NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

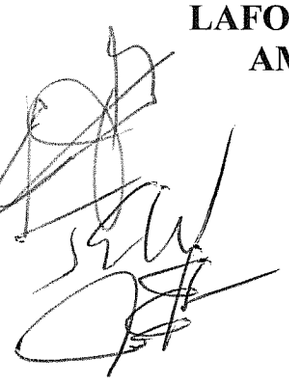
FIRST CIRCUIT

NO. 2006 CA 0537

BRIAN RIVET AND BELINDA RIVET

VERSUS

VACHERIE-GHEENS VOLUNTEER FIRE COMPANY, LAFOURCHE PARISH FIRE PROTECTION DISTRICT NO. 9, AND AMERICAN ALTERNATIVE INSURANCE CORPORATION



Judgment Rendered: FEB 14 2007

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Appealed from the
17th Judicial District Court
In and for the Parish of Lafourche, Louisiana
Case No. 85348

The Honorable Hugh F. Larose, Judge Presiding

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

GAIDRY, J.

In this matter, the defendants appeal two trial court judgments – one incorporating the jury verdict and another denying defendants' motion for new trial and entering a remittitur. We reverse the trial court judgment denying the defendants' motion for new trial and entering a remittitur and remand for new trial.

FACTS AND PROCEDURAL HISTORY

Brian and Belinda Rivet filed suit against the Vacherie-Gheens Volunteer Fire Department ("the Department"), Lafourche Parish Fire Protection District No. 9, and American Alternative Insurance Corporation, for damages resulting from a fire at their residence. In their suit, the Rivets alleged that the Department had improperly trained its volunteers, resulting in unreasonable delays and "general poor performance" by the Department in its efforts to extinguish the fire. The Rivets claimed that the Department's gross negligence caused their house to sustain more extensive damage than it would have if the Department had responded appropriately.

The fire at issue in this case erupted on the afternoon of May 18, 1998, at the home of Brian and Belinda Rivet in Gheens, Louisiana. At the time the fire began, both Brian and Belinda were home sleeping.[1] Belinda first discovered the fire and alerted Brian. After waking Brian, Belinda left the house and called 911. Brian attempted to extinguish the fire, which he described as small and enclosed, by pouring a pot of water on it, but had to leave the house because the smoke began to burn his eyes. Brian and Belinda's son, David, and Brian's friend, Jerry Orgeron, were driving past the house at the same time, saw smoke, and stopped to help.

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[1] The Rivets were at home sleeping in the middle of the day because Belinda had worked the nightshift at the Houma post office the night before the fire and Brian had hurt his back at work and had been sent home to rest.

The Rivets' house was located immediately next door to the Vacherie-Gheens Volunteer Fire Department. Because Gheens is such a small town, many of the volunteer fire fighters work outside of Gheens, thus increasing their response time. Todd Dufrene, a volunteer fireman with the Department, was working in town and arrived within approximately two to three minutes of the 911 call. Todd had been with the Department for approximately eighteen months at the time of the fire, but he had only minimal training and had never been on the scene of a fire. While Todd went to the station to get the fire truck, Brian, David, and Jerry turned off the gas line and disconnected the electric meter from the house. When several minutes passed without Todd returning, Brian sent David next door to the fire station to see what was wrong. According to David, Todd seemed nervous and excited and told David that the fire truck would not start. David found a switch under the driver's seat and turned it, and the truck started. Todd drove the fire truck out of the station and parked it directly in front of the station. Todd stayed on the truck while David and Jerry unrolled the hose. Once the hose was unrolled, it was discovered that it was too short to reach the house. While Todd manned the fire truck, David and Jerry directed the spray of water onto the roof of the house.[2] When the truck eventually ran out of water, the fire was still burning, so Todd hooked up to the fire hydrant. Brian testified that after Todd hooked up to the hydrant, the flow of water coming out of the hose was very small. He went to the truck to find out what was going on and was told by another volunteer who had just arrived on the scene that Todd had not known how to engage the valve to get the water going from the hydrant to the truck. By this time, other

[2] The fire had not spread to the roof, but both David and Jerry testified that they sprayed the water onto the roof instead of directly onto the fire because they heard someone shouting not to break the windows or it would feed the fire. Neither David nor Jerry knew who said not to break the windows, and Todd testified that he did not say it.

volunteers from the Department and from the Lockport Volunteer Fire Department had begun to arrive and normal water pressure was restored and the fire was eventually extinguished. Brian testified that up until the point when the additional volunteers arrived, no water was ever sprayed directly onto the fire.

After the fire, Brian tore down the house and hauled away the debris, claiming that the house was beyond repair. He did take pictures before tearing down the house, but did not have the house inspected or obtain an estimate of damage or repair costs. While he acknowledged that there were some parts of the house that were not damaged, Brian testified that he did not want to live in a remodeled house and felt it would be cheaper to rebuild, so he saw no need to obtain an estimate of the damage. He admitted that his house would have sustained some damage from the fire even if the Department had done everything right, but he was unable to give an estimate as to what that damage would have been.

After a trial, the jury concluded that the Department was grossly negligent in its efforts to extinguish the fire and awarded damages to the Rivets in the following amounts:

Property Damage (Residence)	$40,000.00
Property Damage (Personal Property)	$23,200.00
Lot-Clearing Expenses	$3,870.00
Inconvenience and Mental Anguish (Brian)	$10,000.00
Inconvenience and Mental Anguish (Belinda)	$10,000.00

The Department filed a motion for new trial, based upon the discovery of new evidence. The trial court denied the motion for new trial and instead ordered a remittitur in the amount of $1620.00, the amount of a purported invoice for lot-clearing expenses.

The Department appealed both judgments, alleging the following errors by the jury and the trial court:

1. The trial court erred in denying the Department's motion for new trial and entering a remittitur where the reduction was not based upon the excessive nature of the verdict.
2. The jury erred in awarding damages for the loss of the Rivet's residence and personal property where no evidence was offered establishing what portion of their losses were caused by the Department's gross negligence.
3. The jury erred in finding that the Department was grossly negligent in its efforts to extinguish the fire at the Rivet's house.

DISCUSSION

The Department's first assignment of error involves the jury's award for lot-clearing expenses. At trial, the Rivets introduced an invoice from Dean Toups Trucking. The invoice, dated May 29, 1998, showed that a truck was rented to Brian Rivet for twenty-seven hours at an hourly rate of $60.00, for a total charge of $1,620.00. At trial, Brian testified that the invoice was "an actual bill" given to him at the time the job was done and that he still owed this amount to Dean Toups Trucking.

The Department objected to the introduction of Dean Toups's invoice at trial because it had not been produced prior to trial in response to discovery requests, but the trial court overruled the objection. After trial, the Department filed a motion for new trial based upon the discovery of new evidence. Attached to the motion was an affidavit from Dean Toups in which he stated that: he helped Brian clear the debris from his lot after the fire, but did not charge him for the use of his truck and kept no record of the amount of time he spent helping Brian; long after the lot was cleared, Brian asked him for a blank invoice "for insurance purposes" and told him that if he collected anything he would pay him; the first time he saw the invoice

"filled in" was after the trial and that the invoice was in neither his nor his wife's handwriting and was not signed by him, as was his custom; and because he kept no record of the time spent helping Brian, he was unable to verify the time listed on the invoice.

After a hearing, the trial court ordered a remittitur reducing the jury award for lot-clearing expenses by $1,620.00, the amount of the invoice from Dean Toups Trucking. The Department argues on appeal that a remittitur was not appropriate because the circumstances warranting a reduction of the award was not based upon the excessive nature of the verdict, and because the issue of quantum is not clearly and fairly separable from the other issues in the case. We agree.

Louisiana Code of Civil Procedure article 1814 governing remittitur provides as follows:

> If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the issue of quantum is clearly and fairly separable from other issues in the case. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

Remittitur was not appropriate in the instant case because the issue of quantum was not clearly and fairly separable from other issues in this case. While the amount of the excessive award for lot-clearing expenses is easily ascertainable, the new evidence discovered after trial, *i.e.*, Dean Toups's affidavit, bears not only on the issue of quantum, but it also directly contradicts Brian Rivet's trial testimony regarding his expenses, and most likely would have affected the jury's assessment of his credibility. At trial, Brian Rivet testified at length regarding a number of things, including the

small size of the fire and the fact that it was contained at the time the 911 call was made, the mistakes allegedly made by Todd Dufrene in fighting the fire, the condition of his home after the fire, and the losses he and his family sustained. A jury's factual findings are given great deference because of the jury's unique ability to assess credibility based upon the demeanor of the witnesses testifying, *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La. 1973); the fact that the invoice from Dean Toups Trucking was not prepared by Dean Toups, and was possibly forged by Brian Rivet, would have certainly caused the jury to seriously question the veracity of Mr. Rivet's entire testimony. As such, the Department is entitled to a new trial on all issues under La. C.C.P. art. 1972(2). The trial court abused its discretion in denying the Department's motion for new trial, and we hereby reverse the August 15, 2005 judgment of the trial court.

Because we are reversing the trial court judgment denying the Department's motion for new trial and ordering a remittitur, we pretermit discussion of the additional issues raised in the Department's brief.

DECREE

The judgment of the trial court denying the Department's motion for new trial and ordering a remittitur is reversed and this matter is remanded so that a new trial may be conducted on all issues. Costs of this appeal are to be borne by the plaintiffs, Brian and Belinda Rivet.

REVERSED AND REMANDED.