

JAVIER ORELLANA

*

NO. 2007-CA-1095

VERSUS

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COURT OF APPEAL

**LOUISIANA CITIZENS
PROPERTY INSURANCE
CORPORATION**

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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CANNIZZARO, J., DISSENTS AND ASSIGNS REASONS

I respectfully dissent from the majority's award of \$125,000.00 to the plaintiff, Javier Orellana.

The defendant, Louisiana Citizens Property Insurance Corporation ("LCPIC"), contends the trial court erred in awarding to Mr. Orellana \$125,000.00 in damages for mental anguish, stress and inconvenience. LCPIC maintains that because Mr. Orellana's claims were based on an alleged breach of an insurance contract, his damages are limited to pecuniary losses flowing from the breach.

As a threshold matter, while it is undisputed the trial judge compensated Mr. Orellana for his nonpecuniary damages, LCPIC maintains the statutory basis for the award is somewhat vague. It notes that, while the trial judge characterized the award as "general damages" on several occasions, he cited to paragraph (C) of La. R.S. 22:1220, which LCPIC claims is applicable to the imposition of penalties. LCPIC recognizes Mr. Orellana concedes in brief that the award is for general damages. Notwithstanding, facing the remote possibility it could be faced with the imposition of penalties, LCPIC argues out of an abundance of caution that it is indistinguishable whether the award represents general damages or penalties. In any event, I conclude relief under either case to be inappropriate under the facts.

When considering La. R.S. 22:1220 in its entirety, the statute imposes the affirmative duty on an insurer to adjust claims fairly and promptly and to make a reasonable effort to settle claims. The provision grants a cause of action to an insured or claimant against an insurer who breaches the statutorily prescribed duties, as well as provides for the award of special, general and punitive damages.¹

General and Nonpecuniary Damages

“General damages are those which may not be fixed with pecuniary exactitude; instead, they ‘involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment, or other losses of life or life-style which cannot be definitely measured in monetary terms.’” *Kaiser v. Hardin*, 06-2092 (La. 4/11/07), 953 So.2d 802, 808, 809, citing *Keeth v. Dept. of Pub. Safety & Transp.*, 618 So.2d 1154, 1160 (La. App. 2 Cir. 1993).

As stated, La. R.S. 22:1220 grants the cause of action for general damages for breach of an insurance contract. However, La. C.C. art. 1998 dictates the limited circumstances nonpecuniary damages are awardable for breach of contract.

La. C.C. art. 1998 states:

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 aggrieve the feelings of the obligee.

It is clear each paragraph of the Civil Code article provides a separate vehicle for nonpecuniary relief.

¹ LCPIC does not contest on appeal the trial court’s special damage award for the repairs to Mr. Orellana’s property.

Applying La. C.C. art. 1998, Mr. Orellana is barred recovery under the first paragraph. It is well settled in Louisiana law that the object of a contract of insurance is the payment of money. *Bye v. American Income Life Ins. Co.*, 316 So.2d 164 (La. App. 4 Cir. 1975). By virtue of the nature of the contract at issue in these proceedings, the basis of its formation was not to foster a nonpecuniary interest. Rather, it was for the payment of money to protect physical property against an insurable risk. Mr. Orellana has not presented evidence to suggest otherwise.

Additionally, recovery for general damages is barred under the second paragraph of La. C.C. art. 1998. Although the nature of the contract is irrelevant, Mr. Orellana still had to sustain the burden of proving LCPIC intended to aggrieve his feelings. The record is absent any evidence LCPIC knowingly and intentionally sought to aggrieve or cause distress of any nature to Mr. Orellana's feelings. LCPIC's behavior, while characterized as "arbitrary and capricious," did not equate with "intentional" misconduct. La. R.S. 12:1220 does not define "arbitrary" or "capricious". Similarly, La. C.C. art. 1998 does not define "intentional". As such, I rely on *Black's Law Dictionary*, 8th Edition (1999), which defines "arbitrary" as ". . . [d]epending on individual discretion . . ." It defines "capricious" as ". . . characterized by or guided by unpredictable or impulsive behavior." In vast contrast, *Black's* defines "intention" as "[t]he willingness to bring about something planned or foreseen; the state of being set to do something. – **intentional**, *adj.*" The state of mind for "arbitrary and capricious" behavior is seemingly based on whim, rather than reason or forethought as with intentional misconduct. Therefore, I conclude damages for nonpecuniary loss are not recoverable under La. C.C. art. 1998 and, as such, not compensable under La. R.S. 22:1220(A).

Nor I do not find merit in the majority's reliance on *Blanche v. Jones*, 521 So.2d 530 (La. App. 4 Cir. 1988). Both this case and *Blanche* address the issue of nonpecuniary damages. However, *Blanche* did not involve recovery under La. R.S. 22:1220 or La. C.C. art. 1998. Unlike the instant contractual premised claim, *Blanche* involved a delictual based action arising out of criminal damage to property. Specifically, the plaintiffs' home was intentionally set on fire while they were present. They instituted a tort action seeking nonpecuniary damages against the parents of the minor arsonists alleging the intentional and/or illegal conduct resulted in measurable psychic trauma. The appellate court reversed the trial court finding mental anguish occasioned by property damage is compensable when the defendant's actions are intentional or illegal. The majority undoubtedly relies on *Blanche* for this legal proposition.

Over two years after this court's decision in *Blanche*, the Louisiana Supreme Court articulated, in *Moresi v. State Through Dept. of Wildlife and Fisheries*, 567 So.2d 1081 (La. 1990), the elements necessary for recovery for intentional infliction of mental distress: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. [citing to Restatement of Torts (2d)§ 46(1)]." The jurisprudence is clear that the mental anguish must be a real mental injury, illness or other physical consequence. If a defendant's conduct is merely negligent and causes only mental disturbance, absent accompanying physical injury, then the defendant is not liable for emotional distress. *Moresi v. State Through Dept. of Wildlife and Fisheries*, 567 So.2d at 1095, citing Prosser & Keeton § 54 at 361; Restatement of Torts (2d) § 436A. While the Louisiana Supreme Court in *Moresi* noted that there have been numerous deviations from the general rule for mental

injury damages, it further qualified that each of those cases “. . . have in common the especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. [cites omitted].”²

Applying these principles, I do not find LCPIC should be held liable for mental distress under the facts. Although its actions were arbitrary and capricious, they were not intentional or outrageous. Further, I do not doubt Mr. Orellana suffers from the same worry and inconvenience the other innumerable victims of Hurricanes Katrina and Rita are suffering from over the consequences to their property. However, with the exception of his own testimony, Mr. Orellana did not present any evidence that he suffered measurable and severe psychic trauma and/or injury to justify such an award under these circumstances. For instance, in *Blanche*, the plaintiffs presented evidence of medical treatment for mental health conditions precipitated by the criminal damage to their home.

² In *Moresi*, the court listed the several occasions where mental anguish damages were awarded:

A number of courts have allowed recovery against a telegraph company for the negligent transmission of a message, especially one announcing death, indicating on its face a potential for mental distress. E.g., *Graham v. Western Union*, 109 La. 1069, 34 So. 91 (1903). Some others have allowed similar recovery for the mishandling of corpses, See *French v. Ochsner Clinic*, 200 So.2d 371 (La.App. 4th Cir.1967); *Blanchard v. Brawley*, 75 So.2d 891 (La.App. 1st Cir.1954); *Morgan v. Richmond*, 336 So.2d 342 (La.App. 1st Cir.1976); *Shelmire v. Linton*, 343 So.2d 301 (La.App. 1st Cir.1977); failure to install, maintain or repair consumer products, *Pike v. Stephens Imports, Inc.*, 448 So.2d 738 (La.App. 4th Cir.1984); failure to take photographs or develop film, *Grather v. Tipery Studios, Inc.*, 334 So.2d 758 (La.App. 4th Cir.1976); negligent damage to one's property while the plaintiffs were present and saw their property damaged, *Holmes v. Le Cour Corp.*, 99 So.2d 467 (Orl.La.App.1958); *Lambert v. Allstate Insurance Co.*, 195 So.2d 698 (La.App. 1st Cir.1967); and in cases allowing damages for fright or nervous shock, where the plaintiff was actually in great fear for his personal safety. *Pecoraro v. Kopanica*, 173 So. 203 (Orl.La.App.1937); *Klein v. Medical Building Realty Co., Inc.*, 147 So. 122 (Orl.La.App.1933); *Laird v. Natchitoches Oil Mill, Inc.*, 10 La.App. 191, 120 So. 692 (2d Cir.1929); *Cooper v. Christensen*, 212 So.2d 154 (La.App. 4th Cir.1968).

Moreover, I do not find the instant contract case to be the type of case envisioned by the courts in *Moresi* and *Blanche* to warrant mental anguish recovery. *Moresi* and *Blanche* were both delictual cases relying on general principles of tort law to sustain a cause of action for nonpecuniary damages. Neither court cited to statutory support for mental anguish recovery and, rather, relied exclusively on jurisprudence. In contrast, the Louisiana Legislature specifically enacted La. R.S. 22:1220 and La. C.C. art. 1998 to address recovery for nonpecuniary damages stemming from an insurer's misconduct in the handling of an insurance claim. Mr. Orellana was unable to sustain his burden under these statutory provisions. As such, general damages are not awardable under the facts.

Penalties

The law of Louisiana is clear insofar as it provides that an insured or claimant cannot recover penalties for failure to settle a claim, except in the limited circumstances provided by statute. While La. R.S. 22:1220(C) states penalties may be awarded in the event an insurer is found to have acted arbitrary and capricious, I conclude that LCPIC is immune from the imposition of penalties pursuant to La. R.S. 22:1430, *et. seq.*, entitled "Louisiana Citizens Property Insurance Corporation." This section of the Louisiana Insurance Code sets forth the statutory provisions relative to the purpose, derivation and operation of LCPIC. Specifically, La. R.S. 22:1430.5, captioned "Immunity from liability," states:

A. There shall be no liability on the part of and no cause of action of any nature shall arise against the Louisiana Insurance Rating Commission or any of its staff, or against the governing board of the Louisiana Citizens Property Insurance Corporation or anyone acting on behalf of the corporation or the plans, or against any servicing carrier or carriers, or against any assessable insurer, or against any participating insurance producer, or against the Department of Insurance or its representatives, for any action taken by them in the performance of their duties or responsibilities under this Subpart.

B. Such immunity from liability does not apply to:

- (1) Any of the persons or entities listed in Subsection A hereof for any willful tort or criminal act.
- (2) The corporation, or insurance producers placing business with one of the plans, for breach of any contract or agreement pertaining to insurance coverage.
- (3) The corporation with respect to issuance or payment of debt.
- (4) Any assessable insurer with respect to any action to enforce such insurer's obligations to the corporation under this Subpart.

[Emphasis added.]

Paragraph (A) clearly provides the exemption from liability applies to, among others, LCPIC and anyone acting on its behalf during the performance of their duties or responsibilities. Paragraph (B) sets forth the exceptions to the grant of immunity. This paragraph is not the most artfully of drafted provisions by the Louisiana Legislature and, as such, the exceptions are difficult to discern. Notwithstanding, LCPIC correctly asserts the entirety of La. R.S. 22:1430(5) would be rendered meaningless if there was not an exception from the grant of immunity for the underlying cause of action subject of Mr. Orellana's contractual insurance claim (i.e., property damage claim). To state otherwise, the LCPIC would never be required to pay an insured for a damage claim.

In stark contrast, overriding public policy dictates the Louisiana Legislature did not intend to have an exception from the grant of immunity for the assessment of penalties. See, *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 03-0360 (La. 21/03/03), 860 So.2d 1112 (“Principles of judicial interpretation of statutes are designed to ascertain and enforce the intent of the Legislature in enacting the statute. . . ***The fundamental question in all cases of statutory construction is legislative intent and the reasons that prompted the Legislature to enact the law.*** [Cites omitted; emphasis added]).” The first provision in the Insurance Code relative to LCPIC is La. R.S. 22:1430, which articulates LCPIC's “declaration and purpose; [and] construction.” It expressly states the Legislature created the nonprofit corporation, among other reasons, to meet the public responsibility of providing homeowner's

property coverage for those unable to procure such following Hurricane Katrina. In furtherance of its mission, the Legislature declared in its purpose statement that “. . . *it is essential for the corporation to have maximum financial resources to pay claims following a catastrophic hurricane. . .*” [Emphasis added.]. However, LCPIC is not an insurance carrier operating in the traditional insurance and investment market. Rather, it operates in a statutory imposed residual market, involuntarily subsidized by every Louisiana licensed insurer writing residential and commercial property insurance. La. R.S. 22:1430. Therefore, the Legislature imposed measures to protect LCPIC’s monetary resources and financial independence. For instance, it expressly exempted LCPIC and the interest on its debt obligations from federal income taxation, as well as mandated it take all action to maintain its tax-free status. La. R.S. 22:1430 and 22:1430.5. Further, LCPIC is barred from declaring liquidation or bankruptcy and was ordered to retain any profits or excess reserves so as to offset any deficit incurred in the operation of the plan. La. R.S. 22:1430.6(E); La. R.S. 22:1430.20; and La. R.S. 22:1430(D)(4). Based on such, the imposition of penalties, on each occasion up to two times the amount of the policy, would undoubtedly be in direct contravention of the Legislature’s expressed declaration to protect LCPIC’s financial resources.

Finally, as stated, La. R.S.22:1220(C) is a penalty provision allowing for the punishment of an insurance carrier for arbitrary and capricious behavior. Generally, the penal nature of the monetary assessment is to discourage certain types of misconduct by an insurer. *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 860 So.2d at 1118. However, there would be no deterrent affect with the assessment of penalties against LCPIC, a nonprofit corporation. Rather, the penalty would result in a direct assessment and surcharge on all the insurance carriers operating in the state of Louisiana. These insurers would, in turn, impose a surcharge premium against its Louisiana policyholders to cover its deficit. Since LCPIC is indirectly

financed by Louisiana citizens, they would ultimately suffer the long term effects of the assessment of penalties through their insurance premium increases. While I recognize the validity of the majority's argument relative to the imposition of penalties, I find the overriding costs to be objectionable. In these unique times in history, Louisiana citizens can not be burdened with the excessive expense of bailing out LCPIC or any other entity created with the intention of providing assistance in the State's recovery from Hurricane Katrina and Hurricane Rita. Clearly, such a result would thwart the public purposes propounded by the Legislature in the creation of LCPIC in providing economic stability and orderly growth and development to Louisiana and, particularly, the coastal area. See, La. R.S. 22:1430.

For these reasons, I conclude the majority's award of \$125,000.00 is inappropriate under the facts.