


**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA  
COURT OF APPEAL  
FIRST CIRCUIT  
NUMBER 2011 CA 0949**

**KATIE REALTY, LTD. D/B/A THE LANDRY BUILDING  
VERSUS  
LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION**

*VGW by FEW*  


**Judgment Rendered: FEB 10 2012**

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**Appealed from the  
Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne,  
State of Louisiana  
Suit Number 155,990**

**Honorable Randall L. Bethancourt, Presiding**

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Houma, LA**

**Counsel for  
Plaintiff/Appellee  
Katie Realty, Ltd.**

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Insurance Corporation**

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**BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.**

*Guidry, J. dissents and assigns reasons.*

## **WHIPPLE, J.**

Defendant, Louisiana Citizens Property Insurance Corporation ("Citizens") appeals from a judgment of the trial court ordering it to pay damages, statutory penalties, and attorney's fees to plaintiff, Katie Realty, Ltd., doing business as The Landry Building (Katie Realty), based on its failure to timely pay settlement funds. For the following reasons, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

In September 2008, commercial property owned by Katie Realty, located at 1244 Barrow Street in Houma, Louisiana, sustained damage as a result of Hurricane Gustav. At the time, Katie Realty maintained commercial insurance on the property through Citizens. On December 4, 2008, Katie Realty filed suit against Citizens, seeking payment of its unpaid property damage claim plus statutory penalties and attorney's fees. The petition alleged that damage quotes, totaling \$192,423.98, were received by Citizens on October 24, 2008, and Citizens failed to pay the insured's claim despite receiving this satisfactory proof of loss.

Citizens filed various exceptions and defenses and generally denied liability for Katie Realty's claim. On July 16, 2010, the parties submitted the matter to mediation and signed a written settlement agreement.<sup>1</sup> According to this settlement agreement, Citizens was to pay the amount of \$250,000.00, plus court costs up to \$1,000.00, within thirty days "from today," *i.e.* July 16, 2010. However, because payment was not received by August 16, 2010, Katie Realty filed a "Motion and Order to Enforce Settlement and Assess Damages, Penalties, and Attorney's Fees" on August 30, 2010. Pursuant to the motion, the trial court ordered Citizens to "immediately present" the \$250,000.00 in settlement funds to Katie Realty and further ordered Citizens to show cause at a hearing "why

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<sup>1</sup>Prior to the mediation, Citizens sent a fax to counsel for Katie Realty indicating payment would be made for the undisputed amount of \$35,836.09. However, Citizens then issued payment in the amount of \$10,013.95.

appropriate damages, penalties and attorney's fees should not be assessed as allowed by law." Following a hearing on the motion, the trial court rendered judgment on October 19, 2010, ordering Citizens to pay \$125,000.00 as damages and penalties, inclusive of attorney's fees, for failure to timely pay the agreed upon settlement funds. Citizens then filed the instant suspensive appeal.

### ASSIGNMENTS OF ERROR

Citizens requests that the judgment appealed be reviewed for the following alleged errors:

1. The trial court erred in awarding penalties and attorney's fees under [LSA-]R.S. 22:1892 A(2), in that [LSA-]R.S. 22:1892 A(2) governs only third-party claims.
2. The trial court erred in awarding penalties under [LSA-]R.S. 22:1973(C), in that [LSA-] R.S. 22:1973(C) is beyond the discretion of the Court.
3. The trial court erred in awarding attorney's fees under [LSA-] R.S. 22:1973 (C), as § 1973 (C) does not provide for the award of attorney's fees.
4. The trial court's award of \$125,000.00 in penalties and attorney's fees was excessive, considering the circumstances surrounding the delay of payment of the settlement amount.

### DISCUSSION

Citizens' assignments of error essentially question whether the trial court committed legal error in construing and applying LSA-R.S. 22:1892 and 1973.

Louisiana Revised Statute 22:1892 (formerly LSA-R.S. 22:658) provides, in pertinent 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.

(2) 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.**

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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), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), 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. 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. [Emphasis added.]**

Louisiana Revised Statute 22:1973 (formerly LSA-R.S. 22:1220) imposes damages and allows for penalties for an insurer's failure to deal with an insured in good faith, and provides, in pertinent part:

A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to **his insured** a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the **insured** or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

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:

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**(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.**

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(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.

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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. 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. [Emphasis added.]

Citizens contends that the only applicable penalty provision is LSA-R.S. 22:1973, and that LSA-R.S. 22:1892 is not applicable because it provides penalties for failure to timely pay written settlements solely for *third party claimants*. Citizens argues that as such, Katie Realty cannot recover attorney's fees under LSA-R.S. 22:1892 and further that Katie Realty is not entitled to discretionary penalties under 22:1973(C) because Katie Realty failed to show that it sustained damages due to the Citizen's late payment of settlement funds.

In considering Citizens' arguments, we apply the well-established principles regarding statutory interpretation. The appropriate starting point for statutory interpretation is the language itself. Pepper v. Triplet, 2003-0619 (La. 1/21/04), 864 So. 2d 181, 193. When the law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written. Id. Only when the language is subject to more than one reasonable interpretation does the determination of the intent of the provision become necessary. Louisiana Mun. Ass'n v. State, 2000-0374 (La. 10/6/00), 773 So. 2d 663, 667.

While we agree with Citizens' argument that LSA-R.S. 22:1892(A)(2) is inapplicable in that it only applies to third party claims, we find no merit to Citizens' argument that LSA-R.S. 22:1973 is the only applicable penalty provision. Specifically, we find that LSA-R.S. 22:1892(A)(1) is applicable as the settlement agreement constitutes "proof of loss" under this subdivision. As such, Citizens may be liable for penalties, including attorney's fees, under LSA-R.S. 22:1892(B), if its conduct was arbitrary, capricious, or without probable cause.

Given the plain language of LSA-R.S. 22:1892, referring to the insurer's obligation to pay "any insured" upon receipt of satisfactory proof of loss, we reject Citizens' argument that LSA-R.S. 22:1892 is wholly inapplicable herein. Instead, we find that the interpretation of LSA-R.S. 22:1892 urged by Citizens would lead to an absurd result. Namely, if Katie Realty's remedy was limited to only those penalties provided for in LSA-R.S. 22:1973, then Citizens would owe greater penalties to a third party claimant when it failed to timely pay a settlement agreement, than it would owe to its own insured. In enacting LSA-R.S. 1973 and 1892, we do not believe our legislature intended to provide greater protections to third party claimants than to an insurance company's own insured[s]. Moreover, if we were to accept Citizens' reasoning, there would be no reason for the legislature to mention payments to insured[s] under LSA-R.S. 22:1892(A)(1) and would render this provision superfluous. Louisiana Revised Statutes 22:1892(A)(1) applies to an insurer's failure to pay "any insured" within thirty days after receipt of satisfactory proof of loss. A signed settlement agreement between an insured and insurer clearly constitutes satisfactory "proof of loss" under the generally prevailing meaning of the term. Furthermore, we find that this Court's interpretation of LSA-R.S. 22:1892(A)(1) does not render LSA-R.S. 22:1973, specifically LSA-R.S. 22:1973(B)(2), meaningless. Penalties are imposed under LSA-R.S. 22:1973 if the insurer acts "knowingly," whereas, LSA-R.S. 22:1892 requires a higher burden of proof before penalties can be imposed, *i.e.*, a showing that the insurer's actions were "arbitrary, capricious, or without probable cause."<sup>2</sup>

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<sup>2</sup>In Calogero v. Safeway Ins. Company of Louisiana, 99-1625 (La. 1/19/00), 753 So. 2d 170, the Supreme Court addressed the close relationship between conduct prohibited in the former LSA-R.S. 22:1220 (now LSA-R.S. 22:1973) and LSA-R.S. 22:658 (now LSA-R.S. 22:1892). Calogero is somewhat distinguishable from the present matter as it did not pertain to an insurer's failure to pay a settlement agreement. Nevertheless, the Supreme Court did note that where penalties are greater under one of the statutes, then the statute with the greater penalties supersedes the other. Calogero, 753 So. 2d at 174.

In the present matter, it is undisputed that Citizens did not pay the settlement agreement within thirty days as required by LSA-R.S. 22:1973, 1892, and the terms of the settlement agreement. Accordingly, we must address whether Citizens' actions were arbitrary and capricious, thereby justifying the trial court's imposition of penalties, including attorney's fees, under LSA-R.S. 22:1892. The determination that an insurer's handling of a claim is arbitrary and capricious is a factual finding which may not be disturbed unless manifestly erroneous. An insurer's actions are arbitrary and capricious when its willful refusal of a claim is not based on a good faith defense, or is unreasonable or without probable cause. Calogero, 753 So. 2d at 173, (citing Louisiana Maintenance Servs., Inc. v. Certain Underwriters at Lloyd's of London, 616 So. 2d 1250, 1253 (La.1993) and Darby v. Safeco Ins. Co., 545 So. 2d 1022, 1029 (La.1989)).

In rendering its decision, the trial court noted: (1.) there was no evidence in the record that Citizens requested more time to pay; (2.) there was no evidence offered as to why the money was paid late; and (3.) Katie Realty's attorney had to remind Citizens to pay the settlement money. The record reflects that counsel for Katie Realty emailed counsel for Citizens on August 11, 2010, asking him to make sure that funds were received by the close of business on August 16, 2010 or his client would insist on penalties as allowed by law. On August 16, 2010 (thirty days after the settlement agreement was executed), counsel for Citizens contacted opposing counsel requesting a completed W-9 form. There was no explanation given as to why the request for a W-9 was delayed and why the check would be delayed. Notably, the duly-executed W-9 was returned to Citizens on the same date. On August 17, 2010, counsel for Citizens left a phone message for Katie Realty's counsel, indicating a paralegal would be contacting him regarding signing settlement documents. It was not until eight days later, on August 25, 2010, that Citizens contacted opposing counsel, via email, attaching a proposed receipt and

release and copy of settlement checks. Plaintiff's counsel requested changes to the receipt and release and an agreed upon copy was mailed and emailed on August 27, 2010. On August 28, 2010, Citizens sent an email, stating the check went out "yesterday afternoon." The check was received on August 31, 2010, i.e., forty-five days after the written settlement agreement. The envelope was post-marked August 30, 2010, not August 27, 2010 as indicated in Citizens' email. The foregoing facts support the trial court's finding that Citizens was arbitrary and capricious in failing to timely pay the insured's claim, as reflected in the settlement agreement, despite having satisfactory proof of loss.

Accordingly, we find the trial court did not commit legal error in concluding that penalties and attorney's fees under LSA-R.S. 22:1892 were warranted herein. Furthermore, the trial court's decision to award \$150,000.00 in penalties and attorney's fees was not manifestly erroneous.

#### **CONCLUSION**

Based on the above and foregoing reasons, the October 19, 2010 judgment of the trial court is hereby affirmed. All costs are assessed against defendant-appellant, Louisiana Citizens Property Insurance Corporation.

**AFFIRMED.**



STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0949

KATIE REALTY, LTD. D/B/A THE LANDRY BUILDING

VERSUS

LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION

**GUIDRY, J., dissents in part and assigns reasons.**

 **GUIDRY, J., dissenting in part.**

I disagree with the majority's interpretation La. R.S. 22:1892(A)(1) to hold that a settlement agreement constitutes "proof of loss" under that provisions of that statute. While clearly the facts demonstrate that Citizens was guilty of violating La. R.S. 22:1892(A)(1) by failing to timely process Katie Realty's claim upon satisfactory proof of loss, rather than waiting out the litigation process to recover the remedies provided pursuant to La. R.S. 22:1892(B), Katie Realty elected to settle its Section 1892(A)(1) claim with Citizens. By settling its claim, Katie Realty was precluded from bringing a subsequent action based on that claim, which was thereby compromised. See La. C.C. art. 3080; see also La. C.C. arts. 3071 and 3078. By improperly interpreting La. R.S. 22:1892(A)(1) to encompass the settlement of Katie Realty's claim against Citizens for failure to timely pay after receipt of satisfactory proofs of loss, the majority essentially renounces the validity of the settlement and makes the adoption of La. R.S. 22:1973 superfluous.

The legislative history of La. R.S. 22:1892, formerly La. R.S. 22:658, illustrates that the penalty provisions of the La. R.S. 1892(B) were not intended to apply to the settlement of an insured's claim. When first enacted by 1958 La. Acts, No. 125, La. R.S. 22:658 simply provided in pertinent part:

All insurers issuing any type of contract other than [life, health, and accident] shall pay the amount of any claim due any insured...within sixty days after receipt of satisfactory proofs of loss from the insured, employee or any party in interest. Failure to make such payment within sixty days after receipt of such proofs and demand therefor, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty....

Several years later, by 1985 La. Acts, No. 778, §1, the statute was rewritten and expanded to include additional provisions separated into lettered paragraphs. The penalty provisions of the prior version of the statute essentially remained the same, but were separated from the articulation of an insurer's duty and inserted in paragraph (B) of the rewritten statute.<sup>1</sup> Louisiana Revised Statute 22:658 was again amended the following year by 1986 La. Acts, No. 132, §1, but the more pertinent amendment of La. R.S. 22:658 was made by 1989 La. Acts, No. 638, §1, wherein the Louisiana Legislature amended the statute to provide in paragraph (B)(1)<sup>2</sup>: "Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor and after written agreement **or settlement with a first or third party claimant**, when such failure is found to be

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<sup>1</sup> The pertinent portions of the amendment changed the La. R.S. 22:658 to read:

A. All insurers issuing any type of contract, other than [life, health, and accident], shall pay the amount of any claim due any insured, including any employee under Chapter 10 of Title 23 of Revised Statutes of 1950, within sixty days after receipt of satisfactory proofs of loss from the insured, employee or any party in interest.

B. Failure to make such payment within sixty days after receipt of such proofs and demand therefor, 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....

<sup>2</sup> Also in 1989 La. Acts, No. 638, §1, the legislature amended paragraph (A) of La. R.S. 22:658, to provide, in pertinent part:

(1) All insurers issuing any type of contract, other than [life, health, accident, or workers' compensation], 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.

(2) All insurers issuing any type of contract, other than [life, health, accident, or workers' compensation], 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.

....

arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty...." (Emphasis added.)

A year later, by 1990 La. Acts, No. 262, §1, the legislature deleted the language "and after written agreement or settlement with a first or third party claimant" and replaced it with "as provided in R.S. 22:658(A)(1), or within thirty days after written agreement or settlement as provided in R.S. 22:658(A)(2)."<sup>3</sup> Of equal interest, that same year by 1990 La. Acts, No. 308, §1, the legislature added La. R.S. 22:1220 (renumbered La. R.S. 22:1973 by 2008 La. Acts, No. 415, §1, effective January 1, 2009), expressly providing, in pertinent part:

A. An insurer including but not limited to a foreign line and surplus line insurer **owes to his insured** a duty of good faith and fair dealing. **The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both.** Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

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:

....

**(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.** [Emphasis added.]

Hence, in 1990, the legislature purposely removed the provisions in La. R.S. 22:658 (now La. R.S. 22:1892) related to the penalty imposed on an insurer for failing to timely pay an *insured's* settlement and placed them in the newly enacted La. R.S. 22:1220 (now La. R.S. 22:1973). Thus, the legislative development of La. R.S. 22:1892 and 1973 clearly supports what is illustrated in a plain reading of the statutes that a settlement with an insured does not fall within the ambit of La. R.S. 22:1892. See also Sultana Corporation v. Jewelers Mutual Insurance Company, 03-0360, p. 9 (La. 12/3/03), 860 So. 2d 1112, 1119 (wherein the Louisiana

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<sup>3</sup> Louisiana Revised Statute 22:658(A)(1) and (A)(2) correlate to the existing La. R.S. 22:1892(A)(1) and (A)(2), respectively, pursuant to the renumbering of La. R.S. 22:658 by 2008 La. Acts, No. 415, §1, effective January 1, 2009.

Supreme Court held that an insured does not have the burden of proving that an insurer arbitrarily and capriciously withheld payment of settlement funds for more than thirty days, observing "[t]he Legislature did not require such proof with regard to the timely payment of settlement funds.").

Without question, Citizens added insult to injury by failing to timely pay the settlement in accordance with La. R.S. 22:1973(B)(2). I further find that Citizens knowingly violated La. R.S. 22:1973(B)(2), which finding I believe is implicit in the majority's determination that Citizens acted arbitrarily and capriciously, and therefore should be held liable for the penalties imposed under La. R.S. 22:1973(C). However, I believe the majority grossly errs in construing that La. R.S. 22:1892 applies under the circumstances presented herein, and for these reasons, I respectfully dissent.