UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JUSTIN and AUDREY BENIT, et al.	*	**CIVIL ACTION: 07-6738**
	*	
	*	**JUDGE G. THOMAS PORTEOUS, JR.**
VERSUS	*	
	*	**SECTION "T"**
STATE FARM FIRE AND CASUALTY	*	
COMPANY	*	**MAGISTRATE 5**
	*	

** *

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' RULE 60 MOTION FOR RELIEF FROM JUDGMENT

MAY IT PLEASE THE COURT, in opposition to plaintiffs' Motion for Relief From Judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure, Defendant, State Farm Fire & Casualty Company ("State Farm"), respectfully avers as follows:

I. INTRODUCTION

Plaintiffs' suit sought damages and penalties from State Farm for its alleged failure to provide coverage and payment for property damage allegedly sustained as a result of levee breaches and overtopping related to Hurricane Katrina. State Farm filed a motion to dismiss pursuant to Rule 12(b)(6). The Court granted State Farm's Motion to Dismiss and entered a final judgment dismissing the plaintiffs' case in its entirety.

II. PROCEDURAL HISTORY

The entire basis for plaintiffs' Motion for Relief from Judgment is based on misrepresentations of fact made by plaintiffs to the court during the hearing on the Motion to Dismiss and a misstatement of the procedural history of this matter. As will be shown below in the accurate recitation of the procedural history:

- Plaintiffs filed suit against State Farm on August 21, 2007 in the 34th Judicial District Court, Parish of St. Bernard.
- State Farm timely removed the suit to this Court on October 11, 2007.
- On November 30, 2007, State Farm filed a Rule 12 (b)(6) Motion to Dismiss all of the plaintiffs' Hurricane Katrina claims (Rec. Doc. 5). The Motion was set for hearing with oral argument on January 16, 2008.
- On January 3, 2008, State Farm filed on an Answer and Defenses to the plaintiffs' Original Petition for Damages ("Original Petition") which was immediately served upon Mr. Barasch via email through the Court's CM/ECF system. (Rec. Doc. 10).
- Five days later, on January 8, 2008, plaintiffs filed an Opposition to State Farm's Motion to Dismiss (Rec. Doc. 11) and *attempted* to file an Amended Complaint (Rec. Doc. 12). In their Opposition to State Farm's Motion to Dismiss, the plaintiffs' lone argument was that in light of their attempted filing of an Amended Complaint, State Farm's Motion to Dismiss was moot and the hearing should be removed from the Court's calendar. *See* Rec. Doc. 11. Notably, in their Opposition, the plaintiffs did not address a single substantive argument made in State Farm's Motion to Dismiss. In his Unsworn Statement, Mr. Barasch states that when he filed the Opposition and

attempted to file the Amended Complaint he had "overlooked the fact that State Farm had filed an Answer three business days (5 days) earlier."

- Upon the attempted filing of an Amended Complaint by Mr. Barasch, the Clerk of Court sent the parties a Notice of Deficient Filling on January 9, 2008 advising the plaintiffs that Leave of Court is required in order for plaintiffs to file an Amended Complaint and directing plaintiffs to the Local Rules of this Court governing electronic filings. The Clerk advised the plaintiffs that they were required to remedy the deficiency by January 16, 2008 or the document could be stricken without further notice.
- On January 15, 2008 (*one day* prior to the curative deadline and *one day* prior to the hearing on State Farm's Motion to Dismiss), the plaintiffs *attempted* to filed a "Supplemental Memorandum in Opposition to State Farm's Motion to Dismiss Pursuant to Rule 12(b)(6)." ("Supplemental Opposition" hereinafter) Thereafter, the Clerk sent the parties Notice of the plaintiffs' deficient filing of the Supplemental Memorandum in Opposition and advised plaintiffs that Leave of Court was required to file the Supplemental Opposition and that they were required to properly file a Motion for Leave of Court with their proposed Supplemental Opposition by January 24, 2008.
- The next day, January 16, 2008, this matter was heard by Your Honor with oral argument. During oral argument, plaintiffs' counsel, Mr. Centola, misrepresented to the Court that the plaintiffs had field a Motion to Amend their Complaint that was pending before the magistrate judge. Based on that misrepresentation, Your Honor granted State Farm's Motion to Dismiss as to all claims made under Louisiana's

Valued Policy Law (VPL) but deferred ruling as to all other alleged claims pending the outcome of the alleged Motion to Amend. Your Honor explained to Mr. Centola that should no Amended Complaint be properly filed in the record, the plaintiffs' Original Petition would be dismissed in its entirety. State Farm was unaware of any motion pending before the magistrate judge, but did not respond to Mr. Centola's statements because State Farm could not be sure whether something had been filed with or transferred to the magistrate judge without its knowledge.

- However, immediately after the hearing, the undersigned attorneys investigated Mr. Centola's allegation and determined that, as expected, there was nothing pending before the magistrate judge.
- Presumably, this Court also determined that there was no such motion pending before the magistrate judge, as it granted State Farm's Motion to Dismiss all of the plaintiffs' claims, with prejudice, on January 22, 2008. *See* Rec. Docs. 19-21. The Clerk of Court transmitted the Order of Dismissal and the Court's written judgment to the parties via email on January 24, 2008.
- No activity occurred in this matter until February 20, 2008.
- On February 20, 2008, plaintiffs filed a Motion to Enroll Maureen Blackburn Jennings as additional counsel of record.
- The next day, Thursday, February 21, 2008, the plaintiffs filed an Ex Parte Motion to Expedite a Motion for Extension of Time for Filing Notice of Appeal, along with the Motion for Extension of Time for Filing Notice of Appeal and the accompanying memorandum in support. These pleadings were filed two days before the appeal deadline.

- Your Honor Ordered that if the plaintiffs were to file a Rule 60 motion, they must do so expeditiously so as not to delay the filing deadline for the Notice of Appeal. *See* Minute Entry (Rec. Doc. 29-30).
- Despite this courts Order, no activity occurred in the case until March 13, 2008, at which time the plaintiffs filed their Rule 60 Motion for Relief from Judgment and a Motion for Expedited Hearing. (Rec. Doc. 31-34). To comply with Your Honor's Order, the plaintiffs were required to file their Rule 60 motion and set the motion to be heard by March 26, 2008. However, the plaintiffs did not file the Rule 60 Motion with sufficient time to properly notice the hearing within the time constraints provided by the local Rules. Accordingly, plaintiffs requested additional assistance from the court and moved for expedited hearing on the Rule 60 motion. This Court granted the plaintiffs' Motion To Expedite and set the instant matter for hearing on March 24th.

III. LAW AND ARGUMENT

The plaintiffs argue that they are entitled to relief from judgment based on Rule 60(a), which provides a means for the court to correct a clerical error or mistake, or in the alternative, pursuant to Rule 60(b)(1), for alleged mistake, inadvertence, surprise, or excusable neglect, or pursuant to the "catch-all" provision of Rule 60(b)(6). However, as will be shown below, the plaintiffs are not entitled to relief from this Court's judgment dismissing their case for failure to state a claim.

A. The Plaintiffs Are Not Entitled To Relief From Judgment Pursuant to Rule 60(a) – They Seek A Substantive Remedy

Rule 60(a) provides in pertinent part that, "The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record…." Fed. R. Civ. P.60(a). The U.S. Fifth Circuit has repeatedly held that,

"Rule 60(a) provides a **specific** and **very limited** type of relief. *In re Transtexas Gas Corp.* 303 F.3d 571, 581 (C.A.5 (Tex.),2002), citing In re West Texas Marketing Corp., 12 F.3d 497, 503 (5th Cir.1994); *Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co.* (*In re Am. Precision Vibrator Co.*), 863 F.2d 428, 429-30 (5th Cir.1989) (emphasis added). "Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *Id.*, citing *In re West Texas Marketing Corp* 12 F.3d at 503 (quoting *Dura-Wood Treating Co., Div. of Roy O. Martin Lumber Co. v. Century Forest Ind., Inc*., 694 F.2d 112, 114 (5th Cir.1982) (internal citations and quotations omitted). The Fifth Circuit has defined the pertinent test for determining whether an alleged error may be corrected under Rule 60(a) as:

> whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule. As long as the intentions of the parties are clearly defined and all the court need do is employ the judicial eraser to obliterate a mechanical or mathematical mistake, the modification will be allowed. If, on the other hand, cerebration or research into the law or planetary excursions into facts is required, Rule 60(a) will not be available to salvage the government's blunders. Let it be clearly understood that Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a case. It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a). *In Re West Texas Marketing Corp.*, 12 F.3d at 504-505.

In the instant case, relief under Rule 60(a) would be inappropriate. There is no error, oversight or omission in need of clarification. To the contrary, the plaintiffs argue that this Court's ruling and it's reasoning behind its ruling was substantively wrong and request that the Court change its mind. The Plaintiffs speciously assert that the Court made a clerical error by

dismissing plaintiffs' claims on January 22 because, according to the plaintiffs, the Court intended to allow the plaintiffs to obtain a ruling from the magistrate judge on a fictional Motion for Leave to Amend their complaint *before* ruling on State Farm's Motion to Dismiss. However, the core of the plaintiffs' argument is based upon a misrepresentation made by the plaintiffs to this Court. There was no Motion for Leave to Amend their Complaint pending before the magistrate. In fact, there was never a Motion for Leave to Amend their complaint filed.

The Court's intent is accurately and correctly expressed in the judgment dismissing the plaintiffs' case. Alternation of the judgment, as requested by plaintiffs, would ignore the Court's intent at the time the judgment was entered and reflect a reversal of the court's reasoning.

1. **Plaintiffs' Misrepresentations To The Court**

a. There Was No Motion For Leave To Amend Complaint Pending Before The Magistrate

Plaintiffs currently allege that they believed they had until January 24, 2008 to amend their Complaint based on the Clerk's deficiency notice issued relative to a "Supplemental Opposition."[1] Nevertheless, they represented to this Court at the hearing on State Farm's Motion to Dismiss there was a Motion For Leave To Amend pending before the magistrate judge. In reality, there was nothing before the magistrate. The plaintiffs manufactured this fact at the hearing on the Motion to Dismiss. Once the Court determined that there was no pending Motion For Leave to wait on, the Court properly ruled on the Motion to Dismiss and addressed the merits of the only Complaint that had been filed.

[1] State Farm questions the suggestion that plaintiffs ever intended to file a Motion for Leave to File an Amended Complaint on January 24th. The Clerk issued e-notice of this Court's rulings at 11:49 a.m. (Harrington) and 2:58 (Benit) on January 24th and the plaintiffs had filed nothing further at that time.

b. The Plaintiffs Seek The Substantive Right To File A *Second* Proposed Amended Complaint.

Contrary to their assertions in their Motion, the plaintiffs do not solely request that they be given the opportunity to properly file their original "First Amended Complaint." This is a misrepresentation. Instead, plaintiffs seek to file a wholly new and unrelated "Motion for Leave to File First Amended Complaint" and supporting memorandum, as well as a **wholly new proposed amended complaint entitled, "Second Amended Complaint for Damages**" **that is substantively different from the proposed first amended complaint**. *See* Rec. Docs. 31-4 to 31-6. These are new pleadings which neither this Court nor State Farm had ever seen prior to the plaintiffs instant Rule 60 Motion. The plaintiffs do not ask to be put back in the same position they were in before the court ruled, they now want the right to file a different amended complaint with allegations that are distinct from those in the version of the amended complaint they claim they attempted to file previously.

2. The Plaintiffs Did Not Have Until January 24th To File An Amended Complaint

The plaintiffs argue that the Clerk of Court gave them until January 24th to correct their deficient filing of their "Motion for Leave to Amend" their Complaint. Yet the plaintiffs never filed a Motion for Leave to Amend. Instead they attempted, improperly and without leave of court, to file a Supplemental Opposition which the clerk deemed deficient because the plaintiffs failed to seek leave of court. The clerk gave the plaintiffs until January 24th to properly seek leave to file a "Supplemental Opposition," not the purported fictional Motion for Leave to Amend their Complaint.

Thus the plaintiffs have no choice but to now argue that their Supplemental Opposition should be considered their Motion for Leave to Amend their Complaint and that they had until

January 24th to cure the deficient filing of this pleading. Yet, the plaintiffs' Supplemental Opposition clearly states that "…*as part of their opposition to State Farm's Motion* plaintiffs hereby request leave to file their first amended complaint and that the First Amended Complaint previously filed be deemed filed as of the date of the court's order." Despite the clear language of Rule 15 of the Federal Rules of Civil Procedure, and the Clerk's January 9, 2008 notice directing plaintiffs to the local rule requiring leave of court to file the Amended Complaint and instructing the plaintiffs that they must properly "re-fil[e] the document in its entirety," the plaintiffs did not file a "motion" seeking leave. Rather, one day prior to the hearing on State Farm's 12(b)(6), the plaintiffs filed a "Supplemental Memorandum in Opposition to State Farm's 12(b)(6)" and did *this* without seeking leave of court as required. The Supplemental Opposition did not attach a proposed Amended Complaint nor a proposed Order – *it was not a Motion for Leave.* Again, the Court did not make a clerical error by ruling before January 24th as the plaintiffs never filed a Motion for Leave asking the court allow an amended complaint. The clerk advised the plaintiffs of this requirement on January 9th so the plaintiffs cannot now validly state their Supplemental Memorandum in Opposition should be morphed into a Motion for Leave.

3. Plaintiffs' Request For Relief is Substantive in Nature and Alteration as Requested Would Contravene This Court's Intent At the Time of Entry of Judgment

As mentioned above, Rule 60(a) provides the court with a means to correct a clerical error in a judgment so that the judgment accurately reflects the ruling the judge intended at the time the judgment was entered. At the January 24, 2008 hearing on State Farm's Motion to Dismiss, Your Honor granted State Farm's motion with respect to the claims asserted under Louisiana's Valued Policy Law (VPL) and further stated it would defer ruling on any alleged

additional claims for coverage pending the magistrate judge's ruling. The following dialogue took place:

> THE COURT: I am going to grant it as to the VPL aspect, the motion to dismiss clearly is granted as to that. However, with respect to this now allegation that's potentially sitting out there, I am going to defer a ruling until such time as to see what the magistrate does. If the magistrate allows the amendment, I'll still deal with it in my order. If the magistrate denies that amendment and it's there as it was, in that situation, Mr. Centola, you would be unfortunately dead in the water. So when is the magistrate taking this up?
>
> MR. STRAUSS: I don't know, Judge.
>
> MR. CENTOLA: Don't know, your Honor.
>
> THE COURT: I'll check with the magistrate's office. But your motion with respect to the VPL is clearly granted. (*See* Ex. "C" to plaintiffs' Motion).

Thus, Your Honor deferred ruling on the remaining alleged claims because the plaintiffs misrepresented to it that there was a Motion for Leave to Amend the Complaint pending before the magistrate judge.

On January 22, 2008, this Court entered final judgment dismissing all of the plaintiffs' claims. On this date, the Court was aware that, contrary to plaintiffs' assertions at the January 16, 2008 hearing, no Motion for Leave to Amend had ever been filed in this case and no Amended Complaint was ever properly filed. With no Amended Complaint, the Court, as promised at the January 16, 2008 hearing, dismissed all of the plaintiffs claims pursuant to Rule 12(b)(6) because the plaintiffs' Petition fails to state a claim upon which relief can be granted. In fact, the Court issued written reasons with its Order in the *Benit* case and specifically addressed the fact that the plaintiffs failed to properly file an Amended Complaint and therefore it would not be considered. Thus, the Court's intentions were clearly expressed in its judgment and therefore any alteration of the judgment is improper.

The plaintiffs admit in their Memorandum in Support that the relief they seek affects the substantive rights of the parties when they ask this Court to "vacate its January 24, 2008 ruling and restore the parties and record nunc pro tunc to the position they were in on January 22, 2008, which would reinstate the plaintiffs' right to seek leave to amend." This request for relief is inherently substantive. The plaintiffs request that the court give them something that it already intentionally and expressly denied.

Further, the plaintiffs do not ask to be in the same position they were in on January 22 - they now want to file a "Second Amended Complaint" that is distinct from the First Amended Complaint they aver that they intended to file. Granting the plaintiffs yet another additional opportunity to file a **new** Second Amended Complaint would substantially alter the substance of this Court's judgment – it would grant the plaintiffs a right to which they already had and lost.

B. The Plaintiffs Are Not Entitled To Relief From Judgment Pursuant to Rule 60(b) For Any Alleged Mistake, Inadvertence, Surprise, or Excusable Neglect

As an alternative to their requested relief pursuant to Rule 60(a), plaintiffs seek relief under 60(b)(1) and (6) which provide for relief upon a showing of mistake, inadvertence, surprise or excusable neglect and for any other reason justifying relief. Fed. R. Civ. P.60(b). In determining whether a moving party has established "excusable neglect" under Rule 60(b)(1) or manifest injustice under Rule 60(b)(6), the district court enjoys considerable discretion. *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir.1981) (citing *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir.1977)). However, both this Court and the U.S. Fifth Circuit have held that this discretion is not without limits. *Id.*; *Southern Tires Services, Inc. v. Virtual Point Development*, 2004 WL 1770120 (E.D.La. 2004); *Lavespere v. Niagra Mach. & Tool Works, Inc*., 910 F.2d 167, 173 (5th Cir.1990). A district court may only grant relief under Rule 60(b) upon "a sufficient showing of unusual or unique circumstances." *Pryor v. U.S. Postal Service*, 769 F.2d

281, 286 (5th Cir.1985). The movant bears the burden of demonstrating the exceptional circumstances which warrant relief. See *Lavespere*, 910 F.2d at 173-74. **The gross carelessness or ignorance of counsel is not sufficient to warrant reopening the case**. *Id*. at 287.

In exercising its discretion, a trial court must consider several factors in determining whether Rule 60(b) relief is proper: (1) final judgments should not be lightly disturbed; (2) a Rule 60(b) motion is not to be used as a substitute for appeal; (3) the rule should be construed liberally to achieve substantial justice, (4) whether the motion was made within a reasonable time, (5) if the judgment was one in default or a dismissal in which there was no consideration of the merits of the case--the interest in hearing the case on the merits outweighs the interest in the finality of judgments-and there is merit in the movants claim or defense; (6) whether the movant had a fair opportunity to present his claim or defense, if the judgment was rendered after a trial on the merits; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factor that is relevant to the justice of the judgment under attack, bearing in mind that final judgments serves a useful purpose to the courts, society and the litigants. Crutcher v. Aetna Life Ins. Co., 746 F.2d 1076, 1082 (5th Cir.1984) (citing United States v. Gould, 301 F.2d 353, 355-56 (5th Cir.1962)).

1. The Plaintiffs Have Failed to Demonstrate entitlement to Relief Under Rule 60(b)(1) Based On Mistake, Inadvertence, Surprise or Excusable Neglect – They Have Not Acted In Good Faith

The U.S. Fifth Circuit has held that, "While Rule 60(b)(1) allows relief for mistake, inadvertence ... or excusable neglect, these terms are not wholly open-ended. Gross carelessness is not enough. Ignorance of the rules is not enough, nor is ignorance of the law." *Pryor*, 769 F.2d at 287, citing 11 Wright & Miller, Federal Practice and Procedure § 2858 at 170 (footnotes omitted); see also *Murray v. Serena Software, Inc*., 212 Fed.Appx. 349, 351 (C.A.5 (Tex.),2007)

(holding that relief under this Rule is not appropriate when a litigant exhibits a disregard for the judicial process or repeated indifference to court orders and denying plaintiff relief, noting that plaintiff's "**recurring non-compliance reflects a pronounced disrespect for the court's processes and orders**."); *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350 (5th Cir. (Tex.) 1993) (holding that **ignorance of local rules or misconstruction of their applicability does not merit relief** under Rule 60(b)); *United States v. O'Neil,* 709 F.2d 361, 373-375 (5th Cir.1983) (holding that denial of 60(b)(1) motion not abuse of discretion where movant misconstrued court's use of word "sever" and failed to timely appeal; movant had ample opportunity to resolve confusion or ambiguity before time for appeal lapsed).

Furthermore, "…it has long been held, particularly in civil litigation, that the mistakes of counsel, who is the legal agent of the client, are chargeable to the client no matter how unfair this on occasion may seem. Clients are chargeable with their attorney's mistakes." *Pryor*, 769 F.2d at 287 (internal citation omitted); see also, e.g., *Southern Tires Services, Inc.*, 2004 WL 1770120, *2 (E.D.La. 2004), see, e.g., *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 1390 & n. 10, 8 L.Ed.2d 734 (1962). In fact, a court would abuse its discretion if it were to reopen a case under Rule 60(b)(1) when the reason asserted as justifying relief is one attributable solely to counsel's carelessness with or misapprehension of the law or the applicable rules of court. *Knapp v. Dow Corning Corp.*, 941 F.2d 1336, 1338 (5th Cir.1991).

Since the inception of this lawsuit, plaintiffs' counsel has demonstrated blatant disregard for the Federal Rules of Civil Procedure, the Local Rules of this Court and the directions of the Clerk of Court. This inexcusable neglect was first exemplified on January 8, 2008 (eight (8) days prior to the hearing on State Farm's Motion to Dismiss and the day upon which plaintiffs' Opposition to said Motion to Dismiss was due) when plaintiffs' counsel filed an opposition to

State Farm's Motion to Dismiss and attempted to file an Amended Complaint. The plaintiffs' Opposition comprised of a single erroneous argument which can be summed up as follows: "in light of the plaintiffs' [attempted] filing of an Amended Complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure, State Farm's Motion to Dismiss is moot and the hearing should be removed from the Court's calendar." *See* Rec. Doc. 11. The Opposition did not address a single substantive argument made in State Farm's Motion to Dismiss. On the contrary, plaintiffs relied upon a defective procedural argument which was completely inapplicable. Counsel's excuse for this was that when he filed the Opposition and attempted to file the Amended Complaint he had "overlooked the fact that State Farm had filed an Answer three business days (5 days) earlier." *See* Unworn Declaration of Stuart Thomas Barasch, Rec Doc. 31-8. The Clerk sent counsel notice of his deficient filing which clearly identified the deficient document as the "Amended Complaint" and advised him that he had until January 16, 2008 to cure the deficiency and re-file the pleading in its entirety. Nevertheless, plaintiffs never sought or obtained leave of court to file an Amended Complaint and never cured the deficient filing.

Plaintiffs now argue that one day prior to the date the deficiency had to be cured and one day before the hearing on State Farm's Motion to Dismiss, they allegedly attempted to cure the deficiency. The January 15th filing was a "Supplemental Memorandum in Opposition to State Farm's Motion to Dismiss Pursuant to Rule 12(b)(6)," which, as mentioned above, requires leave of court to file. Again, plaintiffs' counsel failed to obtain leave of court to file the pleading. The Clerk notified the parties of the deficiency on January 16, 2008 and advised plaintiffs' counsel that he would have to cure the deficiency and re-file the pleading in its entirety by January 24, 2008. Thus, in essence, State Farm's Motion to Dismiss was unopposed due to the inexcusable neglect of plaintiffs' counsel.

Then, at the January 16th hearing on State Farm's Motion to Dismiss, plaintiffs' counsel misrepresented to this Court that an imaginary Motion for Leave to Amend was pending before the magistrate judge, when in reality, no Motion for Leave to Amend has ever been filed. January 24, 2008 came and went and the plaintiffs did not attempt to cure their deficient filing. Indeed, the Clerk issued notice of its ruling late in the day on the 24th yet nothing was on filed from the plaintiffs. Nonetheless, plaintiffs now inconsistently argue (1) that there was a fictional Motion for Leave to Amend pending before the magistrate judge and (2) that they believed the Clerk's notice gave them until January 24th to filed an Amended Complaint.

In addition, it is absurd to suggest that it is "excusable" for Mr. Barasch, a lawyer of many years of experience, to believe that submitting a paragraph in an Opposition Memorandum would equate to a Motion for Leave to File an Amended Complaint. Commonsense dictates that any "motion" filed with the court seeking specific relief requires a proposed Order. Moreover, the unambiguous Local Rules of Court, the Federal Rules of Civil Procedure and particularly the very specific direction from the Clerk of Court in its January 9th deficiency notice provide clear instruction and note that a Motion For Leave to file a pleading also requires that the proposed pleading be attached to the motion.

Furthermore, after Your Honor dismissed plaintiffs' case, plaintiffs' counsel waited until **twenty-eight (28) days** from entry of the judgment (February 21, 2008) to file a Motion for Extension of Time to File Notice of Appeal. *See* Rec. Doc. 24. Because the deadline for the appeal was only days later, the plaintiffs also filed a Motion for Expedited Hearing. *See* Rec. Doc. 23. Your Honor granted plaintiffs' motions and ordered that if the plaintiffs were to file a Rule 60 motion, they must do so expeditiously so as not to delay the filing deadline for the Notice of Appeal. *See* Rec. Doc. 29-30. Nevertheless, the plaintiffs continued their pattern of

conduct by disregarding this court's Order and filed the instant Rule 60 Motion late, thus requiring expedited consideration of the instant motion.

The plaintiffs were afforded ample opportunity by the Court to cure the numerous unjustifiable errors and omissions made throughout this litigation and have continued to ignore well-established practice and procedure. These errors and omissions are neither excusable nor justified. As previously mentioned, "ignorance of local rules or misconstruction of their applicability does not merit relief." *Edward H. Bohlin Co., Inc.*, 6 F.3d at 357. Moreover, while clients are chargeable with their attorney's mistakes plaintiffs have not lost their remedy as they may have other remedies against their counsel. *Pryor*, 769 F.2d at 289 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 1390, n. 10, 8 L.Ed.2d 734 (1962)). The plaintiffs also retain their right to appeal. Accordingly, plaintiffs have failed to demonstrate a justification for relief from judgment.

2. **State Farm Will Be Prejudiced and the Plaintiffs Have No Likelihood of Success**

State Farm obtained a substantive and dispositive judgment dismissing plaintiffs' claims in their entirety. Plaintiffs now request that ruling be set aside so that they can attempt (again) to file an amended complaint. This is inherently prejudicial to State Farm and there is no likelihood that the plaintiffs' Amended Complaint states a claim upon which relief can be granted.

Allowing plaintiffs to file the Amended Complaint which they attempted to file on January 8, 2008 would be futile. Another division of this court has already held that **identical Amended Complaints filed by plaintiffs' counsel in two other Hurricane Katrina cases fail to state a valid cause of action against State Farm**. *See* Exhibit A, Judge Wilkinson's Orders Re Plaintiffs' Motions for Leave to File Amended Complaints. As previously argued, the First Amended Complaint does not cure the plaintiffs' problem – it still asserts claims for flood

damage caused by levee breaches and overtopping of canals – losses not covered by the State Farm policies at issue.

In addition to being futile, it would be prejudicial to State Farm to be required to draft more motions based on identical circumstances to those already filed. State Farm previously addressed the merits and substance of the plaintiffs' attempted First Amended Complaint in its Reply to Plaintiffs' Opposition to its Motion to Dismiss and argued these points in open court at the January 16th hearing. Requiring State Farm to re-litigate this issue would be highly prejudicial, cause an increase in the cost of litigation and be a waste of judicial resources. The court obviously was not persuaded that the attempted First Amended Complaint would cure the deficiencies of the pleading.

Moreover, according to the plaintiffs' instant motion, plaintiffs propose that they be granted the opportunity to file a **third** complaint (Second Amended Complaint) and a Motion for Leave to File the Second Amended Complaint with a memorandum in support thereof. These are new pleadings that were clearly only recently drafted. Allowing the plaintiffs to file a third complaint, which State Farm has never seen – after State Farm has answered the Original Petition and substantively addressed both the original petition and the First Amended Complaint, neither of which state a claim against State Farm – would be highly prejudicial.

3. Plaintiffs Are Not Entitled To Relief Under Rule 60(b)(6)

One leading commenter has explained that Rule 60(b)(6), "require[s] a very special showing by the moving party." 11 Wright & Miller, Federal Practice and Procedure § 2857. That same commentator noted that the standard under the Rule 60(b)(6) has a more demanding standard of relief than Rule 60(b)(1)-(5). *Id.* As previously explained, Rule 60(b) relief will be afforded only in "unique circumstances," and the "extraordinary relief afforded by Rule 60(b)

requires that the moving party make a showing of unusual or unique circumstances justifying such relief." *Liberty Mut. Ins. Co. v. Gunderson*, No. 04-2405, 2006 WL 3533134, at *1 (W.D. La. Dec. 7, 2006). The plaintiffs have failed to allege any unusual or unique circumstances justifying such relief. Instead they merely show continuous disregard for clear distinctions from the local rules and the clerk of court.

C. The Plaintiffs Cannot Revive The VPL Claims

Even if the Court is inclined to grant the plaintiffs' motion, the Court's initial ruling relative to the VPL claims must stand. The plaintiffs do not ask the Court to put the parties back in the position they were in on the day of the hearing when the court dismissed the VPL claims. Rather they seek to reverse the clock to January 22 when the court reached the remaining non-VPL claims. (Plaintiffs' Motion at p. 13)

Further, at the hearing, the plaintiffs admitted that even with their proposed amended complaint they would have no VPL claims:

> MR. STRAUSS: I understand the dilemma. I think in this case because we have to assume that the facts pled are true, the facts pled are in the first complaint, and in the second complaint that these homes suffered substantial damage from flood, from levee breaches, all of them. Taking that to be true, it's nonsense to then come to court and attempt to amend the petition –
>
> THE COURT: The amendment didn't strike that allegation.
>
> MR. STRAUSS: The amendment didn't strike the allegation, Judge, so you still have this allegation that these are flooded houses and now you're saying wind alone, just wind blowing caused a total loss. And that's so nonsensical I think that you can address it at this point.
>
> I recognize what the plaintiffs are attempting to do, but it doesn't cure the defect in the pleading. I think the plaintiffs have an obligation to plead facts that they have some basis to support. And at this juncture because they recognize and acknowledge these really are flood claims that you can reach this issue now.

> You certainly can reach the VPL issue without any concerns because there is no doubt that to get the VPL you have to show wind alone caused the total loss.
>
> THE COURT: I tend to agree with that. And what's your position on that, Mr. Centola, on the VPL issue?
>
> MR. CENTOLA: That's correct, your Honor.
>
> THE COURT: So the VPL I could actually grant at this point in time?
>
> **……..**
>
> THE COURT: I am going to grant it as to the VPL aspect, the motion to dismiss clearly is granted as to that. (*See* Ex. "C" to Plaintiffs Motion).

III. CONCLUSION

For the foregoing reasons, State Farm respectfully requests that this Court deny plaintiffs' Motion for Relief From Judgment Pursuant to Rule 60.

Respectfully submitted,

/s/ David A. Strauss
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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2008, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing to: Stuart T. Barasch.

/s/ David A. Strauss

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: KATRINA CANAL BREACHES CONSOLIDATED LITIGATION

CIVIL ACTION

NO. 05-4182

PERTAINS TO: Anderson, C.A. No. 07-6737

JUDGE DUVAL
MAG. WILKINSON

ORDER ON MOTION

APPEARANCES: None (on the briefs)

MOTION: Plaintiff's Motion for Leave to File Plaintiff's First Amended Complaint, Record Doc. No. 11051

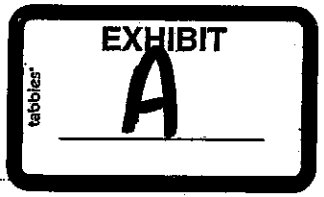
ORDERED:

XXX: GRANTED IN PART AND DENIED IN PART. The motion is granted in part insofar as plaintiffs seek to amend their complaint to clarify that wind and/or wind-driven rain (i.e., covered risks under plaintiffs' State Farm policy) proximately caused damage to plaintiffs' property beyond the amounts paid by State Farm. The motion is denied insofar as the proposed amendment asserts claims that flood damage to their property is covered by plaintiffs' insurance policy with State Farm or that plaintiffs have some sort of claim under Louisiana's Valued Policy Law, since these kinds of claims are futile under recent Fifth Circuit decisions. In re Katrina Canal Breaches Consolidated Litigation, 495 F.3d 191 (5th Cir. 2007) (flood exclusion); Chauvin v. State Farm Fire &Cas. Co., 450 F. Supp. 2d 660 (E.D. La. 2006), aff'd, 495 F. 3d 232 (5th Cir. 2007) (Louisiana Valued Policy Law). Plaintiffs must file an amended complaint that complies with the limitations set forth in this order within ten (10) days of entry of this order.

New Orleans, Louisiana, this 20th day of February, 2008.

JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE

CLERK TO NOTIFY:
HON. STANWOOD R. DUVAL, JR.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: KATRINA CANAL BREACHES CONSOLIDATED LITIGATION

CIVIL ACTION

NO. 05-4182 "K"(2)

PERTAINS TO: Aguda, C.A. No. 07-4457

JUDGE DUVAL
MAG. WILKINSON

ORDER ON MOTION

APPEARANCES: None (on the briefs)

MOTION: Plaintiff's Motion for Leave to File Plaintiff's First Amended Complaint, Record Doc. No. 11420

ORDERED:

XXX: GRANTED IN PART AND DENIED IN PART. The motion is granted in part insofar as plaintiffs seek to amend their complaint to clarify that wind and/or wind-driven rain (i.e., covered risks under plaintiffs' State Farm policy) proximately caused damage to plaintiffs' property beyond the amounts paid by State Farm. The motion is denied insofar as the proposed amendment asserts claims that flood damage to their property is covered by plaintiffs' insurance policy with State Farm or that plaintiffs have some sort of claim under Louisiana's Valued Policy Law, since these kinds of claims are futile under recent Fifth Circuit decisions. In re Katrina Canal Breaches Consolidated Litigation, 495 F.3d 191 (5th Cir. 2007) (flood exclusion); Chauvin v. State Farm Fire &Cas. Co., 450 F. Supp. 2d 660 (E.D. La. 2006), aff'd, 495 F. 3d 232 (5th Cir. 2007) (Louisiana Valued Policy Law). Plaintiffs must file an amended complaint that complies with the limitations set forth in this order within ten (10) days of entry of this order.

New Orleans, Louisiana, this 5th day of March, 2008.

JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE