NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW

NUMBER 2016 CA 1647

ARTHUR DEAL

VERSUS

FARM BUREAU CASUALTY
INSURANCE COMPANY

Judgment Rendered: JUN 02 2017

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Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension, Louisiana
Trial Court Number 115,505

Honorable Alvin Turner, Jr., Judge

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Plaintiff – Arthur Deal

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Defendant – Louisiana Farm Bureau
Casualty Insurance Company

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

Crain, J. concurs

WELCH, J.

The plaintiff, Arthur Deal, appeals a judgment in favor of the defendant, Louisiana Farm Bureau Casualty Insurance Company ("Farm Bureau"), sustaining Farm Bureau's peremptory exception raising the objection of *res judicata* and dismissing the plaintiff's petition for damages, penalties, and attorney fees against Farm Bureau for its alleged bad faith in connection with the settlement of the plaintiff's underlying personal injury claims. We affirm the judgment of the trial court and issue this memorandum opinion in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

BACKGROUND

The relevant facts pertaining to the plaintiff's underlying personal injury suit are not in dispute. On April 27, 2012, the plaintiff was involved in an automobile accident with Billie Fortenberry. As a result of that accident, the plaintiff filed suit on April 24, 2013 seeking damages from Mr. Fortenberry; Mr. Fortenberry's liability insurer, Farm Bureau; and the plaintiff's uninsured/underinsured motorist ("UM") insurer, State Farm Mutual Automobile Insurance Company ("State Farm").[1] The plaintiff subsequently settled his claims with both Farm Bureau and State Farm. In connection with the settlement of his claims, the plaintiff agreed to dismiss his claims and a judgment of dismissal, which dismissed the action "in its entirety, with prejudice" was signed on October 14, 2015. This judgment contained no reservation of any rights against Farm Bureau or any other party.

In regards to Farm Bureau, the plaintiff settled for the insured's policy limits of $25,000.00. Farm Bureau originally issued a check for $25,000.00 to the plaintiff and his attorney on October 24, 2013, which check was "In Full Payment for ANY AND ALL CLAIMS" arising from the April 27, 2012 accident with Mr.

[1] The plaintiff's underlying suit was filed in the 23rd Judicial District Court for the Parish of Ascension and was entitled "Arthur Deal versus Billie Fortenberry, Louisiana Farm Bureau Casualty Insurance Company, and State Farm Mutual Automobile Insurance Company," docket number 106,766, Division B.

Fortenberry. However, this check was not negotiated by the plaintiff or his attorney.[2] Subsequently, the plaintiff hired a new attorney. Almost two years after Farm Bureau issued the original check, on September 23, 2015, the plaintiff's new attorney sent a letter to Farm Bureau, which provided, in its entirety, as follows:

> I am ever so pleased to advise that we have settled the case with State Farm based on [the] payment of your policy limits.
>
> As your old check is probably stale and the check is not cashed, do you want us to use the old check how long would it take you to reissue a new one? [*sic*]

In response to this letter, Farm Bureau requested that the old check be returned, stating that upon receipt, it would issue a new check to the plaintiff and his new attorney. With a letter dated October 15, 2015, the plaintiff forwarded the old check to Farm Bureau, and it was received by Farm Bureau on October 16, 2015. On October 26, 2015, Farm Bureau issued a new check to the plaintiff and his new attorney for $25,000.00, which check was "In Full Payment for ANY AND ALL CLAIMS" arising from the April 27, 2012 accident with Mr. Fortenberry. This check was negotiated by the plaintiff and his attorney, as it cleared the bank on November 2, 2015.

On March 21, 2016, the plaintiff filed a petition for damages against Farm Bureau. In the petition, the plaintiff asserted "[t]hat on [September 23, 2015,] he confirmed the settlement offer with [Farm Bureau], who was to reissue a check for $25,000.00, which [was] the policy limits of [Mr. Fortenberry] in the [underlying suit]," that "[d]espite a written agreement, Farm Bureau ha[d] failed to deliver the check and/or funds within thirty days of settlement despite numerous written and telephonic requests to [Farm Bureau]," and that Farm Bureau's "actions ... were arbitrary, capricious[,] and unreasonable." Accordingly, the plaintiff sought

[2] The plaintiff disputes whether he had actually settled with Farm Bureau at the time it issued the original check; however, that dispute is not relevant to this appeal or our decision herein.

damages, penalties, and attorney fees pursuant to La. R.S. 22:1892[3] and 22:1973.[4] Essentially, the delay between the September 23, 2015 letter from the plaintiff's attorney to Farm Bureau and the October 26, 2015 check from Farm Bureau to the

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[3] Louisiana Revised Statutes 22:1892 provides, in pertinent part, as follows:

> A. (1) All insurers issuing any type of contract ... 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.
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> (2) All insurers issuing any type of contract ... shall pay the amount of any third party property damage claim and of any reasonable medical expenses claim due any bona fide third party claimant within thirty days after *written agreement of settlement* of the claim from any third party claimant.
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> * * *
>
> B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4) of this Section, respectively, *or failure to make such payment within thirty days after written agreement or settlement* as provided in Paragraph (A)(2) of this Section *when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater,* payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due *as well as reasonable attorney fees and costs.* ... [(Emphasis added.)]

[4] Louisiana Revised Statutes 22:1973 provides, in pertinent part, as follows:

> A. An 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.
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> 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:
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> * * *
>
> (2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
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> * * *
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> C. In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. ...

plaintiff and his new attorney was the basis for the suit, and the plaintiff claimed that the thirty-day delay for paying a settlement agreement commenced to run with the September 23, 2015 letter from the plaintiff's attorney to Farm Bureau, and thus, Farm Bureau's payment thirty-three[5] days later on October 26, 2015, was untimely and rendered Farm Bureau liable for penalties and attorney fees under La. R.S. 22:1892 and 22:1973.

In response to the plaintiff's petition, Farm Bureau filed an answer generally denying the allegations of the plaintiff's petition and a peremptory exception raising the objection of *res judicata*.[6] Therein, Farm Bureau argued that any claims the plaintiff may have had against it pursuant to La. R.S. 22:1892 and 22:1973 arose out of the "same transaction or occurrence" that was the subject of the underlying suit involving the April 27, 2012 accident and the subsequent settlement of those claims. As such, Farm Bureau maintained that the claims made in the instant suit were extinguished by the October 14, 2015 judgment of dismissal in the underlying suit, the subsequent settlement of the plaintiff's claims, and the negotiation of the October 26, 2015 check. Thus, Farm Bureau maintained that the plaintiff's action was barred by *res judicata*.

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[5] Arguably, most of the thirty-three day delay was attributable to the plaintiff, as the plaintiff did not return the October 24, 2013 check to Farm Bureau for approximately twenty-two days. However, the effect of the plaintiff's delay is not an issue before this Court in this appeal.

[6] Farm Bureau also claimed that the September 23, 2015 letter from the plaintiff's attorney to Farm Bureau was not a written agreement or settlement because it was unilateral correspondence that discussed a settlement check that had been in the plaintiff's possession for two years. The plaintiff's petition alleged that there was a confirmation of a settlement agreement on September 23, 2015 and that despite that agreement, Farm Bureau failed to pay the settlement within thirty days. Notably, the September 23, 2015 letter was not attached to the plaintiff's petition, but rather was attached to both of the memorandums filed by the parties in support of their position on the objection of *res judicata*. Thus, whether the September 23, 2015 letter actually constitutes a written settlement agreement is not before us on appeal. Rather, the issue presented is to the extent the September 23, 2015 letter is a written settlement or agreement (as alleged by the plaintiff), whether any potential claims for bad faith in connection with that settlement were extinguished or compromised—either by the October 14, 2015 judgment of dismissal or when the October 26, 2015 check was negotiated and deposited by the plaintiff and his attorney on November 2, 2015.

After a hearing, the trial court took the matter under advisement.[7] Thereafter, on September 20, 2016, the trial court issued written reasons and rendered and signed a judgment sustaining Farm Bureau's peremptory exception raising the objection of *res judicata* and dismissing the plaintiff's claims against Farm Bureau. From this September 20, 2016 judgment, the plaintiff now appeals, challenging the trial court's ruling on the objection of *res judicata*.

LAW AND DISCUSSION

As set forth by the trial court in its written reasons for judgment, in Louisiana, the doctrine of *res judicata* is governed by La. R.S. 13:4231, which provides as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Additionally, the trial court, citing **Ortego v. State, Dept. of Transp. and Development**, 96-1322 (La. 2/25/97), 689 So.2d 1358, 1364, correctly noted that

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[7] The hearing in this matter consisted of argument of counsel and was based upon the memoranda previously submitted by both parties, including the exhibits attached thereto. Hence, by agreement of the parties, the matter was submitted to the trial court for decision based on the parties' memoranda and the exhibits attached thereto. See **Morgan v. Morgan**, 2016-0964 (La. App. 1st Cir. 2/17/17), 212 So.3d 1235, 1237 and **Anzalone v. Anzalone,** 2007-1905 (La. App. 1st Cir. 11/18/08), 25 So.3d 836, 837 n. 1, writ granted and judgment reversed in part on other grounds, 2008-2981, 2008-2988 (La. 4/13/09), 6 So.3d 755.

"a valid compromise[8] may form the basis of a plea of *res judicata*." See La. C.C. art. 3080. The trial court also noted that the negotiation of a settlement check "alone is sufficient to establish the requirements of a valid compromise agreement." See **Leray v. Nissan Motor Corp. in U.S.A.**, 2005-2051 (La. App. 1st Cir. 11/3/06), 950 So.2d 707, 710. Based on these precepts, the trial court found that the October 26, 2015 check for $25,000 to the plaintiff and his new attorney was signed and negotiated by the plaintiff on November 2, 2015, and that at the time, there was a "full settlement of all claims which existed at the time the check was negotiated." The trial court further found that considering the plaintiff's allegation that the underlying suit was settled on September 23, 2015, any claim for bad faith came into existence thirty days later on October 23, 2015, and as such, any claim for bad faith was existing at the time of the settlement of all claims on November 2, 2015.[9] Thus, the trial court concluded that any potential claims for bad faith that the plaintiff had in connection with the settlement of his underlying suit were barred by *res judicata*.

Based on our review of the record, we find no manifest error in the judgment of the trial court.[10] The plaintiff's claim for damages, penalties, and attorney fees against Farm Bureau arose from the settlement of claims related to the April 27, 2012 automobile accident. Any claim the plaintiff may have had against Farm Bureau for its purported bad faith or its failure to pay settlement within 30 days of the September 23, 2015 letter was compromised when the plaintiff and his attorney negotiated the October 26, 2015 check for $25,000.00 that was "In Full Payment

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[8] Louisiana Civil Code article 3071 provides that "[a] compromise is a contract whereby the parties ... settle a dispute or an uncertainty concerning an obligation or other legal relationship."

[9] We note that the trial court, in its reasons, used the date of October 23, 2016; however, this appears to be a typographical error.

[10] When an objection of *res judicata* is raised before the case is submitted and evidence is received on the objection, the standard of review on appeal is manifest error. **Davis v. J.R. Logging, Inc.**, 2013-0568 (La. App. 1st Cir. 11/8/13), 136 So.3d 828, 830-831, writ denied, 2014-0860 (La. 6/20/14), 141 So.3d 812.

for ANY AND ALL CLAIMS" arising from the April 27, 2012 accident with Mr. Fortenberry. Therefore, the plaintiff's claim is barred by *res judicata*. Accordingly, the September 20, 2016 judgment of the trial court is affirmed.[11] All costs of this appeal are assessed to the plaintiff, Arthur Deal.

AFFIRMED.

[11] We note that Farm Bureau requested an award of attorney fees and costs, which the trial court denied. In its appellee brief, Farm Bureau also requested an award of attorney fees and costs in defending this appeal. However, Farm Bureau did not answer the plaintiff's appeal seeking a review of the trial court's denial of attorney fees or an award of attorney fees and costs from this court. Therefore, Farm Bureau's claim for attorney fees and costs is not properly before us and is will not be considered. See La. C.C.P. arts. 2133, 2164; see also **Jackson National Life Ins. Co. v. Kennedy-Fagan**, 2003-0054 (La. App. 1st Cir. 2/6/04), 873 So.2d 44, 51, writ denied, 2004-0600 (La. 4/23/04), 870 So.2d 307.