NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0094

ROBYN GRANT-WALKER

VERSUS

GENERAL INSURANCE COMPANY OF AMERICA AND ELIZABETH PHELAN

Judgment rendered: JUL 03 2019

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C641582, Sec. 27

The Honorable Todd W. Hernandez, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, CRAIN, HOLDRIDGE, AND CHUTZ, JJ.

Whipple, C.J. concurs and assigns reasons.
Crain J. dissents w/ reasons
Chutz, J. - Concurs w/o reasons
McDonald, J. dissents and assigns reasons.

HOLDRIDGE, J.

The defendants, Elizabeth Phelan and her insurer, General Insurance Company of America (GICA), appeal a judgment rendered in favor of the plaintiff, Robyn-Grant Walker, granting a Motion to Enforce Settlement and for Sanctions, Penalties, and Attorney Fees. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On October 10, 2014, the parties were involved in an automobile accident. In August of 2015, the plaintiff filed a Petition for Damages against Elizabeth for her resulting injuries from the accident, also naming GICA, the defendant's insurer, as a defendant (defendants). In April of 2017, a string of emails between Michael Frugé, counsel for the plaintiff, and Tammy Bellamy, the claims specialist for Safeco Insurance, who represented GICA, discussed the possibility of settling the plaintiff's claim. It is this chain of correspondence, its interpretation by the trial court, and the resulting statutory penalties that spurred this instant appeal. The disputed emails was as follows:

> **Bellamy (04/21/17, at 11:17am):** Good morning, I was hoping to touch base with you on this case and see if we can settle it for [$]27,000[.00] plus court costs.
>
> **Frugé (04/21/17, at 11:54 am):** Tammy, We were at $45,000[.00], but agreed to take $30,000 plus court costs if done last week. When we did not hear back, assumed it was rejected and why we are submitting pretrial. She will not take $27,000[.00].
>
> **Bellamy (04/21/2017, at 12:08 pm):** Okay Rachel Roe was the one working with you and tried to reach you on Monday to discuss. I was not aware your offer of [$]30,000[.00] was final and only good for last week.
>
> **Frugé (04/21/2017, at 12:19 pm):** We emailed back and forth Monday. Settlement wasn't discussed. Just pretrial inserts. I can ask if client is still amenable if you make offer.

Bellamy (04/21/2017, at 2:52 pm): The top offer would be [$]30,000[.00] plus court costs. Let me know what your client decides, thanks.

Frugé (04/24/2017, at 12:55 pm): She accepted.

Bellamy (04/24/2017, at 1:07 pm): Good news, I only have one lien and its from her prior attorney. I will attach it to this email. Please let me know how you would like the checks issued and please include your Federal Tax ID Number, Thanks.

Frugé (04/24/2017, at 1:13 pm): As you well know, it isn't a valid lien. Moreover, no mention of same in settlement exchanges. This, [sic] if you insist on including it, there is no deal and we will proceed with trial and Judge Hernandez can decide matter, including whether prior lawyer is entitled to anything.

Bellamy (04/24/2017, at 1:15 pm): Ok we may just need to go to trial on this one. I will pass along your email to my defense counsel and they will be in contact with you from this point on.

There was no further correspondence between the plaintiff's counsel and the claims specialist. On June 14, 2017, the plaintiff filed a "Motion to Enforce Settlement and for Sanctions, Penalties and Attorney Fees." In her motion, the plaintiff argued that 30 days had passed from the date the settlement was reached and the defendants' payment of the settlement funds had not been received.

On July 24, 2017, the trial court held a hearing on the plaintiff's motion to determine if the series of emails constituted an enforceable settlement,[1] and whether the statutory penalties, as provided in La. R.S. 22:1892, should be imposed. After the hearing, the trial court took the matter under advisement. The trial court signed a judgment on August 31, 2017, granting the plaintiff's motion and ordering the defendants to pay the plaintiff the settlement amount of $30,000.00, plus court costs, statutory penalties in the amount of $15,000.00, and attorney fees in the amount of $3,750.00. The trial court provided reasons for

[1] On appeal, counsel for the defendants conceded that there was a valid settlement between the parties.

judgment, finding that based upon the evidence presented to the trial court and consideration of the law, the exchange of emails between the parties' representatives constituted a valid written offer and written acceptance, thereby creating a legally binding obligation for the defendants to perform accordingly. Further, the trial court found the defendants' refusal to perform their obligation to fund the settlement on the basis of an unlawful lien claim was insufficient justification for non-payment of the settlement funds. Finding that the defendants failed to comply with the provisions of La. R.S. 22:1892(A)(2), the trial court ordered the defendants to pay a total of $48,750.00,[2] plus all court costs owed to the plaintiff.

The defendants filed a Motion for New Trial, requesting that the trial court vacate the August 31, 2017 judgment. This motion was denied on September 20, 2017. The defendants filed a suspensive appeal and, out of an abundance of caution, also filed a devolutive appeal in the event that their suspensive appeal was untimely.[3] On appeal, the defendants do not dispute the trial court's finding that a valid settlement was confected between the parties, but argue that the trial court erred in applying La. R.S. 22:1892 rather than La. R.S. 22:1973 in determining the penalty owed by the defendants' insurer for untimely payment of a settlement, and that the trial court abused its discretion in awarding the plaintiff penalties in the amount of $15,000.00 and attorney fees in the amount of $3,750.00.

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[2] The sum of $48,750.00 included the $30,000.00 settlement amount, $15,000.00 (one-half of the settlement amount in penalties), and $3,750.00 in attorney fees.

[3] The defendants' suspensive appeal was fax-filed on October 19, 2017, with the original following on November, 6, 2017, which is past the 7-day deadline to provide the clerk of court with the original document. *See* La. R.S. 13:850(B). The trial court granted both the devolutive and suspensive appeal.

STANDARD OF REVIEW

In this case, the central issue is whether the trial court erred in awarding statutory penalties in accordance with La. R.S. 22:1892 instead of applying La. R.S. 22:1973. Legal questions and interpretation of statutes are reviewed by this court *de novo*. *See* **Barfield v. Bolotte**, 2015-0847 (La. App. 1 Cir. 12/23/15), 185 So.3d 781, 785, writ denied, 2016-0307 (La. 5/13/16), 191 So.3d 1058. However, the decision to assess statutory penalties is a factual determination which calls for review under the manifest error standard. *See* **Joubert v. Broussard**, 2002-911 (La. App. 3 Cir. 12/11/02), 832 So.2d 1182, 1184, writ denied, 2003-0060 (La. 3/21/03), 840 So.2d 552. A trial court's determination that statutory penalties are in order is largely based on factual conclusions that the appellate court reviews under the manifest error standard. *See* **Phillips v. Osmun**, 2007-50 (La. App. 3 Cir. 10/24/07), 967 So.2d 1209, 1215. "Because the decision to assess statutory penalties is a factual determination, in part, we review the trial court's assessment of penalties against [the insurer] under the manifest error standard of review. We acknowledge that since the pertinent statutes subject insurers to penalties, we must construe them strictly." **Id.** *citing* **Joubert**, 832 So.2d at 1184. Similarly, the question of whether a party's actions were arbitrary and capricious is essentially a factual issue and the trial court's finding should not be disturbed on appeal absent manifest error. *See* **Guillory v. Lee**, 2009-0075 (La. 6/26/09), 16 So.3d 1104, 1127.

DISCUSSION

As stated previously, the main issue for this court to determine is whether the trial court erred in awarding penalties to the plaintiff in accordance with La. R.S. 22:1892(A)(2) and (B) instead of La. R.S. 22:1973.[4] Since GICA does not

dispute the trial court's finding that a valid settlement was reached between the parties and that it failed to pay the settlement amount within 30 days, the only question that remains is whether the penalty provision of La. R.S. 22:1892 can be applied to award the plaintiff a penalty of $15,000.00 (one-half of the amount owed to the plaintiff by the insurer), or whether La. R.S. 22:1973 applies and limits the maximum allowable penalty to $5,000.00 pursuant to La. R.S. 22:1973.

It is undisputed that GICA failed to timely pay the settlement of $30,000.00 as agreed upon by the parties. Because the issue of penalties concerns statutory interpretation, our analysis is guided by the well-established rules of statutory construction. In accordance with these rules, the interpretation of any statutory provision starts with the language of the statute itself. **Oubre v. Louisiana Citizens Fair Plan**, 2011-0097 (La. 12/16/11), 79 So.3d 987, 997, cert denied, 567 U.S. 935, 133 S.Ct. 30, 183 L.Ed.2d 677 (2012). When the provision is clear and unambiguous and its application does not lead to absurd consequences, its language must be given effect, and its provisions must be construed so as to give effect to the purpose indicated by a fair interpretation of the language used. La. C.C. art. 9; La. R.S. 1:4; **Id.** Unequivocal provisions are not subject to judicial construction and should be applied by giving words their generally understood meaning. La. C.C. art. 11; *see also* La. R.S. 1:3; **Id.**

Words and phrases must be read in context and construed according to the common and approved usage of the language. La. C.C.P. art. 5053; La. R.S. 1:3. Every word, sentence, or provision in a law is presumed to be intended to serve

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[4] Louisiana Revised Statue 22:1973(C) provides:

> 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. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.

some useful purpose, that some effect is given to each such provision, and that no unnecessary words or provisions were employed. **Guillory v. Pelican Real Estate, Inc.**, 2014-1539 (La. 3/17/15), 165 So.3d 875, 877. As a result, courts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause, or word as meaningless surplusage if a construction giving force to and preserving all words can legitimately be found. **Id.** Additionally, statutes that are penal in nature must be strictly construed. **Reed v. State Farm Mut. Auto. Ins. Co.**, 2003-0107 (La. 10/21/03), 857 So.2d 1012, 1020. Accordingly, we are bound to a strict interpretation of the plain language of the penalty provisions to which we now turn. **Katie Realty, Ltd. v. Louisiana Citizens Prop. Ins. Corp.**, 2012-0588 (La. 10/16/12), 100 So.3d 324, 328.

Louisiana Revised Statute 22:1892(A)(2) states, in pertinent part:

> All insurers issuing any type of contract, other than those specified in R.S. 22:1811, R.S. 22:1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, 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.

The trial court found GICA agreed to settle the plaintiff's claim as a third-party claimant. The agreement was in writing as evidenced by the email exchange between the representatives for the parties. While the transcript of the hearing does not identify exactly what was settled, it is clear from the plaintiff's petition and pre-trial memorandum that part of the damages she sought included damages for medical expenses and property damages. It is undisputed that the defendants failed to pay the settlement amount to the plaintiff within 30 days. Therefore, in accordance with the well-established rule of statutory construction, GICA violated the terms of La. R.S. 22:1892(A)(2) by failing to pay the agreed upon settlement amount, which included property damage and medical expense claims, within 30

days of the settlement agreement. The defendants' failure to pay the plaintiff allows for penalties to be imposed against GICA in accordance with La. R.S. 22:1892(B), which states, in pertinent part:

> (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[.]

The defendants argue that the Louisiana Supreme Court ruling in **Katie Realty** prohibits application of La. R.S. 22:1892(B) to this case. The defendants argue that the trial court in **Katie Realty** only would allow the plaintiff to be awarded penalties in accordance with La. R.S. 22:1973. The defendants' reliance on **Katie Realty** is misplaced. The plaintiff in **Katie Realty** had a claim in accordance with La. R.S. 22:1892(A)(1), not La. R.S. 22:1892(A)(2). The plaintiff in **Katie Realty** had a La. R.S. 22:1892(B) claim for attorney fees and settled that claim. The Louisiana Supreme Court in **Katie Realty** stated "[r]ather than waiting out the litigation process to recover the remedies provided pursuant to La. [R.S.] 22:1892(B) for this misconduct, plaintiff elected to settle its La. [R.S.] 22:1892(B) penalty claim with Citizens. By settling its property insurance claim, plaintiff was precluded from bringing a subsequent action based on that claim[.]" **Katie Realty**, 100 So.3d at 331.

Unlike **Katie Realty**, there is nothing in the record before us which suggests that the plaintiff settled her La. R.S. 22:1892(B) claim with the defendants or that any amount for that claim was included in the $30,000.00 settlement that she

reached with the defendants. The clear language of La. R.S. 22:1892(A)(2) requires the defendant to pay the settlement amount to a third-party claimant within 30 days. The defendants admit that they failed to pay the settlement amount even after they agreed that a settlement had been reached.[5] After a *de novo* review, we find that the trial court was correct in finding that any penalties should be awarded in accordance with La. R.S. 22:1892(B)(1) since the defendants refused and failed to pay the plaintiff the property and medical expense settlement more than 30 days after the settlement agreement was reached.

PENALTIES

It is well-settled that a plaintiff seeking to recover penalties and attorney fees must prove that the insurer knowingly committed actions which were completely unjustified, without reasonable or probable cause or excuse. **Lastrapes v. Progressive Security Insurance Company**, 2010-0051 (La. 11/30/10), 51 So.3d 659, 663. In this case, in order to establish a cause of action for penalties and attorney fees, the plaintiff was required to show that: (1) there was a written agreement or settlement; (2) the defendants failed to tender payment within 30 days of the settlement; and (3) the defendants failure to pay was arbitrary, capricious, or without probable cause. *See* La. R.S. 22:1892(B).

The question of arbitrary and capricious behavior is generally a factual issue, and the trial court's finding should not be disturbed on appeal absent manifest error. **Guillory v. Lee**, 16 So.3d at 1127. In the instant matter, the trial court found that the defendants' refusal to fund the settlement based on an invalid lien was insufficient justification for non-payment under the terms of the agreement. Based on this finding, the trial court awarded the plaintiff damages and penalties

[5] In oral arguments, the defendants' attorney admitted that over two years have passed since a settlement amount was reached, yet the defendants have not paid any of the settlement amount to the plaintiff.

pursuant to La. R.S. 22:1892 in the amount of $15,000.00, for the defendants' failure to pay the settlement amount within 30 days of the agreement. The trial court further awarded the plaintiff attorney fees in the amount of $3,750.00. We find no manifest error in the trial court's finding that the defendants' failure to pay the plaintiff was arbitrary, capricious, and without probable cause.[6] Further, we find no abuse of discretion in the amount of the damage award, which was within the bounds set by La. R.S. 22:1892. Therefore, we affirm the trial court's judgment awarding the plaintiff $30,000.00 for the agreed upon settlement, $15,000.00 in statutory penalties, and $3,750.00 in attorney fees against the defendants.

DECREE

For these reasons, we affirm the judgment of the trial court rendered in favor of the plaintiff, Robyn Grant-Walker, and against the defendants, Elizabeth Phelan, and her insurer, General Insurance Company of America, in the sum of $48,750.00. Appeal costs are assessed to the defendants, Elizabeth Phelan, and her insurer, General Insurance Company of America.

AFFIRMED.

[6] The defendants failed to offer any evidence to show what amount of the settlement was for general damages and what amount was attributed to medical expenses and property damages. Therefore, we are unable to say that the trial court's judgment was manifestly erroneous.

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COURT OF APPEAL

VERSUS

FIRST CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA AND ELIZABETH PHELAN **NUMBER 2018 CA 0094**

WHIPPLE, C.J., concurs. See Stewart v. Livingston Parish School Board, 2007-1881 (La. App. 1st Cir. 5/2/08) 991 So. 2d 469, 474 ("As a general rule, appellate courts will not consider issues that were not raised in the pleadings, were not addressed by the trial court, or are raised for the first time on appeal.").

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WJC by JMM

CRAIN, J., dissents.

The trial court found a valid settlement and that the failure to fund the settlement warranted penalties and attorney's fees under Louisiana Revised Statute 22:1892A(2). This appeal does not challenge the finding of a settlement, but solely challenges the award of penalties and attorney's fees. However, the existence of a settlement alone does not trigger application of Section 22:1892A(2). *See Katie Realty, Ltd. v. Louisiana Citizens Prop. Ins. Corp.*, 12-0588 (La. 10/16/12), 100 So. 3d 324, 331 (holding a written settlement agreement constitutes proof only of the amount due on the settlement of the claim, not the amount due on the insurance claim itself). Without evidence of the elements of the insurance claim, the trial court erred in applying Section 22:1892. *See Atain Specialty Ins. Co. v. Premier Performance Marine, LLC*, 15-1128 (La. App. 1 Cir. 4/8/16), 193 So. 3d 187, 190 (unless properly offered and introduced into evidence, documents appearing in the record do not constitute evidence). I dissent from the majority's decision affirming the award.

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McDONALD, J., dissents.

I respectfully dissent. While I applaud my colleagues for their attempt to rectify a grave injustice, I do not believe their efforts are legally sound. The action of the insurer in this case is reprehensible. The case was settled in April, 2017, and the insurer has yet to make any payment to the plaintiff. There is no question in my mind that this is unreasonable and subjects the insurer to penalties and sanctions. However, as the majority notes, the question is which statute is applicable, La. R.S. 22:1892(A)(2) and (B) or La. R.S. 22:1973. The majority affirms the trial court in finding that the former applies.

The majority seems concerned about using common and approved usage in finding the meaning of words and phrases. However, they ignore the actual wording of the statute. La. R.S. 22:1892(A)(2) requires the insurer to "pay the amount of any third party property damage claim and of any reasonable medical expenses claim." The settlement does not identify the amounts attributable to property damage and medical expenses. Thus, I do not know how the penalty amount can be expressly determined. The majority acknowledges this but ignores it in finding that while "the transcript of the hearing does not identify exactly what was settled, it is clear from the plaintiff's petition and pre-trial memorandum that part of the damages she sought included damages for medical expenses and property damages." I believe it is necessary to make an exact determination of these amounts before the 50% penalty amount can be calculated. The trial court and the majority have applied the 50% to the entire amount of the settlement. This would include general damages for

pain and suffering as well as special damages for property damage and medical expenses. I believe it was error for the trial court and the majority to base the penalty amount on the entire settlement amount rather than only on the amount of the property damage and medical expenses in contradiction of the explicit wording of the statute. I believe this is the same conclusion reached by Judge Crain in his dissent. He notes that "[w]ithout evidence of the elements of the insurance claim, the trial court erred in applying Section 22:1892."

I also disagree with the concurrence that seems to relate to the application or consideration of La. R.S. 22:1973. It suggests that we cannot consider the question of the application of this statute because it was not raised at the trial level. However, GICA filed a motion for new trial that was denied on September 20, 2017. In this motion they clearly raised the issue and suggested that La. R.S. 22:1973 was the proper statute to consider in awarding penalties and attorney fees. Since the issue was squarely before the trial court on the motion for new trial, I believe it is properly before us. I would, therefore, reverse the trial court's award of penalties of $15,000.00 and reduce the penalties to $5,000.00. I would affirm the judgment in all other respects. As discussed by the appellee, I recognize the potential unfairness of this result. It allows an insurer to settle a case and arbitrarily withhold payment with no greater penalty than $5,000.00. This seems highly unreasonable and unjust. However, without evidence of the amounts of medical payments and property damage, I do not believe it is possible to determine the amount of penalties under La. R.S. 22:1892.

For these reasons I respectfully dissent.