

Jaw
JTP by JW

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NUMBER 2010 CA 1481

ST. TAMMANY PARISH HOSPITAL

VERSUS

TRINITY MARINE PRODUCTS, INC.
AND ACE AMERICAN INSURANCE COMPANY

WHR
TMT
JMM

Judgment Rendered: FEB 16 2012

On Appeal from the
Office of Workers' Compensation, District 6,
State of Louisiana
Docket Number 09-09730

Elizabeth Warren,
Workers' Compensation Judge Presiding

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Plaintiff—Appellant
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Trinity Marine Products, Inc. and
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BEFORE: CARTER, C.J., WHIPPLE, PARRO, KUHN, GUIDRY,
PETTIGREW, GAIDRY, McDONALD, McCLENDON,
HUGHES, WELCH, AND HIGGINBOTHAM, JJ.

*Kuhn, J., concurs for the reasons assigned by Chief Judge Carter, by
Carter C.J. concurs in the results with
reasons*

Hughes, Jr., concurs for the reasons assigned by Carter, C.J.

*McClendon J. concurs in the result for the reasons assigned by Judge Carter in
his concurrence.
Gaidry J. dissents and assigns reasons*

*Whipple J. dissents and assigns reasons
Parro, J., concurs in the result for the reasons set forth in Judge Carter's concurring opinion.*

WELCH, J.

In this workers' compensation case, St. Tammany Parish Hospital ("the hospital"), a health care provider, appeals a judgment in favor of defendants Trinity Marine Products, Inc. ("Trinity") and Ace American Insurance Company ("Ace"), Trinity's workers' compensation insurer (collectively referred to as "the employer"), sustaining a peremptory exception raising the objection of prescription as to the hospital's claim for penalties and attorney fees. We reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

The underlying facts of this case are undisputed. On July 18, 2008, the hospital provided medical treatment to Adam Bonin, an injured employee of Trinity. On September 24, 2008, the employer issued a check to the hospital for the payment of those services; however, the payment was less than the amount billed by the hospital. Therefore, on November 18, 2009, the hospital filed a disputed claim for compensation due to the "[i]mproper and/or late payment of medical bills" by the employer. Additionally, the hospital asserted a claim against the employer for penalties and attorney fees pursuant to La. R.S. 23:1201(F)(4).¹

The employer filed a peremptory exception raising the objection of prescription as to the claim for penalties and attorney fees.² The employer claimed that under this court's opinion in **Craig v. Bantek West, Inc.**, 2003-2757 (La. App. 1st Cir. 9/17/04), 885 So.2d 1234, writ denied, 2004-2995 (La. 3/18/05), 896

¹ A health care provider's claim against the employer for underpayment of compensation benefits falls within the exclusive jurisdiction of the Office of Workers' Compensation. See **Baton Rouge General Medical Center v. Liberty Mut. Ins. Co.**, 2009-0316 (La. App. 1st Cir. 9/11/09), 21 So.3d 990, 992, writ denied, 2009-2197 (La. 12/18/09), 23 So.3d 946; **Millervillage Chiropractic Center v. East Baton Rouge Parish School Bd.**, 2008-1350 (La. App. 1st Cir. 12/23/08), 4 So.3d 846, 848. Moreover, the hospital specifically alleged that it was "not a PPO related claim." See **Broussard Physical Therapy v. Family Dollar Stores, Inc.**, 2008-1013 (La. 12/2/08), 5 So.3d 812, 817.

² The employer did not challenge the timeliness of the claim for the improper payment (or underpayment) of the medical bills.

So.2d 1004, the one-year liberative prescription period set forth in La. C.C. art. 3492 for delictual actions was applicable to all claims for penalties and attorney fees under La. R.S. 23:1201(F). Since the hospital's disputed claim for compensation was filed on November 18, 2009—more than one year after the underpayment was made on September 24, 2008—the employer claimed that the hospital's claim for penalties and attorney fees had prescribed. The workers' compensation judge ("WCJ") agreed with the employer, and, relying on **Craig**, sustained the objection of prescription as to the hospital's claim for penalties and attorney fees, even though the hospital's underlying claim for the payment of its fee (which was subject to a three-year liberative prescription period under La. R.S. 23:1209(C)) had not prescribed. After the peremptory exception raising the objection of prescription was sustained, the employer tendered to the hospital the amount of the disputed underpayment (\$28.54), plus interest thereon (\$2.32). Thereafter, the WCJ dismissed the hospital's claim, and the hospital appealed.

On appeal, the hospital contends that the WCJ erred in determining that its claim for penalties and attorney fees had prescribed. The hospital argues that this court's decision in **Craig** is distinguishable from the present case because **Craig** did not involve a claim by a health care provider for the payment or underpayment of its fee and did not discuss or interpret La. R.S. 23:1201(F)(4), which is the basis of the claim for penalties and attorney fees. Additionally, the hospital claims that regardless of whether the applicable liberative prescription period for claims for penalties and attorney fees is one year or three years, under the plain language of La. R.S. 23:1201(F)(4), a health care provider's claim for penalties and attorney fees does not accrue until after the "health care provider prevails on a claim for payment of his fee." The hospital further argues that since it had not yet prevailed on the claim for the payment of its fee, its claim for penalties and attorney fees had

not accrued and could not be prescribed.

STANDARD OF REVIEW

Generally, the factual findings of a trial court (or of a WCJ) on a peremptory exception raising the objection of prescription, such as the date on which prescription begins to run, is reviewed on appeal under the manifest error/clearly wrong standard of review. See **Gilmore v. Whited**, 2008-1808 (La. App. 1st Cir. 3/31/09), 9 So.3d 296, 299; **Dean v. Southmark Const.**, 2003-1051 (La. 7/6/04), 879 So.2d 112, 117. However, in this case, the issue of whether the hospital's claim for penalties and attorney fees under La. R.S. 23:1201(F)(4) was prescribed involves the proper application and interpretation of statutes. The proper application and interpretation of a statute is a question of law. **Gilmore**, 9 So.3d at 299; **Cleco Evangeline, L.L.C. v. Louisiana Tax Com'n**, 2001-2162 (La. 4/3/02), 813 So.2d 351, 353. Questions of law are reviewed *de novo*, with the judgment rendered on the record, without deference to the legal conclusions of the tribunal below. **Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc.**, 2006-0582 (La. 11/29/06), 943 So.2d 1037, 1045. Therefore, on review, the issue before this court is the legal correctness of the WCJ's determination that the hospital's claim for penalties and attorney fees pursuant to La. R.S. 23:1201(F)(4) had prescribed.

LAW AND DISCUSSION

Generally, the prescriptive period applicable to claims for workers' compensation benefits is set forth in La. R.S. 23:1209.³ However, this statute

³ Louisiana Revised Statutes 23:1209 provides:

A. (1) In case of personal injury, including death resulting therefrom, all claims for payments shall be forever barred unless within one year after the accident or death the parties have agreed upon the payments to be made under this Chapter, or unless within one year after the accident a formal claim has been filed as provided in Subsection B of this Section and in this Chapter.

does not reference the applicable prescriptive period with regard to claims for penalties and attorney fees arising out of the failure to pay workers' compensation benefits pursuant to La. R.S. 23:1201(F).

Louisiana Revised Statutes 23:1201(F) provides that the failure to pay compensation or medical benefits as required in La. R.S. 23:1201 shall result in the assessment of a penalty, together with reasonable attorney fees for each disputed claim. Under La. R.S. 23:1201(F)(1), "[s]uch penalty and attorney fees shall be assessed against either the employer or the insurer, depending upon fault." The health care provider's claim for penalties and attorney fees is set forth in La. R.S.

(2) Where such payments have been made in any case, the limitation shall not take effect until the expiration of one year from the time of making the last payment, except that in cases of benefits payable pursuant to R.S. 23:1221(3) this limitation shall not take effect until three years from the time of making the last payment of benefits pursuant to R.S. 23:1221(1), (2), (3), or (4).

(3) When the injury does not result at the time of or develop immediately after the accident, the limitation shall not take effect until expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the proceedings have been begun within two years from the date of the accident.

B. Any claim may be filed with the director, office of workers' compensation, by delivery or by mail addressed to the office of workers' compensation. The filing of such claims shall be deemed timely when the claim is mailed on or before the prescription date of the claim. If the claim is received by mail on the first legal day following the expiration of the due date, there shall be a rebuttable presumption that the claim was timely filed. In all cases where the presumption does not apply, the timeliness of the mailing shall be shown only by an official United States postmark or by official receipt or certificate from the United States Postal Service made at the time of mailing which indicates the date thereof.

C. All claims for medical benefits payable pursuant to R.S. 23:1203 shall be forever barred unless within one year after the accident or death the parties have agreed upon the payments to be made under this Chapter, or unless within one year after the accident a formal claim has been filed with the office as provided in this Chapter. Where such payments have been made in any case, this limitation shall not take effect until the expiration of three years from the time of making the last payment of medical benefits.

D. When a petition for compensation has been initiated as provided in R.S. 23:1310.3, unless the claimant shall in good faith request a hearing and final determination thereon within five years from the date the petition is initiated, that claim shall be barred as the basis of any claim for compensation under the Worker's Compensation Act and shall be dismissed by the office for want of prosecution, which action shall operate as a final adjudication of the right to claim compensation thereunder.

23:1201(F)(4), and provides:

In the event that the health care provider prevails on a claim for payment of his fee, penalties as provided in this Section and reasonable attorney fees based upon actual hours worked may be awarded and paid directly to the health care provider. This Subsection shall not be construed to provide for recovery of more than one penalty or attorney fee.

In **Craig**, a worker who was injured on December 14, 1999, filed a disputed claim for compensation on April 17, 2003, alleging that he was entitled to multiple penalties under La. R.S. 23:1201(F)(1) for his employer's alleged misconduct or violations of workers' compensation statutes that occurred on December 14, 1999, September 24, 2000, April 6, 2001, and February 6, 2003. **Craig**, 885 So.2d at 1235. However, the injured workers' disputed claim for compensation did not make a claim for any underlying compensation benefits. The employer filed a peremptory exception raising the objection of prescription, claiming that its alleged conduct giving rise to the injured worker's claims for penalties had occurred more than one year prior to the filing of the action. **Craig**, 885 So.2d at 1235. The WCJ sustained the objection as to the claims for penalties and attorney fees due to the alleged misconduct on December 14, 1999, September 24, 2000, and April 6, 2001,⁴ and the injured worker appealed. **Craig**, 885 So.2d at 1236.

On appeal, this court determined that neither La. R.S. 23:1209 nor La. R.S. 23:1201(F)(1) sets forth when a worker's claim for attorney fees and penalties arises or accrues and does not reference a specific prescriptive period for such claims, and reasoned that the injured worker's claim for penalties and attorney fees necessitated an inquiry into fault and a determination of whether the non-paying party's actions negated good faith and just cause. **Craig**, 885 So.2d at 1237 and

⁴ The WCJ overruled the objection of prescription as to the claim for penalties and attorney fees due to the employer's alleged misconduct on February 6, 2003. However, this claim was subsequently dismissed on a motion for summary judgment, which was affirmed by this court in a separate appeal, **Craig v. Bantek West, Inc.**, 2004-0229 (La. App. 1st Cir. 9/17/04), 885 So.2d 1241.

1240-41. This court then determined that the injured worker's fault-based claim for penalties and attorney fees was delictual in nature, and thus, the one-year liberative prescription period for delictual actions set forth in La. C.C. art. 3492 was applicable. **Craig**, 885 So.2d at 1237. Since the injured worker's disputed claim for compensation was filed on April 17, 2003, more than one year from the date that the employer's alleged misconduct occurred (*i.e.*, December 14, 1999, September 24, 2000, and April 6, 2001), this court found no error in the WCJ's determination that the injured worker's claim for penalties and attorney fees had prescribed. **Craig**, 885 So.2d at 1241.

We find that **Craig** is distinguishable from the instant case. In **Craig**, this court was dealing with the issue of prescription on a *worker's* (or *employee's*) claim for penalties and attorney fees under La. R.S. 23:1201(F)(1), *which did not accompany an original or underlying claim for benefits*. In this case, the issue with which we are faced concerns a *health care provider's* claim for penalties and attorney fees under La. R.S. 23:1201(F)(4), *which was filed contemporaneously with an underlying claim for the underpayment of its fee*.

The applicable statute herein, La. R.S. 23:1201(F)(4), is substantially different from the statute at issue in **Craig**, La. R.S. 23:1201(F)(1), which provides that penalties and attorney fees *shall* be assessed if the employer or its insurer fails to provide a compensation payment or medical benefit to the employee or fails to consent to the employee's request to select a treating physician, with the penalty assessed and attorney fee assessed "depending upon fault." As such, in **Craig**, this court correctly reasoned that the injured worker's claim for penalties and attorney fees was fault-based and necessitated an inquiry into fault and a determination of whether the non-paying party's actions negated good faith and just cause. However, in this case, the statute at issue, La. R.S. 23:1201(F)(4), deals solely with

claims for penalties and attorney fees by health care providers due to an employer's (or insurer's) failure to pay the health care provider's fee, and provides that the health care provider *may* be awarded penalties and attorney fees "[i]n the event that [it] prevails on a claim for payment of [its] fee." Thus, this court's holding in **Craig**—that the one-year prescriptive period set forth in La. C.C. art. 3492 is applicable to an injured worker's claim for penalties and attorney fees under La. R.S. 23:1201(F)(1) that does not accompany an original or underlying claim for benefits—is not applicable to the resolution of the issue before us this case.

Thus, we must first determine when the health care provider's claim for penalties and attorney fees accrues and the applicable prescriptive period for such claims. It is well settled that prescription cannot run against a cause of action or claim until it has accrued. See Reggio v. E.T.I., 2007-1433 (La. 12/12/08), 15 So.3d 951, 957. The hospital's claim is based on La. R.S. 23:1201(F)(4), which provides for an award of penalties and attorney fees to a health care provider in the event that it prevails on a claim for the payment of its fee. But it is the employer's (or the insurer's) failure to provide the payment of the medical benefit within the time period required for the payment of that medical benefit under La. R.S. 23:1201 that triggers the health care provider's entitlement to a penalty. See La. R.S. 23:1201(F). Accordingly, we must conclude this is when the health care provider's claim for penalties and attorney fees arises or accrues.

With regard to the applicable prescriptive period, in a series of cases factually similar to the case before us, our brethren in the Fourth Circuit Court of Appeal have determined that when a health care provider makes a claim for penalties and attorney fees under La. R.S. 23:1201(F)(4), which accompanies a claim for the payment of his fee (medical benefits), if the underlying claim has not

prescribed, then neither has the claim for penalties and attorney fees. See Touro Infirmary v. Fisk Corp., 2010-0105 (La. App. 4th Cir. 7/28/10), 44 So.3d 874, 876; Touro Infirmary v. Wm. B. Reily & Co., Inc., 2010-0074 (La. App. 4th Cir. 7/28/10), 44 So.3d 867, 869; Touro Infirmary v. Emeril's Homebase, L.L.C., 2010-0104 (La. App. 4th Cir. 7/28/10), 44 So.3d 871, 873; Touro Infirmary (Goodwin) v. Silocaf of New Orleans, 2010-0072 (La. App. 4th Cir. 7/28/10), 44 So.3d 862, 864; Touro Infirmary v. Lowes New Orleans Hotel Corp., 2010-0103 (La. App. 4th Cir. 7/28/10), 44 So.3d 869, 871; and Tulane University Hosp. & Clinic v. Lockheed Martin Corp., 2011-0179 (La. App. 4th Cir. 6/29/11), 70 So.3d 988, 991.⁵ But cf. Central Louisiana Ambulatory Surgical Center, Inc. v. Payless Shoesource, Inc., 2010-0086 (La. App. 3rd Cir. 7/28/10) 46 So.3d 689, 697, abrogated on other grounds by Agilus Health v. Accor Lodging North America, 2010-0800 (La. 11/30/10), 52 So.3d 68; Musculoskeletal Institute of Louisiana, APMC v. McDonald's Corp., 45,629 (La. App. 2nd Cir. 9/22/10), 48 So.3d 359, 366, abrogated on other grounds by Agilus Health v. Accor Lodging North America, 52 So.3d 68 (both providing that when a health care provider's claim for penalties and attorney fees accompanies an underlying claim for benefits, if the underlying claim for benefits has not prescribed, then neither has the claim for penalties and attorney fees, but concluding that the health care provider's claim for penalties and attorney fees does not arise or accrue until the health care

⁵ See also Rave v. Wampold Companies, 2006-0978 (La. App. 3rd Cir. 12/6/06), 944 So.2d 847, 855; Trahan v. City of Crowley, 2007-0266 (La. App. 3rd Cir. 10/3/07), 967 So.2d 557, 560, writs denied, 2007-2462, 2007-2741 (La. 2/15/08), 976 So.2d 185 and 187; and Farley v. City of New Orleans, 2011-0301 (La. App. 4th Cir. 5/20/11), 66 So.3d 1115, 1118, writ denied, 2011-1265 (La. 9/23/11), 69 So.3d 1163 (each providing that an *employee's* claim for penalties and attorney fees is not prescribed, when such claims are accompanied by an underlying claim for benefits that has not prescribed). But cf. Seidl v. Zatarains, Inc., 2005-0780 (La. App. 5th Cir. 3/28/06), 927 So.2d 557, 561 (concluding that an *employee's* claim for penalties and attorney fees had prescribed based on this court's holding in Craig, even though the claim for penalties and attorney fees accompanied an underlying claim for benefits that had not prescribed).

provider's underlying claim for payment is adjudicated in its favor).

We agree with the rationale of the Fourth Circuit—if a health care provider makes a claim for penalties and attorney fees under La. R.S. 23:1201(F)(4), which accompanies a claim for the payment of his fee, if the underlying claim has not prescribed, then neither has the claim for penalties and attorney fees. Thus, the applicable prescriptive period for a health care provider's claim for penalties and attorney fees is the same prescriptive period that is applicable to its underlying claim for medical benefits. In accord **St. Tammany Parish Hosp. v. Ace American Ins. Co.**, 2010-1480 (La. App. 1st Cir. 6/16/11), ___ So.3d ___.⁶

As previously set forth, the applicable prescriptive period for claims for medical benefits is set forth in La. R.S. 23:1209(C), which provides:

All claims for medical benefits payable pursuant to R.S. 23:1203 shall be forever barred unless within one year after the accident or death the parties have agreed upon the payments to be made under this Chapter, or unless within one year after the accident a formal claim has been filed with the office as provided in this Chapter. Where such payments have been made in any case, this limitation shall not take effect until the expiration of three years from the time of making the last payment of medical benefits.

Herein, the employer had made a payment of medical benefits to the hospital; however, it was not the full amount billed by the hospital. Accordingly, under La. R.S. 23:1209(C), the hospital's claim for the underpayment of medical benefits would not prescribe "until the expiration of three years from the time of making the last payment of medical benefits." The uncontradicted evidence established that the employer's "last payment" was made to the hospital on September 24, 2008. Thus, the three-year prescriptive period provided under La. R.S. 23:1209(C) for the underlying claim for medical payments and the claim for

⁶ An application for rehearing in **St. Tammany Parish Hosp.** was denied *en banc* on this date. That application for rehearing was considered in conjunction with our decision herein, **St. Tammany Parish Hosp. v. Trinity Marine Products, Inc.**, 2010-1481 (La. App. 1st Cir. 2/16/12), ___ So.3d ___.

penalties and attorney fees under La. R.S. 23:1201(F)(4) began to accrue when the employer made the underpayment on September 24, 2008. The hospital filed its claim for the underpayment of its fee and for penalties and attorney fees on November 18, 2009, approximately one year and one month after the date of the last payment, and well within the three-year prescriptive period.

Since the hospital's claim for penalties and attorney fees accompanied its underlying or original claim for the underpayment of its fee and since its underlying claim for the payment of its fee had not prescribed, the hospital's claim for penalties and attorney fees also had not prescribed. Accordingly, the WCJ erred in sustaining the employer's peremptory exception raising the objection of prescription as to the claim for penalties and attorney fees, and its judgment in this regard is reversed.

CONCLUSION

The judgment of the WCJ sustaining the peremptory exception raising the objection of prescription filed by Trinity Marine Products, Inc. and Ace American Insurance Company as to St. Tammany Parish Hospital's claim for penalties and attorney fees and dismissing those claims is reversed. This matter is remanded to the Officer of Workers' Compensation for further proceedings.

All costs of this appeal are assessed to Trinity Marine Products, Inc. and Ace American Insurance Company.

REVERSED AND REMANDED.

ST. TAMMANY PARISH HOSPITAL NUMBER 2010 CA 1481
VERSUS FIRST CIRCUIT
TRINITY MARINE COURT OF APPEAL
PRODUCTS, INC. AND ACE STATE OF LOUISIANA
AMERICAN INSURANCE CO.

 **CARTER, C.J., concurring in the result**

I respectfully agree with the majority's decision to reverse the trial court's judgment, but disagree with the majority's rationale for reaching that conclusion.

The claim for penalties and attorney fees is delictual in nature, and since Louisiana Revised Statutes section 23:1201F does not reference a specific prescriptive period for claims for penalties and attorney fees, the one-year prescriptive period for delictual actions set forth in Louisiana Civil Code article 3492 should apply.

Louisiana Civil Code article 3492 provides that the prescriptive period commences the date the injury or damage is sustained. However, it is well settled that prescription cannot run against a cause of action that has not accrued, or while the cause of action cannot be exercised. *See Reggio v. E.T.I.*, 07-1433 (La. 12/12/08), 15 So. 3d 951, 957; *Bailey v. Khoury*, 04-0620 (La. 1/20/05), 891 So. 2d 1268, 1275; *Wilkinson v. Wilkinson*, 323 So. 2d 120, 125 (La. 1975). Louisiana Revised Statutes section 23:1201F(4), which provides the health care provider with its cause of action, specifies that the health care provider may only be awarded penalties and attorney fees "[i]n the event that [it] prevails on a claim for payment of his fee." (Emphasis added.) Under the plain language of Louisiana Revised Statutes section 23:1201F(4), the health care provider's claim for penalties and

attorney fees does not accrue until the health care provider has prevailed on its claim for payment of its fee.

In this case, the hospital's cause of action for penalties and attorney fees had not yet accrued when it filed suit, and the prescriptive period had not yet begun to run. For this reason, the WCJ erred in sustaining the peremptory exception raising the objection of prescription.¹

¹ The employer has advanced the argument that this result allows the health care provider greater rights to penalties and attorney fees than are afforded to an injured worker. However, as set forth in the majority opinion, upon appropriate proof by the injured worker, penalties and attorney fees are *mandatory*, whereas the health care provider's claim for penalties and attorney fees is *discretionary*. See La. Rev. Stat. Ann. §§ 23:1201F(1) and 23:1201F(4). Thus, I disagree that the health care provider is afforded greater rights than the injured worker.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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ST. TAMMANY PARISH HOSPITAL

VERSUS

TRINITY MARINE PRODUCTS, INC. AND ACE AMERICAN INSURANCE
COMPANY

GUIDRY, J., dissents and assigns reasons.



GUIDRY, J., dissenting.

I respectfully disagree with the majority's determination that the prescriptive period applicable to a health care provider's claim for penalties and attorney's fees under La. R.S. 23:1201(F)(4) is the same as the prescriptive period applicable to the provider's underlying claim for medical benefits.

In Craig v. Bantek West, Inc., 03-2757 (La. App. 1st Cir. 9/17/04), 885 So. 2d 1234, writ denied, 04-2995 (La. 3/18/05), 896 So. 2d 1004, this Court held that a claim for penalties and attorney's fees under La. R.S. 23:1201(F) is delictual in nature and therefore, the one-year prescriptive period set forth in La. C.C. art. 3492 applies to such claim. From my review of the instant case, I do not find any basis to deviate from this court's previous holding. Accordingly, I respectfully dissent from the majority's opinion.

STATE OF LOUISIANA

COURT OF APPEAL


FIRST CIRCUIT

NO. 2010 CA 1481

ST. TAMMANY PARISH HOSPITAL

VERSUS

TRINITY MARINE PRODUCTS, INC.
AND ACE AMERICAN INSURANCE COMPANY

 GAIDRY, J., dissents with reasons.

I respectfully dissent with the opinion of this case in the following respects:

The sole contested issue on this appeal is whether the prescriptive period is one or three years on a Title 23 claim for penalties and attorney's fees relating to a health care provider's claim of nonpayment or underpayment for services rendered. While La.R.S. 23:1201(F)(1) allows penalties and attorney's fees to be assessed against an employer or insurer, "depending on fault," prescription relating to claims for nonpayment is found in La.R.S. 23:1209. This statute, however, does not consider penalties and attorney's fees; it only considers the payment of the benefits themselves. For this reason we should apply the holding of *Craig v. Bantek West, Inc.*, 2003-2757 (La. App. 1 Cir. 9/17/04), 885 So.2d 1234, *writ denied*, 2004-2995 (La. 3/18/05), 896 So.2d 1004, to the facts of this case and require that a claim for penalties and attorney's fees be filed within one year of the nonpayment.

The statutes providing for penalties and attorney fees are penal in nature and must be strictly construed. Penalties should be enforced only in those instances in which facts clearly negate good faith and just cause in connection with refusal of allowance of compensation. *Id.*, at p. 5. While 23:1201(F)(1) states attorneys fees and penalties can be awarded “based on fault,” 23:1201(F)(2) goes on to say that penalties and attorney’s fees cannot be awarded “if the claim is reasonably controverted or if such nonpayment results from conditions over which the employer or insurer had no control.” The reasoning of *Craig* goes hand in hand with the statute. Delictual fault is the intentional or negligent causing of damages. *Touro Infirmary v. Sizeler Architects*, 2004-0634, p. 7 (La. App. 4 Cir. 3/23/05), 900 So.2d 200, at 204. A claim for penalties and attorney fees necessarily implies wrongful conduct for inaction and involves an inquiry into fault as provided in La. R.S. 23:1201(F)(1). *Craig v. Bantek West, Inc.*, 2003-2757, p. 5 (La. App. 1 Cir. 9/17/04), 885 So.2d 1234, 1237. Therefore, when St. Tammany Parish Hospital (hereinafter “the Hospital”) filed its claim for penalties and attorney’s fees against the defendants, it had essentially made a claim that the defendants acted in bad faith by paying what the Hospital alleges is less than the true amount owed. The inquiry, then, is not simply about what is owed; rather, the claim raises the inquiry into whether the defendants’ actions constitute bad faith.

“Delictual actions are subject to a liberative prescription period of one year. This prescription commences to run from the day the injury or damage is sustained.” La.C.C. Article 3492. Footnote (b) of that Article states that the one year prescription applies to all delictual actions, and it further explains that “the notion of delictual liability includes: intentional misconduct, negligence, abuse of right, and liability without negligence.”

Going back to La.R.S. 23:1201(F), the actions which can trigger the claim for penalties and attorney's fees are "[f]ailure to provide payment... or failure to consent to the employee's request a treating physician..." In this case, failure to provide payment is the more applicable of the two. Such a failure to pay, if done in bad faith, could indeed be cast as intentional misconduct or negligence.

The majority distinguishes *Craig* on the basis that the plaintiff was the employee, whereas the plaintiff in this case is the health care provider. That factual difference, however, has no bearing on the applicability of Art. 3492 to a delictual action. No matter the parties, no matter the factual circumstances, as long as a delictual claim is made, the prescriptive period of Art. 3492 will apply. The majority is essentially granting to a health care provider a right greater than that of the employee: a three year prescriptive period to file a claim for penalties and attorney's fees. That result is neither logical nor equitable.

On the point of equity, when no rule for a particular situation can be derived from legislation, courts are bound to proceed according to the notion of equity, which means to decide on the side of justice and reason. La.C.C. Article 4. In this case, the defendants reached an agreement with the Hospital and tendered the amount of the payment in dispute. How is it equitable, then, that the Hospital can accept what it considered adequate compensation from the employer, but three years later be allowed to sue the employer for the unpaid benefits *and* the penalties and attorney's fees? If the defendants did indeed underpay in bad faith, I believe that would have been readily apparent from the time the underpayment was first tendered and a one year prescriptive period would have been sufficient for the Hospital. A three year prescriptive period for penalties and attorney's fees would not

benefit the Hospital in any way, but it would definitely harm the defendants' ability to defend against the claim, as it becomes more difficult to preserve evidence and witness testimony over such a period of time. One of the most fundamental purposes of a prescriptive period is to protect the defendant from stale claims and from the loss or non-preservation of relevant proof. *Findley v. City of Baton Rouge*, 570 So.2d 1168, 1170 (La. 1990).

La.R.S. 23:1209 does not spell out a prescriptive period for the filing of claims for penalties and attorney's fees, but it is not necessary. La.C.C. Article 3492 answers the question at the center of this dispute. It is neither necessary for this court to "re-invent the wheel," so to speak, when *Craig* has already addressed this issue. I believe the proper prescriptive period for filing claims for penalties and attorney's fees under the provisions of Title 23 is one year, and I respectfully disagree with the majority opinion.