JASON BIGELOW AND JENNIFER LOHMANN-BIGELOW	*	**NO. 2008-CA-0932**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
CRESCENT TITLE, L.L.C., ROBERT BERGERON, DANNY DOUGLASS, CHARLES A. LAGARDE, JR., STATE FARM FIRE AND CASUALTY COMPANY, ROBERT AND CARLA RAINEY, AND IBERIA BANK	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-41, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *
Judge Patricia Rivet Murray
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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Terri F. Love)

JONES, J., DISSENTS WITH REASONS

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REVERSED

This is a negligence action against an insurance agent and his employer, an insurance company, for failing to transfer a flood insurance policy. Following a jury trial, a judgment was rendered in favor of the plaintiffs, Jason and Jennifer Bigelow, and against the agent, Charles Lagarde, Jr., and his employer, State Farm Fire and Casualty Company ("State Farm"). The trial court denied the motion for judgment notwithstanding the verdict ("JNOV") or, in the alternative, motion for new trial filed by Mr. Lagarde and State Farm. From that judgment, Mr. Lagarde and State Farm appeal. For the reasons that follow, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2004, Robert and Carla Rainey purchased a standard flood insurance policy on their residence located on Memphis Street in New Orleans. The Raineys purchased the flood policy through the office of Mr. Lagarde, a State Farm agent. The Raineys had a longstanding relationship with Mr. Lagarde's office and often dealt with Mr. Lagarde's office manager, Delouise Morgan. The Raineys paid a premium of $390.00 for the flood policy, which was issued through

the National Flood Insurance Program ("NFIP"). The policy had a one year term ending October 21, 2005, and the number of this policy is 98-RB-6291-4.

In December 2004, the Raineys sold their Memphis Street residence to the Bigelows. Because the property was located in a flood zone, the Bigelows' mortgagor, Iberia Bank, required that they obtain flood insurance as a condition of the closing on the property. In an attempt to obtain flood insurance at a low premium, the Bigelows contacted the Raineys regarding assuming their existing flood insurance policy on the residence. Mrs. Rainey contacted Mr. Lagarde's office manager, Ms. Morgan, regarding the feasibility of assigning their flood policy to the Bigelows. Ms. Morgan, who is a licensed insurance agent, advised Mrs. Rainey that it was possible to assign the policy, that it had to be done in writing, and that it could be done by collecting the remaining unearned premium from the Bigelows at the closing. Thereafter, the Raineys agreed to allow the Bigelows to assume the flood policy and to have the Raineys pay them at the closing the prorated value of the policy ($329.10).

On the day before the closing, Toni Landry with Crescent Title, L.L.C. ("Crescent Title"), the Bigelows' closing attorney, faxed the Bigelows' personal information to Ms. Morgan. Using this information,[1] Ms. Morgan filled in the following information on the State Farm Change Request Form: the Raineys' flood insurance policy number (98-RB-6291-4), the effective date of the policy

[1] Although Mr. Bigelow testified that he spoke with someone at Mr. Lagarde's office before the closing, he could not identify the person with whom he spoke, and no one at Mr. Lagarde's office recalled speaking with him before Hurricane Katrina. Ms. Morgan testified that she used the information she received from Ms. Landry to complete the Change Request Form.

transfer, the Bigelows' names, the property address, Mr. Bigelow's social security number, the Bigelows' mortgage company's name and address, the total premium payable, the flood insurance coverages for the building ($250,000) and contents ($20,000), and the date and time of the application. Mr. Lagrande's office also stamped the form with a stamp reading: "C. LAGARDE, JR. 18-1382 CRESCENT CITY METRO 22-5692."

On that same date, December 16, 2004, Ms. Morgan faxed the filled out Change Request Form to Ms. Landry at Crescent Title with a cover sheet that set forth the following instructions:

> "Have Mr. Rainey sign @ top as 'signature of current insured' and Mr. Bigelow sign further down as 'Applicant's signature.' The coverage @ $250,000 is max we can write for flood. Let me know if you need any further info or assistance."

Ms. Morgan placed a copy of the unsigned Change Request Form in the personal pending file that she keeps in her drawer.

At the December 17, 2004 closing, the Bigelows paid the Raineys the pro rata value of the flood insurance policy, $329.10. Crescent Title listed this payment on the HUD settlement statement it prepared; this payment was listed as payment was for "Flood Insurance Proration 12/17/04 to 10/21/05." Crescent Title, however, failed to have the parties sign the Change Request Form at the closing. The Change Request Form therefore was neither signed by the parties, nor returned to Mr. Lagarde's office. As a result, the flood policy was not transferred.

On January 11, 2005, Mrs. Rainey called Ms. Morgan regarding cancelling her homeowner's insurance policy on the Memphis Street property, which had

been sold to the Raineys. Because Mrs. Rainey believed the flood policy had been transferred to the Bigelows at the closing, she did not mention it. Ms. Morgan entered her computer and cancelled all the outstanding policies on the Memphis Street property, including the flood policy that was still insured in the Raineys' name. On January 11, 2005, State Farm issued a premium refund check in the amount of $327.99 to the Raineys. On the check, it was noted that this payment was for the return of the unused premium. Along with the refund check the Raineys also received an Acknowledgment of Cancellation Request stating that the Flood-Dwelling Policy (Policy Number 98-RB-6291-4) was cancelled effective December 17, 2004 (the date of the closing) at the request of the policyholder. The Raineys endorsed and deposited the check.[2]

On August 29, 2005, Hurricane Katrina struck the New Orleans area. As a result, the Bigelows' home on Memphis Street sustained severe flood damage.[3] Thereafter, the Bigelows attempted to file a claim with State Farm. At that time, they first learned that the flood policy on their property had not been transferred and had been cancelled. This suit followed against the following defendants: (i) Crescent Title and two of its attorneys, Robert Bergeron and Danny Douglass; (ii) Mr. Lagarde and his employer, State Farm; (iii) the Raineys; and (iv) Iberia Bank.[4] After settling their claims against the Crescent Title defendants and Iberia

[2] Although the Raineys acknowledge they were paid twice (once by the Bigelows and once by State Farm), they indicated that they did not realize the refund check they received was for the flood policy. They, like the Bigelows, believed the flood policy had been transferred at the closing.

[3] It was stipulated that it would take $159,300 to return the Bigelows' home to pre-Hurricane Katrina status. It was not disputed that the contents of their home that were lost exceeded $20,000.

[4] This matter was removed to federal court and remanded to state court based on the federal court's finding that this case—involving "negligence based upon Louisiana tort and insurance law against Louisiana attorneys and a

Bank and dismissing their claims against the Raineys, the Bigelows proceeded to trial against Mr. Lagarde and State Farm.

On January 28 and 29, 2008, a jury trial was held in this matter.[5] The jury found that both Mr. Lagarde and Crescent Title were negligent and allocated fault equally between them. The jury found no comparative fault on the part of the Bigelows or any other party. The jury determined that the Bigelows' damages were as follows: $159,400 property damages, $20,000 content damages, $10,000 mental pain and suffering ($5,000 each), and $13,200 rental expenses. After reducing the damage award by 50%, the trial court entered judgment against Mr. Lagarde and State Farm for $101,300 plus prejudgment interest from the date of judicial demand. On April 25, 2008, the trial court denied the motions for JNOV, or, in the alternative, new trial filed by Mr. Lagarde and State Farm. This appeal followed.

DISCUSSION

On appeal, the Defendants, Mr. Lagarde and State Farm, assert the following three assignments of errors:

1. The trial court erred in denying the Defendants' motions for directed verdict and JNOV, and in entering judgment against the Defendants, because the evidence at trial was insufficient as a matter of law to establish the Defendants' liability.

2. The trial court erred in denying the Defendants' motion for JNOV with respect to mental anguish damages, and in entering judgment awarding mental anguish damages, because there was no evidence that Mr. Lagarde's

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Louisiana insurance agent for their failure to procure flood insurance on their Louisiana property"—is a matter for state court.

[5] At trial, the parties stipulated that the only claim the Bigelows are asserting against State Farm are in State Farm's fiduciary capacity vis-à-vis Mr. Lagarde and not in State Farm's fiduciary capacity vis-à-vis FEMA, the NFIP, the United States, or any other agency associated with the federal government.

agency engaged in extreme and outrageous conduct and there was no competent evidence of a genuine mental injury.

3. The trial court erred in failing to instruct the jury that the Plaintiffs are charged with knowledge of the prerequisites for transferring a flood policy issued pursuant to the NSIP.

The standard of review for a JNOV is a two part inquiry. First, using the same criteria the trial court uses in deciding whether to grant JNOV, the appellate court must determine if the trial court erred. *Davis v. Wal-Mart Stores, Inc*., 00-0445 p. 5 (La. 11/28/00), 774 So.2d 84, 89. "[T]he standard for granting or denying a JNOV is the same as that for a directed verdict—whether reasonable minds could differ." Frank L. Maraist and Harry T. Lemmon, 1 *Louisiana Civil Law Treatise, Civil Procedure* § 13.4 (1999); *see* La. C.C.P. art. 1811. "After determining that the trial court correctly applied its standard of review as to the jury verdict, the appellate court reviews the JNOV using the manifest error standard of review." *Davis, supra.*

In this case, Mr. Lagarde and State Farm filed a motion for directed verdict at the close of the Bigelows' case based on their contention that no evidence was presented that they owed a duty to the Bigelows. Denying the motion for directed verdict, the trial court reasoned that there was sufficient evidence for the jury to find Mr. Lagarde's office had accepted and attempted to act on a duty to procure the transfer of the flood policy in question. As noted, Mr. Lagarde and State Farm assert on appeal the trial court erred in denying their motions for directed verdict and JNOV. They contend that because of the Bigelows' failure to return the Change Request Form they never became Mr. Lagarde's clients and neither Mr. Lagarde nor State Farm owed a duty to them. They further contend that the trial

court's finding of liability was erroneous given that the evidence at trial demonstrated that:

- The Bigelows never asked Mr. Lagarde's office to transfer the flood policy, and any undertaking to do so was expressly contingent upon future events that were beyond Mr. Lagarde's office's knowledge and control;

- The steps the Bigelows claim that Mr. Lagarde's office should have taken are well beyond the scope of any duty undertaken by Mr. Lagarde's office; and

- Mr. Lagarde's office never did or said anything to support any reasonable belief by the Bigelows that the flood policy had in fact been transferred.

The Bigelows, on the other hand, cite the following facts as supporting a finding of a fiduciary agent-client relationship between them and Mr. Lagarde's office:

- The Bigelows discussed assuming the Raineys' flood insurance policy with the Raineys, and the Bigelows agreed to pay the Raineys the pro rata value of the policy at closing. The Raineys, in turn, spoke to Mr. Lagarde's office and informed them that they wanted the Bigelows to assume their flood policy.

- Mr. Bigelow spoke with someone at Mr. Lagarde's office and provided their office with the Bigelows' personal information.

- The Bigelows' closing attorneys, Crescent Title, communicated by telephone and by fax with Mr. Lagarde's office manager, Ms. Morgan, and provided her with the Bigelows' personal information needed to facilitate transferring the flood policy at the closing.

- Ms. Morgan completed the Bigelows' information on the Change Request Form and faxed the filled out form to Crescent Title to be signed by the parties at the closing.

- Between Mr. Lagarde's office's combined interactions with the Raineys, Mr. Bigelow, the Bigelow's closing attorney (Crescent Title), and possibly the Bigelows' homeowner insurance agent (Phillis Moore with Parish National Insurance), Mr. Lagarde's office clearly understood that the Bigelows were planning to assume the Raineys' flood policy.

- The Bigelows and the Raineys believed that State Farm was the Bigelow's flood insurer and Mr. Lagarde was their agent for the purpose of their flood policy.

Continuing, the Bigelows contend, based on the fiduciary agent-client relationship, that Mr. Lagarde's office had two duties to them: (i) to follow up on the execution of the Change Request Form that was faxed to Crescent Title, and (ii) to inform the Bigelows of the cancellation of the flood policy that was in the name of the Raineys at the time of cancellation.

The issue of whether a defendant owes a legal duty to the plaintiff is a question of law subject to a *de novo* standard of review. *Haney v. Delta Petroleum Co.*, 99-0170, p. 4 (La. App. 4 Cir. 10/6/99), 748 So.2d 36, 38. Louisiana law imposes a fiduciary duty on insurance agents in their dealings with the insured in certain instances. *Taylor v. Sider*, 99-2521, p. 4 (La. App. 4 Cir. 5/31/00), 765 So.2d 416, 419.

An insurance agent who undertakes to procure insurance for another owes an obligation to his client to use reasonable diligence in attempting to place the insurance requested and to notify the client promptly if he failed to obtain the requested insurance. *Karam v. St. Paul Fire & Marine Ins. Co.*, 281 So.2d 728, 730 (La. 1973). The client may recover from the agent the loss he sustains as a result of the agent's failure to procure the desired coverage **if the actions of the agent** warranted an assumption by the client that he was properly insured in the amount of the desired coverage. *Id*. To recover for losses resulting from such failure, the plaintiff must establish: 1) an undertaking or agreement by the insurance agent to procure insurance; 2) failure of the agent to use reasonable diligence to obtain insurance and to notify the client promptly of the absence of

coverage; and 3) actions by the agent which warranted the client's assumption that he was insured in the amount of the desired coverage. *Opera Boats, Inc. v. Continental Underwriters, Ltd.,* 618 So.2d 1081, 1085-86 (La. App. 1st Cir. 1993).

Applying those principles to the facts of this case, we find the Bigelows cannot satisfy the first requirement. Mr. Bigelow acknowledged at trial that he was the one who handled procuring flood insurance on their residence and that he never requested Mr. Lagarde's office obtain flood insurance for them. When Mrs. Rainey, the State Farm insured, requested that Mr. Lagarde's office transfer the flood policy, she was informed by Ms. Morgan that the transfer would have to be done in writing. Ms. Morgan also gave express instructions to the Bigelows' closing attorneys regarding the need to have the parties sign the Change Request Form and return it to Mr. Lagarde's office.

It is undisputed that the necessary paperwork for transferring the flood policy—the Change Request Form—was never signed at the closing. The significance of the Change Request Form is that it was the Bigelows' application to Mr. Lagarde's office for it to procure flood insurance on their behalf from State Farm. The Bigelows' failure to return that signed form to Mr. Lagarde's office resulted in the absence of an agreement to procure insurance. Given the absence of such an agreement, there was no duty on the part of Mr. Lagarde or State Farm. *See 3 Couch on Insurance* § 46:65 (3d ed. 2008)("[i]n the absence of any agreement, or contract to effect, maintain, or renew, insurance, no duty to do so

arises.") None of the facts the Bigelows cite is sufficient to impose a duty on Mr. Lagarde's agency.[6]

Our finding that Mr. Lagarde had no duty to the Bigelows is bolstered by a consideration of the actions taken by the parties before, during, and after the closing. Before the closing, Mr. Lagarde's office, through Ms. Morgan, provided the Bigelows' closing attorneys with the Change Request Form and with specific instructions regarding the parties signing the form at the closing and returning it to Mr. Lagarde's office. No one from Mr. Lagarde's office was required to attend or attended the closing. Although the Bigelows' closing attorneys may properly be faulted for failing to have the parties sign the Change Request Form at the closing, there was no fault on the part of Mr. Lagarde's office for failing to have the form signed. After the closing, there was no communication between Mr. Lagarde's office and the Bigelows until after the occurrence of the flood loss caused by Hurricane Katrina. The only action Mr. Lagarde's office took during that period was to cancel the flood policy.

The Bigelows argue that Mr. Lagarde was at fault not only for cancelling the flood policy but also for failing to notify them of the cancellation. We disagree. At the time it was cancelled, the flood policy was still in the Raineys' name because the transfer form had not been executed and returned to the agent. As noted, the record contains a copy of an Acknowledgment of Cancellation Request

[6] Although the Bigelows cite an unpublished federal district court decision in support of their position, we find it unnecessary to discuss that case because it is distinguishable. In that case, the request to change the insured was executed, but the agent failed to follow up and ensure the insurance company changed the covered insured. In this case, the failure to follow up pertains to following up not with the insurance company (State Farm), but with the closing attorneys.

stating that the flood policy (98-RB-6291-4) was cancelled effective December 17, 2004 (the date of the closing) at the request of the policyholder (the Raineys). This notice and a check for refund premium were sent to the Raineys as the policyholders. Despite receiving this notice, the Raineys failed to inform either Mr. Lagarde's office or the Bigelows that the flood policy they believed they had transferred at the closing had been cancelled. Instead, the Raineys endorsed and deposited the check. Although the Raineys may be faulted for failing to inform the Bigelows of the cancellation of the flood policy, there was no fault on the part of Mr. Lagarde for failing to do so.

Accordingly, we find, as a matter of law, Mr. Lagarde and State Farm were not at fault. The trial court should have granted the JNOV. This finding renders it unnecessary to address the other assignments of error raised on this appeal.

DECREE

For the foregoing reasons, the judgment of the trial court is reversed.

REVERSED