UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KATHRYN FRENCH and MALCOLM SUTTER	*	CIVIL ACTION NO.: 06-8251
	*	JUDGE: BARBIER
VERSUS	*	
	*	MAGISTRATE: SHUSHAN
ALLSTATE INDEMNITY COMPANY	*	
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PERTAINS TO: 06-8251

ALLSTATE INDEMNITY COMPANY'S MEMORANDUM
IN SUPPORT OF RULE 52(b) MOTION TO MODIFY JUDGMENT

Allstate Indemnity Company ("Allstate") requests pursuant to Federal Rules of Civil Procedure 52(b) that this Court modify its findings of fact and conclusions of law and amend its Judgment entered February 13, 2009 as set forth more fully below.

INTRODUCTION

After a two-day bench trial, the Court orally issued its Federal Rule of Civil Procedure 52(a) findings of fact and conclusions of law and entered its Judgment on February 13, 2009. Based upon its findings and conclusions, the Court awarded the Plaintiffs the following amounts: $123,000 under Coverage A of the Plaintiffs' Allstate homeowners' policy; $10,000 for a retaining wall under Coverage B; and $87,000 in penalties under the 2003 version of La. R.S. § 22:658. *See* Tr. of Ruling, p. 54-55, 61. In so holding, the Court concluded that Plaintiffs

established that unpaid damage to their house and a retaining wall had occurred, entitling them to additional money under the policy. The Court further found that Allstate failed to timely pay the undisputed amount due of $70,462 based on the initial adjuster's estimate. The Court also concluded that it was required to award a penalty of 25% on the Plaintiffs' entire property claim, which totaled $338,000, rather than on the undisputed amount of $70,462 found to have been untimely paid to the Plaintiffs. *See id.* at p. 57. Allstate now moves to modify the Court's findings and conclusions and to amend the Judgment.

LAW AND ARGUMENT

Federal Rule of Civil Procedure 52(b) permits a district court, on motion filed 10 days after entry of judgment, to amend its findings or make new findings and correspondingly amend the judgment. "The purpose of motions to amend is to correct manifest errors of law or fact or, in some limited situations, to present newly discovered evidence." *Fontenot v. Mesa Petroleum Co*., 791 F.2d 1207, 1219 (5th Cir. 1986). "Under the better view, a party may move to amend the findings of fact even if the modified or additional findings in effect reverse the judgment." *Id*. citing 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 52.11[2] (2d ed. 1985) ("If the trial court has entered an erroneous judgment, it should correct it."). "To prevail on a Rule 52(b) motion to amend, the moving party must show that the Court's findings of fact or conclusions of law are not supported by evidence in the record." *Ice Embassy, Inc. v. City of Houston*, No. 97-0196, 2007 WL 963983 (S.D. Tex. Mar. 29, 2007) (citing *Fontenot*, 791 F.2d at 1219). Applying these principles here, the Court should modify its findings and conclusions and amend its Judgment.

The Court also awarded Plaintiffs penalties under La. R.S. § 22:658, finding that Allstate arbitrarily and capriciously failed to timely pay undisputed amounts due in the amount of $70,462.

As shown below, however, the Plaintiffs failed to prove by a preponderance of the evidence that they were entitled to receive $123,000 for the allegedly uncompensated wind damages to their property. Moreover, the Court incorrectly awarded 25% of the Plaintiffs' entire property claim with Allstate rather than 25% of the amount untimely paid as a matter of law.

1. There was Insufficient Evidence of Additional Wind Damage to Justify an Award of Policy Limits.

Finding that Plaintiffs' house had extensive damage, the Court concluded that "Plaintiffs are entitled to additional amounts for the structure," up to their policy limits of $338,000. Tr. at 55:15-19. The Court found that "these repairs would at least equal or exceed the remaining $123,000 on their policy" for the dwelling. Tr. at 55:20-24. The Court explained that "[P]laintiffs are entitled to additional amounts for the structure. . . . My sense of things is that [repair costs are] going to substantially exceed the amounts that have been paid by Allstate . . . ." Tr. at 55:15-18.

Under Louisiana law, the Plaintiffs are required to establish additional, uncompensated wind damage by a preponderance of the evidence. *See Dickerson v. Lexington Ins. Co.*, No. 07-30823, 2009 WL 130207, *3 (5th Cir. Jan. 21, 2009). Plaintiffs failed to offer sufficient competent evidence proving that any unpaid damage actually existed.

Indeed, substantial competent evidence, including the Plaintiffs' own admissions, established that Plaintiffs had been overcompensated for alleged damage and thus logically could not be owed additional amounts for so called unpaid damage. According to Plaintiffs' 2003

appraisal (Exh. 29), the total replacement cost for their home prior to Hurricane Katrina was $534,000. Plaintiff Malcolm Sutter testified at trial that the structural component of the dwelling, which was indisputably undamaged by Katrina, had a replacement cost of $225,000 at the time of construction. Assuming *arguendo* that construction costs have risen by 15% since that time, the replacement cost for the entire dwelling and just the structural component of the dwelling would total $614,100 and $264,500, respectively today.

Thus, based on Plaintiffs' own evidence, the damaged portion of the dwelling had a replacement cost value of no more than $349,600 ($614,100 total replacement cost less the $264,500 in replacement costs attributable to undamaged structural component). Given that Plaintiffs had already received approximately $387,000 in insurance payments for the damages to their dwelling ($215,000 under the Policy and approximately $171,000 under their flood insurance policy),[1] plaintiffs had already received $37,400 more to repair their dwelling than it would reasonably cost to replace or repair the damaged portion of the dwelling. This evidence belies the conclusion that Plaintiffs were owed more money for damage to their structure, and, thus, the $123,000 remaining on their homeowners' policy should not have been awarded.

Further, plaintiffs did not offer competent evidence to prove that any additional unpaid damage was caused by wind rather than flood. In addition, as the Court acknowledged in its oral ruling, Plaintiffs failed to establish the actual cost of repairing damage to their property, much

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[1] In addition to receiving over $400,000 in insurance payments for the damages to their dwelling, Plaintiffs have also received $150,000 from the Road Home program, and at least $15,000 from FEMA. Plaintiffs have also received over $80,000 under the Policy for the damages to their personal property.

less the actual cash value, the measure Allstate has to pay.[2] Specifically, the Court stated that: "I am not convinced, however, that the estimate by [Plaintiffs' expert] Mr. LaGrange of $452,000 is [at] all justifiable." Tr. 54:24-25. As a result, the Court's decision to award an additional $123,000 to Plaintiffs under the Dwelling coverage is unsupported by the evidence and the law and is manifestly erroneous, requiring amendment of the judgment under Rule 52(b).

2. The Penalty Under La. R.S. § 22:658 is 25% of The Amount Due, Not 25% of The Entire Claim

The Court should amend its earlier judgment to award penalties only on the undisputed amount rather than the entire property damage claim. While the Court purported to follow the Fifth Circuit's recent decision in *Grilletta v. Lexington Ins. Co.*, No. 07-30963, 2009 WL 46886 (5th Cir. Jan. 8, 2009), the *Grilletta* decision, in fact, misconstrued controlling Louisiana law and should not be considered binding precedent.

Prior to 1992, Section 658 awarded penalties as a percentage of "the total amount of the loss." *See* La. Acts 1989, No. 638, § 1 (re-enacting La. R.S. 22:658(B)(1)); La. Acts 1990, No. 262 § 1 (same). In 1992, however, the legislature amended section 22:658 to award penalties only as a percentage of "the amount found to be due from the insurer to the insured. . ." La. Acts 1992, No. 879, § 1 (amending La. R.S. 22:658(B)(1)). In 2003, the Louisiana legislature again amended section 658 to provide penalties of 25% of "the amount found to be due from the

[2] Plaintiffs' homeowners' policy specifically provides that unless or until the Plaintiffs repair or replace their damaged property, payments for a covered loss are based on the actual cash value (as opposed to replacement cost value) of the property, thereby requiring a deduction for depreciation. The repair estimate provided by Plaintiffs' expert Paul LaGrange, however, was based on replacement cost, not actual cash value, which the Court specifically noted in its ruling. Tr. 55:1-2. Thus, the Paul LaGrange repair estimate cannot be considered reliable, definitive proof of the cost of repairing the damages to Plaintiffs' property.

insurer to the insured." It is the 2003 version that this Court correctly found applies to plaintiffs' claims.

The plain language of section 658 provides that penalties shall be awarded only on the amount found to be due from the insurer to the insured, not on the "total amount of the loss," as the statute provided before 1992. While the *Grilletta* decision purported to rely on Louisiana court decisions awarding penalties on a plaintiffs' entire claim for property damage, these decisions, in turn, relied on cases that pre-date the 1992 amendment to section 658. *See Shadow Lake Management Co. v. Landmark Am. Ins. Co.*, No. 06-4357, 2007 WL 1959236 (E.D. La. July 2, 2007); *Warner v. Liberty Mut. Fire Ins. Co.*, 543 So. 2d 511 (La. App. 4 Cir. 1989).

The *Grilletta* decision did not properly follow the most recent decision by the Louisiana Supreme Court addressing the issue, *Louisiana Bag Co. v. Audubon Indemnity Co.*, No. 2008-C-0453 (La. Dec. 2, 2008), 2008 WL 5146674. There, in December 2008, the Louisiana Supreme Court expressly considered the amount of penalties due on plaintiff's claim under a commercial insurance policy. In that case, it was undisputed that the insurer had paid only $1 million of its insured's claim of approximately $3.3 million, which exceeded the policy limits, within thirty days of receipt of satisfactory proof of loss. *Id.* at *1, 6. The *Louisiana Bag* court noted that an insurer's failure to tender an undisputed amount due would render it "subject to penalties ***on the difference between the amount paid or tendered and the amount found to be due***" under La. R.S. § 22:658.[3] *Id.* at *13 (emphasis added). Accordingly, the court upheld an award for penalties on the difference between the remaining amount due and the $1 million payment, or for 25% of approximately $2.2 million, rather than the total property claim. *Id.* at *6, 13.

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[3] The *Grilletta* court likewise cited this language in support of its holding that La. R.S. 22:658 imposes penalties on an insured's entire claim, however, the court did not discuss the facts of the case, which awarded penalties only on the amount found to thirty-days overdue by the court rather than on the entire amount of the claim.

As *Louisiana Bag* makes clear, Louisiana courts do not routinely award penalties of 25% on the entire amount due of an insured's claim. Following the Louisiana Supreme Court's recent holding in *Louisiana Bag*, the Court only should award penalties based on 25% of the portion of Mr. Favel's estimate ($70,462) that was not paid until thirty days after submission of his report to Allstate, or $17,616.

CONCLUSION

For the foregoing reasons, Allstate respectfully requests that pursuant to Rule 52(b) the Court's earlier findings of fact and conclusions of law and its Judgment be modified.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Memorandum in Support of Rule 52(b) Motion to Modify Judgment has been served upon all parties by filing with the Court's ECF system, which will send electronic notice to all counsel, this 2nd day of March, 2009.

/s/ Judy Barrasso