

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

LAWRENCE TROY TOMLINSON and \*  
ELIZABETH BOWMAN TOMLINSON \* CIVIL ACTION NO.: 06-00617  
INDIVIDUALLY AND AS PARENTS \*  
AND NATURAL TUTORS OF \*  
KATHLEEN K. TOMLINSON AND \* JUDGE FELDMAN  
SEAN V. TOMLINSON \*  
VERSUS \* MAGISTRATE ROBY  
ALLSTATE INDEMNITY COMPANY \*  
\*\*\*\*\*

**ALLSTATE INDEMNITY COMPANY'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Allstate Indemnity Company, ("Allstate"), submits this Memorandum in Support of its Motion for Partial Summary Judgment seeking dismissal of several of plaintiffs' claims for which it is undisputed no factual basis exists to support the claims. For the following reasons, the motion should be granted.

**BACKGROUND**

Plaintiffs' lawsuit arises out of alleged property damage to their residence located at 17 Madewood, in Marrero, Louisiana, as a result of Hurricane Katrina. Plaintiffs filed this suit

on January 17, 2006, and alleged numerous claims against Allstate, their homeowner insurer, including but not limited to the following claims:

- B. Continued decay of the immovable property due to defendant's failure to timely adjust the claim . . .
- C. Past, present and future pain and suffering resulting from Allstate's inaction and bad faith;
- D. Past, present and future medicals for the minor children . . .
- E. Past, present, and future negligent and intentional infliction of emotional distress . . .
- I. Monies spent and interest paid to creditors to begin work on property, and pay for living expenses and the like. . . .

See Petition, ¶ XIV.

Recently, on December 19, 2006, in her deposition, Elizabeth Bowman Tomlinson, the insured and herself an attorney who helped draft the petition filed by her own firm, admitted that several of these claims have no factual basis and at least one may have no legal basis.<sup>1</sup> Because these claims either have no factual support or are not actionable under Louisiana law, the claims should be dismissed.

## **LAW AND ANALYSIS**

### **I. Standard on Motion for Summary Judgment.**

Federal Rule of Civil Procedure 56(c) provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

---

<sup>1</sup> Plaintiff Elizabeth Bowman Tomlinson's deposition took place on December 19, 2006. Undersigned counsel requested by a letter dated December 21, 2006, that plaintiffs dismiss the claims that Ms. Tomlinson admitted in her deposition have no factual basis. However, as of the date of this filing, plaintiffs have failed to do so.

and that the moving party is entitled to judgment as a matter of law.” See Fed. R. Civ. P. 56(c); *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994). Once the movant shows there is no genuine issue of material fact, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). The nonmovant may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that fact issues exist will not suffice. *Id.* The “nonmoving party must set forth specific facts showing the existence of a ‘genuine’ issue concerning every essential component of its case.” *Id.* If the record cannot lead a rational trier of fact to find for the nonmovant, then summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408 (5th Cir. 1993).

**II. It Is Undisputed That Plaintiffs’ Claims for Continued Decay, Past, Present and Future Medicals, Intentional Infliction Of Emotional Distress, And Claim For Monies Paid To Creditors Have No Factual Basis.**

Here, it is undisputed that several of plaintiffs’ claims have no factual basis and should be dismissed. Specifically, when questioned about the claim for alleged continued decay of immovable property, Ms. Tomlinson admitted there is no factual basis to support this claim:

Q: So as we sit here today, there’s no fact basis for claiming that any action or inaction of Allstate caused decay.

A: Not at this time.

Exhibit A, Excerpt from Ms. Tomlinson’s Deposition, p. 13.

Likewise, after agreeing that her children had never stepped foot in the residence which is the subject of this suit and agreeing that she is not contending the house where they are now living is

causing medical problems for her children, Ms. Tomlinson admitted there was no factual basis for the plaintiffs' claims of past, present, and future medicals for their minor children:

- Q. So you would agree there is no fact basis as we sit here today for the claim against Allstate for past, present and future medicals of your children?
- A. At this time, no.

Exhibit A, Excerpt from Ms. Tomlinson's Deposition, pp. 11-12.

Plaintiffs' claim of past, present, and future negligent and intentional infliction of emotional distress is also without merit. Again, Ms. Tomlinson admitted there were no facts that support Allstate intentionally inflicting emotional distress on plaintiffs and that as a lawyer, she was not even sure such a claim was allowable under the law on an insurance claim.

Exhibit A, Excerpt from Ms. Tomlinson's Deposition, p. 16-17.

Finally, plaintiffs' have no factual basis to support their claim for monies spent and interest paid to creditors to begin work on the property, as alleged in Paragraph XIV (I) of the Petition. In her deposition, Ms. Tomlinson admitted that this claim was included in all hurricane suits filed by her firm out of an abundance of caution, but that she did not believe they had taken out any loans to pay for repairs in this case. Exhibit A, Except from Ms. Tomlinson's Deposition, p. 31-32. Plaintiffs have produced no evidence of any loans taken to pay for repairs to support this claim. Accordingly, because this claim has no factual basis, it should be dismissed, along with the other unsupportable claims detailed above.

**III. Plaintiffs' Fail To State A Claim Under Louisiana Law For Pain And Suffering As A Result Of An Alleged Breach Of Insurance Contract.**

Plaintiffs attempt to state a claim for “past, present and future pain and suffering resulting from Allstate’s inaction and bad faith.” This claim also fails under Louisiana law. It is well established that damages for non-pecuniary loss such as pain and suffering or mental anguish are not recoverable for breach of an insurance contract. *See Perry v. State Farm Fire & Cas. Co.*, 700 F. Supp. 306 (M.D. La. 1988) (dismissing claim against fire insurer for mental anguish as result of alleged breach of insurance contract); *Dixon v. First Premium Ins. Group*, 934 So. 2d 134 (La. App. 1st Cir. 2006) (reversing award for damages for mental anguish and emotional distress as a result of an alleged breach of insurance contract). Accordingly, plaintiffs fail to state a claim under Louisiana law for pain and suffering against Allstate for its alleged breach of their homeowner policy.

**CONCLUSION**

Based on Ms. Tomlinson’s own testimony in this case, none of the claims detailed above have any factual support. In addition, plaintiffs fail to state a claim for pain and suffering as a matter of law. Accordingly, Allstate requests that the Court grant its motion for partial

summary judgment and dismiss plaintiffs' claims as pled in Paragraph XIV (B),(C), (D), (E), and (I) of their Petition.

Respectfully submitted,



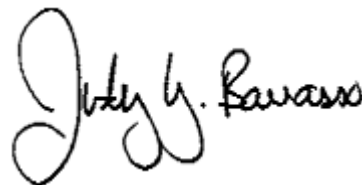
---

Judy Y. Barrasso, 2814  
Susan M. Rogge, 28203  
Of  
BARRASSO USDIN KUPPERMAN  
FREEMAN & SARVER, L.L.C.  
909 Poydras Street, Suite 1800  
New Orleans, Louisiana 70112  
Telephone: 504/589-9700

Attorneys for Allstate Indemnity  
Company

**CERTIFICATE**

I hereby certify that a copy of the above and foregoing Memorandum in Support of Motion for Partial Summary Judgment has been served upon all counsel of record Via the Court's electronic system, this 5th day of January, 2007.



---