

JAVIER ORELLANA * **NO. 2007-CA-1095**
VERSUS * **COURT OF APPEAL**
LOUISIANA CITIZENS * **FOURTH CIRCUIT**
PROPERTY INSURANCE *
CORPORATION * **STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-8512, DIVISION "L-6"
Honorable Kern A. Reese, Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love,
Judge Edwin A. Lombard, Judge Leon A. Cannizzaro, Jr., and
Judge Roland L. Belsome)

**LOVE, J., CONCURS IN PART AND DISSENTS IN PART AND ASSIGNS
REASONS**

CANNIZZARO, J., DISSENTS AND ASSIGNS REASONS

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AFFIRMED

Defendant, Louisiana Citizens Property Insurance, appeals a judgment of the trial court, which found in favor of Plaintiff, Javier Orellana, and awarded \$87,500.00 for dwelling property damages as well as \$125,000 in general damages. For the following reasons, we affirm.

FACTS:

This suit arises out of the property damages suffered by Plaintiff to his duplex located at 631-33 S. Solomon Street, New Orleans, Louisiana, as a result of Hurricane Katrina. At the time of the August 29, 2005 storm, Plaintiff had a homeowner's policy of insurance with Defendant, Louisiana Citizens Property Insurance Corporation (hereinafter "Louisiana Citizens"), with policy limits of \$144,000.00 for dwelling. There was no coverage for contents or loss of use.

As a result of Hurricane Katrina, Plaintiff sustained wind and rain damage to his house. In November of 2005, Plaintiff reported his claim to Louisiana Citizens. Thereafter, Louisiana Citizens sent out its adjuster, Bradford Knight, to do an inspection of the premises. Mr. Knight submitted his estimate in the amount of \$48,181.84 to Louisiana Citizens on December 14, 2005; however, Louisiana Citizens did nothing and paid nothing to Plaintiff. On August 3, 2006, Plaintiff's

expert, James Simpson, estimated the wind and rain damages to be \$103,635.51. Mr. Simpson's estimate was submitted to Louisiana Citizens on August 16, 2006; however, Louisiana Citizens did nothing and paid nothing to Plaintiff. On March 1, 2007, Louisiana Citizens sent a new adjuster, Don May, to Plaintiff's home to do a re-inspection. The re-inspection estimated the wind and rain damages to be \$80,594.41; however, again, Louisiana Citizens did nothing and paid nothing.

After a one day bench trial, the trial court found in favor of Plaintiff and against Louisiana Citizens. The trial judge awarded Plaintiff \$87,500.00 for dwelling property damages, plus interest and cost, as well as \$125,000.00 in general damages for Plaintiff's "mental anguish, stress, and inconvenience sustained as a result of Louisiana Citizens' bad faith failure to properly and timely adjust this claim." Louisiana Citizens now appeals this final judgment.

DISCUSSION

Louisiana Citizens briefed three assignments of error arguing that: (1) the trial court erred in awarding general damages for mental anguish in contravention of La. C.C. Art. 1998¹; (2) the trial court erred in awarding general damages for mental anguish because the claim does not rise to the level necessary for an award of mental anguish damages under Louisiana jurisprudence; and (3) in the alternative, if this Court re-characterizes the general damage award as a penalty pursuant to La R.S. Art. 22:1220, the trial court erred in failing to recognize that,

¹ La. C.C. Art. 1998. Damages for nonpecuniary loss.

Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.

Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrive the feelings of the obligee.

pursuant to its founding legislation and the overall legislative intent thereof, Louisiana Citizens is immune from the penalty provisions of the Insurance Code.

The thrust of Louisiana Citizens' arguments goes to the issue of whether a trial court, after finding a breach of the duty to act in good faith, may award general damages sustained as a result of the breach. The trial court, in its reasons for judgment, states, in pertinent part:

Finally, the Court awards Plaintiff general damages for his mental anguish, stress, and inconvenience sustained as a result of Louisiana Citizens' bad faith to properly and timely adjust this claim. *See* La. R.S. Art. 22:1220 (C). Mr. Orellana testified that, since he was not given any money from his insurer to repair his house, he and his mother have had to live with various friends and relatives. To this day, which is over a year and a half after the storm, they still live in a FEMA trailer in front of the subject residence of 631-33 S. Solomon Street. Mr. Orellana testified that his two children, who are ages 13 and 25, came to stay with him in the FEMA trailer and were extremely uncomfortable. This has caused strained relations between Plaintiff and his mother, and between Plaintiff and his two children.

Further, because Plaintiff has not received any timely insurance payments, he has been forced to piece-meal his home repairs. Plaintiff has been forced to hire various independent laborers to do the repairs to his home, rather than just hiring a general contractor and have the contractor deal with the "headaches" of doing the renovation. Further, the financial burden of having to come out of pocket for his home repairs on such a limited budget has caused Plaintiff emotional strain. In fact, Plaintiff testified that the reason his home is not complete and livable is because he did not have enough money to pay the workers and they left the jobsite. The Court finds Plaintiff's testimony regarding his emotional distress to be very credible. Had Louisiana Citizens actions not been so arbitrary and capricious in their failure to pay Plaintiff's claim in a timely manner, Plaintiff could have rebuilt his house in a timely manner and the strained relationships Plaintiff has had to endure with his family and the emotional distress described herein could have been avoided. Accordingly, the Court awards Plaintiff \$125,000 in general damages. *See National Union Fire Insurance Company of Louisiana v. Harrington*, 2002-832 (La. App. 3 Cir. 2003), 854 So.2d 880.

La. R.S. 22:1220. Good faith duty; claims settlement practices; cause of action; penalties, states, 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:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
- (2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
- (3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.
- (4) Misleading a claimant as to the applicable prescriptive period.
- (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.

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)

La. R.S. 22:1220 clearly states that an insurance company may be assessed general and special damages for breach of the imposed duty, and may be assessed penalties in addition. In this case, the trial court made a finding that Louisiana Citizens acted in bad faith for its failure to properly and timely adjust Plaintiff's claim. We find no error in this finding, especially in light of the fact that findings of fact of the trial court are given great weight and are only overturned if manifestly erroneous or clearly wrong. See *Stobart v. State, Through DOTD*, 617 So.2d 880 (La.1993).

Further, this Court, in *Blache v. Jones* addressed the issue of whether a homeowner can recover for mental anguish caused by property damage.

Specifically, this Court stated:

In Louisiana, an award for mental anguish resulting from property damage is permissible in limited situations: (1) when property is damaged by an intentional or illegal act; (2) when property is damaged by acts for which the tortfeasor will be strictly or absolutely liable; (3) when property is damaged by acts constituting a continuing nuisance; or (4) when property is damaged when the owner is either present or nearby and suffered a psychic trauma as a direct result. *First of Georgia Insurance Co. v. Cohen*, 398 So.2d 1209 (La.App. 4th Cir.1981); *Turgeon v. Pan American World Airways*, 764 F.2d 1084 (5th Cir.1985).

Blache v. Jones, 521 So.2d 530, 531 (La. App. 4 Cir. 2/10/88).

In this case, Plaintiff has had to watch his home sustain ongoing damage² as a result of Louisiana Citizens' decision to not pay timely insurance payments, which qualifies the case under subsection (1). Had Louisiana Citizens actions not been so arbitrary and capricious in its failure to pay Plaintiff's claim, Plaintiff could have prevented further deterioration of the home and/or allowed Plaintiff the opportunity to properly rebuild. The trial court observed the testimony of the Plaintiff and found that the Plaintiff was very credible. We find nothing in the record to indicate that the award of \$125,000.00 was beyond the "great, even vast" discretion of a trier of fact in fixing such a damage award. See *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La. 1993).

Although Louisiana Citizens argues that it is immune from the ramifications of La. R.S. 22:1220, we find no merit in this assignment of error. We have been unable to find any statute that gives immunity to Louisiana Citizens from being

² In 2005, Louisiana Citizens' adjuster estimated the damage to be \$48,181.84; however, in 2007, Louisiana Citizens' adjuster estimated the damage to be \$80,594.41.

assessed damages pursuant to La. R.S. 22:1220. For these reasons, we affirm the judgment of the trial court, which awarded Plaintiff \$87,500.00 for dwelling property damages as well as the general damage award for \$125,000.00.

AFFIRMED