NOT DESIGNATED FOR PUBLICATION

W. EVAN PLAUCHE'	*	**NO. 2009-CA-1708**
VERSUS	*	
		COURT OF APPEAL
THE HANOVER INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2007-08358, DIVISION "K-5"
Honorable Herbert Cade, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge Roland L. Belsome)

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APRIL 21, 2010

AFFIRMED

Plaintiff, W. Evan Plauche, appeals a judgment of the trial court, which found in favor of defendant, The Hanover Insurance Company ("Hanover"), and against Mr. Plauche, dismissing all of Mr. Plauche's claims with prejudice. For the following reasons, we hereby affirm.

FACTS AND PROCEDURAL HISTORY

On September 3, 2005, Mr. Plauche contacted Hanover to report damage to his property, located at 323 Nashville Avenue, New Orleans, Louisiana, caused by Hurricane Katrina. The premises' dwelling and garage roofs were damaged. Hanover retained Worley Claim Service ("Worley"), an independent adjusting firm, to adjust Mr. Plauche's claim. Eric Wolverton was the independent adjuster assigned to inspect the residence. At the time of the storm, Mr. Plauche's premises had three separate roofs: an upper (main) roof composed of asbestos tile shingles; a lower (rear) roof that was composed of 3-tab asphalt/fiberglass composite shingles; and a garage roof, which was also composed of 3-tab asphalt/fiberglass composite shingles.

After inspecting Mr. Plauche's property on September 15, 2005, Mr. Wolverton determined that the three roofs required replacement and prepared an estimate that included the replacement of each of Mr. Plauche's roofs. Specifically, the estimate replaced the 30-year 3-tab asphalt/fiberglass composite shingles on the lower dwelling roof and garage roof with 30-year 3-tab asphalt/fiberglass composite shingles and replaced the asbestos tile shingles on the upper roof with an equivalent concrete "S" or flat tile, 50-year roof. Based on the estimate, and prior to suit being filed in August 2007, Hanover paid Mr. Plauche $20,769.24 to replace the three roofs on his home.

In November 2005, Mr. Plauche hired Pitts Roofing to replace all three roofs. Pitts Roofing replaced Mr. Plauche's roofs with a 30-year 3-tab asphalt/fiberglass composite shingle roof, for a total cost of $21,000.00. While Pitts replaced the upper asbestos tile roof with a different material, 30-year 3-tab asphalt/fiberglass composite shingles, both the lower roof and garage roof were replaced with the exact same roof material, 30-year 3-tab asphalt/fiberglass composite shingles that were on those roofs at the time Hurricane Katrina struck.

Mr. Plauche testified that because of the extreme workload of roofers in the New Orleans area in the year following Hurricane Katrina, he was unable to find a roofer willing and able to give an estimate and bid to install a lifetime permanent replacement roof on his home until June 2007. At that time, Mr. Plauche testified that he obtained a bid from CMR Construction and Roofing, LLC with a price of $67,529.52 for the installation of a slate replacement roof on his home. Thereafter, Mr. Plauche forwarded the CMR estimate to Hanover arguing that Hanover's previous payment of $20,769.24 to replace the roof was inadequate to replace his roofs with slate. Upon receiving the CMR estimate, Hanover allegedly informed

Mr. Plauche that he could replace his roof with any type of material he wanted, but that it would not compensate him for a slate roof because his policy only provided for replacement of like, kind, and quality material and that slate was considered an upgrade over asbestos tile.

On August 17, 2007, Mr. Plauche filed suit against Hanover. On March 6, 2009, the trial court granted Hanover's Motion for Partial Summary Judgment and dismissed, with prejudice, Mr. Plauche's claims that he was entitled to replace the lower roof and garage roof with slate. Thus, the only issues remaining for trial were whether a slate roof is the like, kind, and quality and proper replacement material for the asbestos roof (the main roof), and whether Hanover acted in bad faith in the adjustment of Mr. Plauche's insurance claims.

After a one-day bench trial, the trial court rendered judgment in favor of Hanover and dismissed Mr. Plauche's claims against it with prejudice. Mr. Plauche now appeals this final judgment, arguing: (1) the trial court erred when it failed to award damages where it was uncontested that Hanover owed compensation for roof re-decking; (2) the trial court erred when it failed to find that he was owed additional money by Hanover for the cost of replacement of the roof on his home with a lifetime roof; (3) the trial court erred when it failed to find Hanover in bad faith and arbitrary and capricious in adjusting his claim; and (4) the trial court erred when it failed to award damages to him for the cost of the installation of the temporary replacement roof.

STANDARD OF REVIEW

Louisiana courts of appeal apply the manifest error standard of review in civil cases. *Detraz v. Lee*, 05-1263, p. 7 (La.1/17/07), 950 So.2d 557, 561, citing *Hall v. Folger Coffee Co.*, 03-1734 (La.4/14/04), 874 So.2d 90. The manifest error

standard of review precludes the setting aside of a trial court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. *Rosell v. ESCO*, 549 So.2d 840 (La.1989). "[W]here there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable." *Id.* at 844. If the trial court's findings "are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* Moreover, "[w]hen findings are based on determinations regarding the credibility of witnesses, the manifest error--clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said." *Id.*

DISCUSSION

The issues in this appeal are whether a slate roof is the like, kind, and quality and proper replacement material for an asbestos tile roof, and whether Hanover acted in bad faith in the adjustment of Mr. Plauche's insurance claim. At trial, three witnesses testified: Mr. Plauche, Mr. Chad Carroll, and Mr. David Bell.

Mr. Plauche testified that because he could not obtain a price to have a lifetime roof placed on his house following Hurricane Katrina, he decided to install a temporary replacement roof, which was a fiberglass composite roof. Mr. Plauche testified that in June 2007, he conferred with Hanover's in-house adjuster to address his roof issue and thereafter provided a copy of an estimate to replace all three of his roofs with slate. Mr. Plauche testified that Hanover did nothing after

he provided it with the information about the cost of a lifetime replacement roof. Mr. Plauche testified that he is entitled to recover the cost of a lifetime replacement roof, which is the CMR estimate of $67,529.52.

Mr. Chad Carrol of CMR Construction & Roofing, an expert in the field of roof repair, and estimating, testified that he prepared an estimate for Mr. Plauche on June 11, 2007. The estimate called for the replacement of all three of Mr. Plauche's roofs, the upper dwelling roof, lower dwelling roof, and garage roof, with Vermont slate in the amount of $67,529.52. Although Mr. Carrol could not testify to the longevity of the concrete "S" tile and TAMKO Lamarite slate composite shingle, Mr. Carrol did testify that asbestos tiles, the "S" tile, and TAMKO Lamarite slate are all synthetic products, and all are different from slate.

Mr. David Bell of Bell Roofing Company, an expert in roofing installation, repair, and estimating, testified regarding what would be the equivalent, or like, kind and quality replacement for the upper roof of Mr. Plauche's home. In discussing a comparable product to asbestos, Mr. Bell testified that, in his expert opinion, TAMKO Lamarite slate is of like, kind, and quality to the asbestos tile. Mr. Bell testified that slate was not the like, kind, and quality replacement for asbestos tile, and was in fact an upgrade. Mr. Bell further testified that in his expert opinion the concrete "S" tile or flat tile contained in Hanover's estimate was of the same quality and provided the same life span as an asbestos tile shingle roof, but that the "S" tile differs from the asbestos shingle in its appearance.

The Hanover Policy specifically provides that Mr. Plauche is entitled to replace "that part of the building damaged with material of like, kind, and quality." After a review of the record, we find that Mr. Plauche failed to satisfy his burden of proof that he was entitled to the replacement of any of the three roofs with a

slate roof and/or that the 30-year 3-tab asphalt/fiberglass composite shingle roof he installed on his home was a temporary roof. Mr. Bell, the only roofing expert to testify, testified that slate is an upgrade from asbestos tile and is a betterment not the like, kind, and quality equivalent to asbestos tile. Mr. Bell testified that the more comparable like, kind, and quality equivalent to asbestos tile is Lamarite, which is manufactured by TAMKO. Mr. Bell further testified that while Hanover called for replacement with concrete "S" or flat tile, it was referring to a concrete tile equivalent to asbestos in both quality and longevity. Mr. Bell concluded that the only difference with concrete "S" or flat tile and asbestos tile is in appearance and that is why he would use the Lamarite instead. The trial court's choice to accept the opinion of one expert over another, when there are differing views that are consistent with the evidence, is not manifest error. Accordingly, we find no merit in Mr. Plauche's argument on appeal that the trial court erred in failing to find that the only appropriate "like kind" equivalent of an asbestos tile roof is a slate roof.

We further find that Mr. Plauche failed to maintain his burden at trial that Hanover acted arbitrarily, capriciously or without probable cause. La. R.S. 22:1892, formerly cited as La. R.S. 22:658, states in pertinent part:

> A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:1811, 1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest. The insurer shall notify the insurance producer of record of all such payments for property damage claims made in accordance with this Paragraph.
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> (4) All insurers shall make a written offer to settle any property damage claim, including a third-party claim,

> within thirty days after receipt of satisfactory proofs of loss of that claim.
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> B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs. 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.

The evidence indicates that after the claim was submitted, an advance in the amount of $1,500.00 was issued to Mr. Plauche on September 13, 2005. After the advance was issued, Hanover continued working with Mr. Plauche to adjust the loss and tender the undisputed payment. Although Hanover disagreed with Mr. Plauche that he was entitled to upgrade his asbestos tile and composite shingle roofs with slate, Hanover paid Mr. Plauche, in January 2006, to replace his roofs with the equivalent like, kind, and quality roof. Although Mr. Plauche testified that he contacted the independent adjuster one time in January or February 2006 to discuss Hanover's roof estimate, it was not until June 2007, more than one and a half years after the adjustment and payment on Mr. Plauche's loss, that he provided Hanover with an estimate for a slate roof and claimed that he deemed slate to be the only proper replacement for all three roofs on his home. At that time, Hanover

responded and advised Mr. Plauche that it would only pay like, kind, and quality and that the asphalt/fiberglass composite shingles on the garage and lower roof were replaced with asphalt/fiberglass composite shingles. Although Hanover offered to re-inspect and see if an agreement could be reached as to what the like, kind, and quality equivalent was to the asbestos tile on the upper roof, Mr. Plauche refused. Under these facts, we do not find Hanover's conduct arbitrary, capricious or without probable cause.

Accordingly, we hereby affirm the judgment of the trial court, which dismissed Mr. Plauche's case with prejudice.

AFFIRMED