. The payments tendered or the amount awarded under the H&M policy related to repairs to the vessel are not at issue on appeal.

Discussion

On appeal, FAL contends that (1) the trial court erred in charging the jury that the Hull and Machinery policy at issue is an indemnity policy that only requires Underwriters to reimburse FAL for expenses incurred for completed repairs, and (2) the trial court erred in granting, in part, Underwriters' motion for directed verdict as to FAL's bad faith claims against it. In its Answer to the appeal, Underwriters assigns as error the jury's award related to the "loss of hire" provision of the policy, and asks this Court to deny FAL's claims under this provision of the policy or to reduce the amount awarded. We address each assignment of error in turn.

Jury Instruction

In its first assignment of error on appeal, FAL contends that the trial court improperly charged the jury as follows:

> The Hull and Machinery insurance policy in this lawsuit is an indemnity policy that states no claim for unrepaired damage shall be allowed. In other words, the insurer under the Hull and Machinery policy agrees to reimburse expenses to the insured that the insured is liable to pay and has actually paid.

On appeal, FAL contends that the trial court improperly determined that the policy at issue is an indemnity policy and that such erroneous instruction constitutes reversible error. FAL asserts that the trial court improperly charged the jury that Underwriters is only liable under the policy to reimburse or pay for the expenses to FAL that it "is liable to pay and has actually paid." FAL argues that the policy does not include the term "indemnity" and that the policy language supports an interpretation that policy coverage is triggered as soon as damage is sustained. Underwriters, on the other hand, points to specific language in the policy, stating that "no claim for unrepaired damages shall be allowed…" and contends that coverage is not triggered until repairs are made and expenses incurred.

Trial courts are given broad discretion in formulating jury instructions, and a trial court's judgment should not be reversed as long as the charge correctly states the substance of the law. *Aych v. State Farm Mut. Auto. Ins. Co.*, 23-89 (La. App. 5 Cir. 10/31/23), — So.3d —, 2023 WL 7141031. The policy at issue is a marine machine and hull insurance policy. The Louisiana Supreme Court has stated that, "[a]lthough marine insurance is a complex subject, contracts of marine insurance are generally contracts of indemnity." *Deshotels v. SHRM Catering Servs., Inc.*, 538 So.2d 988, 992 (La. 1989).

Louisiana law governs the interpretation of marine insurance policies unless displaced by controlling federal maritime law. *Ingersoll–Rand Financial Corp. v. Employers Ins. Of Wausau,* 771 F.2d 910, 912 (5th Cir. 1985); *Fireman's Fund Ins. Co. v. Wilburn Boat Co.,* 300 F.2d 631, 633 (5th Cir. 1991); *Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882 (5th Cir. 1991).[12] Under Louisiana law, "[a]n insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts set forth in the Louisiana Civil Code." *Cadwallader v. Allstate Ins. Co.,* 848 So.2d 577, 580 (La. 2003). The Louisiana Civil Code provides that "[i]nterpretation of a contract is the determination of the common intent of the parties." La. C.C. art. 2045; *see also Cadwallader,* 848 So.2d at 580; *La. Ins. Guar. Assoc. v. Interstate Fire & Cas. Co.,* 630 So.2d 759, 763 (La. 1994).

An insurance contract must be "construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to or made a part of the policy." La. R.S. 22:654. Interpretation of an insurance contract generally

[12] The policy at issue also contained a choice-of-law provision. See *Collins v. A.B.C. Marine Towing, L.L.C.*, No. CIV.A. 14-1900, 2015 WL 5797793 (E.D. La. 10/2/15) (which contained a choice-of-law provision similar to the provision contained in the policy at issue in this appeal, stating that "[i]n the case of any dispute arising out this insurance, the same shall be governed by and construed in accordance with Louisiana law ...").

involves a question of law. *Bonin v. Westport Ins. Corp.,* 930 So.2d 906, 910 (La. 2006) (citing *Robinson v. Heard,* 809 So.2d 943, 945 (La. 2002)); *see also La. Ins. Guar. Assoc.,* 630 So.2d at 764. “The court should construe the policy ‘to fulfill the reasonable expectations of the parties in light of the customs and usages of the industry.’” *La. Ins. Guar. Ass’n*, 630 So.2d at 764 (quoting *Trinity Indus., Inc. v. Ins. Co. of N. Am.,* 916 F.2d 267, 269 (5th Cir.1990)). “A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties.” La. C.C. art. 2053 (1987); *Collins v. A.B.C. Marine Towing, L.L.C.*, No. CIV.A. 14-1900, 2015 WL 5797793 (E.D. La. Oct. 2, 2015).

The Hull and Machinery policy at issue incorporates the 1977 American Hull Institute Form which specifically states, under the “General Claims” provisions that, “[no] claim for *unrepaired* damage shall be allowed… .” (emphasis added). This language, which applies to all claims under the H&M policy as evidenced by its inclusion in the “General Claims” provision, clearly states that a claim for coverage is not triggered until a repair has been made. A separate provision of the policy, the “Liner Repair Clause” further expands the coverage under the policy to include “[t]he cost of temporary repairs and overtime, and the enhanced cost of deferred repairs, reasonably incurred…to maintain the vessel’s sailing schedule… .” Although the Liner Negligence Clause expands coverage beyond the physical damage to the vessel, it nevertheless maintains that such coverage is for “expenses incurred.” The language “expenses incurred” has been interpreted by the Louisiana Supreme Court to mean an expense that “one has paid [] or become legally obligated to pay.” *See Hoffman v. Travelers Indem. Co. of Am.,* 13-1575 (La. 5/7/14), 144 So.3d 993, 997-98 (an expense is “incurred” when one has paid it or become legally obligated to pay it.)

Upon review of the policy language contained in the marine insurance policy at issue, we find that the trial court did not err in determining that the Hull and Machinery policy at issue is an indemnity policy that specifically provides that "no claim for unrepaired damages shall be allowed" and, thus, payment under the policy is not required until repairs have been made or expenses incurred, i.e., expenses for which the insured has paid or has become legally obligated to pay because a service/repair has been performed or equipment/material purchased.[13] This assignment of error lacks merit.

Directed Verdict on Bad Faith Claims

In its second assignment of error, FAL asserts that the trial court erred in granting Underwriters' motion for directed verdict, in part, as to FAL's bad faith claims under La. R.S. 22:1892[14] and 22:1973.[15] At the conclusion of evidence presented by FAL, Underwriters moved for a directed verdict on the entirety of

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[13] We point out that the uncontradicted testimony at trial in this case is that as of at least December 2016, little to no repairs had been initiated to the vessel other than the initial remediation/clean-up. Concerning FAL's argument that the jury verdict may have been affected by evidence of repairs made, but not paid for, and its assertion that the language "no claim for unrepaired damages" is not synonymous with "liable to pay and has paid," we find that, under the facts of this case—where no related repairs were made prior to payment—any error alleged would be harmless given that no covered expenses (meaning those expenses incurred while the vessel was undergoing repairs as is required under the policy) were incurred (but not paid) for the purpose of repair before the summer of 2017, after $595,000.00 in payments had been issued.

[14] La. R.S. 22:1892 provides, in part:
A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:1811, 1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest. The insurer shall notify the insurance producer of record of all such payments for property damage claims made in accordance with this Paragraph.

[15] La. R.S. 22:1973 provides in 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.
B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A of this Section:
(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
(3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.
(4) Misleading a claimant as to the applicable prescriptive period.
(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.
(6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.

FAL's claims, asserting no coverage under the policy and further that FAL failed to present any evidence to support its bad faith claims against it. After deferring its decision, the trial court granted, in part, Underwriters' motion for directed verdict only as to FAL's bad faith claims under La. R.S. 22:1892 and 22:1973. On appeal, FAL contends that the trial court erred in granting a directed verdict on its bad faith claims because the evidence supports a finding that Underwriters failed to "adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured" and further failed to "pay the amount…due…within sixty days after receipt of satisfactory proof of loss…[and that] such failure is arbitrary, capricious, or without probable cause."

A motion for a directed verdict is a procedural device available in jury trials for the purpose of judicial economy. The motion is appropriately made at the close of evidence offered by the opposing party and should be granted when, considering all of the evidence in the light most favorable to the non-mover, it is clear that the facts and inferences point so overwhelmingly in favor of the mover that reasonable jurors could not reach a contrary verdict. *Dep't of Transportation & Dev. v. Motiva Enterprises, LLC*, 19-32 (La. App. 5 Cir. 10/2/19), 279 So.3d 1076, 1081 (quotations omitted) (citing La. C.C.P. art. 1810; *Baudy v. Travelers Indem. Co. of Connecticut*, 13-882 (La. App. 5 Cir. 4/9/14), 140 So.3d 125, 131).

The trial court has much discretion in determining whether a directed verdict should be granted. *State, Dept. of Transp. And Development v. Lauricella Land Co., L.L.C.*, 10-790 (La. App. 5 Cir. 4/28/11), 65 So.3d 712, 717. The standard of review on appeal is whether reasonable persons could not reach a contrary verdict under the evidence submitted. Furthermore, the reviewing court must consider the propriety of a directed verdict in light of the substantive law applicable to the claims. *Dep't of Transportation & Dev. v. Motiva Enterprises, LLC*, 279 So.3d at 1081.

La. R.S. 22:1973 provides that the insurer has an affirmative duty to adjust claims fairly and promptly. An insurer breaches this duty when it fails to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss when such failure is arbitrary, capricious, or without probable cause. *La Louisiane Bakery Co. v. Lafayette Ins. Co.*, 09-825 (La. App. 5 Cir. 2/8/11), 61 So.3d 17, 35, *writ denied*, 11-0493 (La. 4/25/11), 62 So.3d 95.

Concerning the elements of a bad faith claim under either La. R.S. 22:1892 or 1973, this Court has recently stated:

> The conduct prohibited by La. R.S. 22:1892(A)(1) is virtually identical to the conduct prohibited by La. R.S. 22:1973(B)(5): the failure to timely pay a claim after receiving satisfactory proof of loss when that failure to pay is arbitrary, capricious, or without probable cause. *Reed v. State Farm Mutual Automobile Insurance Company*, 03-107 (La. 10/21/03), 857 So.2d 1012, 1020. The primary difference is the time periods allowed for payment. *Id.* Both statutes are penal in nature and must be strictly construed. *Id.*
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> In order to establish a cause of action for penalties and/or attorney's fees and costs under La. R.S. 22:1892 (formerly La. R.S. 22:658), a claimant must show that (1) an insurer has received satisfactory proof of loss, (2) the insurer failed to tender payment within thirty days of receipt thereof, and (3) the insurer's failure to pay is arbitrary, capricious or without probable cause. *See Louisiana Bag Co., Inc. v. Audubon Indent. Co.*, 08-453 (La. 12/2/08), 999 So.2d 1104, 1112-1113.
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> With regard to what constitutes "arbitrary, capricious, or without probable cause," this Court has held that the phrase is synonymous with "vexatious." *Reed*, 857 So.2d at 1021. Furthermore, a "vexatious refusal to pay" means "unjustified, without reasonable or probable cause or excuse." *Id.* Both phrases describe an insurer whose willful refusal of a claim is not based on a good-faith defense. *Id.*

Bell v. Steckler, 19-170 (La. App. 5 Cir. 12/4/19), 285 So.3d 561, 569-70, *writ denied*, 20-00028 (La. 2/26/20), 347 So.3d 877.

One who claims entitlement to penalties under these "bad faith" statutes has the burden of proving the insurer received satisfactory proof of loss as a predicate

to a showing that the insurer was arbitrary, capricious, or without probable cause. *La Louisiane Bakery Co.*, 61 So.3d at 35 (citing *Reed v. State Farm Mut. Auto. Ins. Co.,* 03–0107 (La. 10/21/03), 857 So.2d 1012, 1020-21).

As to the H&M policy, as discussed above, we find that the policy is an indemnity policy and that Underwriters was not required to tender payment until after FAL presented proof that it had paid or incurred liability to pay for repairs made. The record is undisputed that, as of December 2016 (when Underwriters began making payments under the H&M policy), "little to no" repairs had been made and certainly no evidence was presented to show that FAL had incurred expenses on repairs over the $100,000.00 H&M policy deductible. On November 23, 2016, Mr. Fraser with Alliant sent email correspondence to FAL advising that the H&M policy at issue is an indemnity policy and explaining that, although FAL had submitted estimates for repair, FAL would be required to submit *invoices* for repairs completed. In light of this Court's finding that Underwriters was not required to tender payment to FAL until after receipt of proof of repairs made or expenses incurred, i.e., paid or liable to pay, we find that the trial court did not err in granting in part the directed verdict as to FAL's bad faith claims under the H&M policy.

As to the Loss of Hire portion of the policy, we point out that this portion of the policy includes a 30-day deductible period. Therefore, the loss of hire provision could not have been triggered prior to November 27, 2016. First, the evidence presented reflects that Underwriters issued payments under the loss of hire provision. Underwriters issued an $82,000.00 payment on December 7, 2016—within 10 days of the 30-day deductible period—on the loss of hire provision of the policy. A second payment under the loss of hire provision was tendered in the first week of January 2017—within sixty days of the 30-day

deductible period—thereby totaling the payments under the loss of hire provision to 50 days paid under that provision (minus the 30-day deductible).

Second, the evidence at trial reflects that Underwriters' surveyor, Mr. Schonborn, advised Underwriters on multiple occasions after his inspection that the vessel repair could have been completed within 21 days, if organized and properly managed. The policy language included in the loss of hire provision requires the insured to effect all repairs with "due diligence."

Upon review of the record on appeal, we cannot say that the trial judge abused his discretion in finding that the evidence overwhelmingly demonstrated that Underwriters had a reasonable basis upon which to dispute payment under the loss of hire provision or that Underwriters' payment under that portion of the policy was sufficient given the undisputed evidence that Underwriters had been informed by its surveyor that repairs could have been completed within 21 days—before the 30-day deductible period would have expired. We find the trial judge did not abuse his discretion in finding that the evidence failed to demonstrate that Underwriters acted in bad faith and that a reasonable juror could not reach a contrary verdict. This assignment of error lacks merit.

Jury Award on Loss of Hire

In its Answer to the appeal, Underwriters assigns as error the jury's award under the loss of hire provision of the policy. At the conclusion of trial, the jury's verdict reflects that it determined repairs to the vessel could have been reasonably completed within 60 days from the date of the incident. Therefore, the judgment of the trial court awarded FAL 60 days under the loss of hire provision of the policy, minus the 30-day deductible period, calculated to total $349,999.80.[16]

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[16] The jury verdict provided the 60-day period, and the trial judge subsequently calculated the final amount due FAL after deduction of previous payments tendered and stipulated policy deductibles to reach its final award of $29,999.80.

On appeal, Underwriters contends that the evidence at trial clearly demonstrates that the repairs could have been completed within the 30-day deductible period and, thus, it should not be liable for any payment under the loss of hire provision. Underwriters asks this Court to amend the trial court judgment to remove or reduce the amount awarded under the loss of hire provision of the policy.

A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Fremin v. ANPAC Louisiana Ins. Co.*, 22-36 (La. App. 5 Cir. 10/5/22), 351 So.3d 719, 723 (citing *Stobart v. State through Dep't of Transp. & Dev.*, 617 So.2d 880, 882 (La. 1993)); *Rosell v. ESCO*, 549 So.2d 840 (La. 1989). To reverse a fact-finder's determination, the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and that the record establishes that the finding is clearly wrong. *Mart v. Hill*, 505 So.2d 1120 (La. 1987). Where the jury's findings are reasonable, in light of the record viewed in its entirety, the court of appeal may not reverse. *Goudia v. Mann*, 11-960 (La. App. 5 Cir. 5/22/12), 98 So.3d 364, 372, *writ denied*, 12-1423 (La. 10/8/12), 99 So.3d 1007.

Upon review of the record on appeal, we cannot say that a reasonable factual basis does not exist to support the jury's factual finding that a period of 60 days would be reasonable to complete remediation and repairs to the vessel. Mr. Schonborn consistently testified that repairs could have been completed within 21 days after the incident. Mr. Brown, the IMS project manager, also testified that repairs could have been completed within approximately 30 days. However, Mr. Brown also testified that the remediation or clean-up work was not completed until November 8, 2016, approximately twelve days after the incident, and there is no allegation of delay in the remediation. Further, Mr. Brown's report, dated

November 11, 2016, reflects that repairs would take at least 21 days from the date the repairs began. Moreover, Mr. Brown testified at trial to the organization required for such a vessel repair, including scheduling working days available for subcontractors and ordering parts and materials. Upon review of all evidence presented at trial, we cannot say that the jury's determination of a 60-day reasonable time period for repair has no factual basis or is clearly wrong. Therefore, we cannot amend the jury's award on this claim. This assignment of error lacks merit.

Decree

Accordingly, for the reasons provided above, we affirm the trial court judgment.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 13, 2023** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

22-CA-578

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE MICHAEL P. MENTZ (DISTRICT JUDGE)
ALEX S. AUGHTRY (APPELLANT)
NICHOLAS H. BERG (APPELLANT)
ARTHUR R. KRAATZ (APPELLEE)
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RACHEL BLAND (APPELLEE)
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