UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RYAN HAYGOOD, DDS, ET AL.	**CIVIL ACTION NO. 13-0335**
VERSUS	**JUDGE S. MAURICE HICKS, JR.**
BRIAN BEGUE, ET AL.	**MAGISTRATE JUDGE HORNSBY**

PLAINTIFFS' MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE MEMORANDUM RULING (R. DOC. 293) AND ORDER (R. DOC. 294) GRANTING "MOTION FOR ATTORNEY'S FEES BY DEFENDANTS BARRY OGDEN, CAMP MORRISON, DANA GLORIOSO, AND KAREN MOORHEAD" (R. DOC. 230)

NOW COME Plaintiffs, Ryan Haygood, DDS and Haygood Dental Care, LLC, which submit this Motion for Reconsideration of and/or to Alter or Amend the Memorandum Ruling (R. Doc. 293) and Order (R. Doc. 294), which granted the "Motion for Attorney's Fees filed by Defendants, Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead" (R. Doc. 230), as follows:

As set forth in the accompanying Memorandum, Plaintiffs, Ryan Haygood, DDS and Haygood Dental Care, LLC (hereinafter collectively referred to as "Dr. Haygood" or "Plaintiffs"), respectfully submit that the Memorandum Ruling (R. Doc. 293) and Order (R. Doc. 294)—which granted the Motion for Attorney's Fees filed by Defendants, Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead (hereinafter collectively referred to as "Ogden Defendants") (R. Doc. 230)—were improper due to mistake and/or inadvertence; are otherwise erroneous as a matter of law; and, are erroneous and/or as a result of intervening change in controlling law.

WHEREFORE, Plaintiffs, Ryan Haygood, DDS and Haygood Dental Care, LLC, respectfully request that "Plaintiffs' Motion for Reconsideration of and/or to Alter or Amend the Memorandum Ruling (R. Doc. 293) and Order (R. Doc. 294) Granting 'Motion for Attorneys'

Fees by Defendants Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead' (R. Doc. 230)" be granted and Memorandum Ruling (R. Doc. 293) and Order be vacated and reversed.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS RYAN HAYGOOD, DDS AND HAYGOOD DENTAL CARE, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **April 8, 2019**, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of this Court's electronic system.

/s/ Jerald R. Harper
Jerald R. Harper

UNITED STATES DISTRICT COURT
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RYAN HAYGOOD, DDS, ET AL.	**CIVIL ACTION NO. 13-0335**
VERSUS	**JUDGE S. MAURICE HICKS, JR.**
BRIAN BEGUE, ET AL.	**MAGISTRATE JUDGE HORNSBY**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE MEMORANDUM RULING (R. DOC. 293) AND ORDER (R. DOC. 294) GRANTING "MOTION FOR ATTORNEY'S FEES BY DEFENDANTS BARRY OGDEN, CAMP MORRISON, DANA GLORIOSO, AND KAREN MOORHEAD" (R. DOC. 230)

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Ryan Haygood, DDS and Haygood Dental Care, LLC (hereinafter "Dr. Haygood" or "Plaintiffs"), which hereby submit this Memorandum in Support of their Motion for Reconsideration of the Memorandum Ruling (R. Doc. 293) and Order (R. Doc. 294) Granting the "Motion for Attorney's Fees by Defendants Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead" (R. Doc. 230), as follows:

I. APPLICABLE LAW

A. FED. R. CIV. P. 54, 59 AND 60

The Federal Rules of Civil Procedure do not recognize a motion for reconsideration, *per se*. However, a motion challenging a judgment or order may be filed under Rules 54, 59, or 60.[1]

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[1] Fed. R. Civ. P. Rule 60(b) states in pertinent part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;

See Brown Estate v. New York Life Insurance Co., No. 17-1486, 2018 WL 4520200, at *1 (W.D. La. June 14, 2018); *HBM Interests, LLC v. Chesapeake Louisiana, LP*, No. 12-1048, 2013 WL 3893989, at *1 (W.D. La. July 26, 2013).[2]

"Under Rule 54(b), the Court is given broad discretion to 'reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.' *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981)." *HBM Interests*, 2013 WL 3893989, at *1.

> "The exact standard applicable to the granting of a motion under Rule 54(b) is not clear, though it is typically held to be less exacting than would be a motion under Rule 59(e)…Though less exacting, courts have looked to the kinds of consideration under those rules for guidance."

Id. at *1 (quoting *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 259 F.Supp.2d 471, 475 (M.D. La. 2002)). *See also Jones v. Herlin*, No. 12-1798, 2014 WL 3497831, at *1 (W.D. La. July 14, 2014) (citing *Leong v. Cellco P'Ship*, CIV.A 12-0711, 2013 WL 4009320 (W.D. La. July 31, 2013)).

> Generally **a motion** to alter or amend a judgment, **filed under Rule 59(e)** may be granted "(1) to correct manifest errors of law or fact upon which judgment is based; (2) the availability of new evidence; (3) the need to prevent manifest injustice; or (4) an intervening change in controlling law." *In the Matter of Self*, 172 F.Supp.2d 813-815-16 (W.D. La. 2001) (citing 11 Wright, Miller, & Kane, Federal Practice and Procedure § 2810.1).

HBM Interests, 2013 WL 3893989 at *1 (internal citations omitted) (emphasis added). *See also Brown Estate*, 2018 WL 4520200 at *1; *Brown v. Mississippi Co-op Extension Service*, 89 Fed. Appx. 437, 439 (5th Cir. 2004).

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(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

[2] *See Ruiz v. Estelle*, 609 F.2d 118 (5th Cir. 1980) (discussing finality of rulings on motions for attorneys' fees and comparing with *Trustees of Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1881) and *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959)).

B. LA. R.S. 51:1409

The Louisiana Unfair Trade Practices Act, La. R.S. 51:1401 *et seq*. ("LUTPA"), contains a provision, which permits recovery for attorney's fees under the following, relevant circumstances:

> Upon a finding by the court that an action under this Section was **groundless and brought in bad faith or for purposes of harassment**, the court **may** award to the defendant reasonable attorneys fees and costs.

La. R.S. 51:1409(A) (emphasis added).

This provision is "penal in nature and is subject to reasonably strict construction." *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993). *See also Bobby and Ray Williams Partnership, LLP v. The Shreveport Louisiana Hayride Co., LLC*, 38,224 (La. App. 2d Cir. 4/21/04), 873 So.2d 739, 746 (internal citation omitted).

II. ARGUMENT

A. THE DISMISSAL OF LUTPA CLAIMS AGAINST THE OGDEN DEFENDANTS WAS LEGAL ERROR

The dismissal of the claims under LUTPA against Defendants Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead (hereinafter the "Ogden Defendants") rests primarily upon an error, repeated in the various memoranda rulings from the Court, which this Court has later acknowledged elsewhere. Specifically, the Court has ruled that Haygood's pleadings do not plead a violation of LUTPA by the Ogden Defendants because "Dr. Haygood fails to allege any act by these defendants which would enable them to achieve an unfair competitive advantage (no can he [sic] since none of these defendants are dentists" (R. Doc. 293, at p. 2). As a result of this erroneous ruling (and, an even more implausible finding that a contrary view is "bad faith"), this Court seeks to award attorney's fees to the Ogden Defendants pursuant to La. R.S. 51:1409.

At one point in time, this Court held the erroneous opinion that LUTPA claims could only be brought by or against competitors. *See Baba Lodging, LLC v. Wyndham Worldwide Operations, Inc.*, No. 10-1750, 2012 WL 13041532, at *1 (W.D. La. Mar.19, 2012). This Court later reversed its reasoning in *Baba* in *Caldwell Wholesale Company, LLC v. R.J. Reynolds Tobacco Company*, No. 17-0200, 2018 WL 2209165 (W.D. La. 5/11/18).[3]

Notably, the *Caldwell* decision occurred on the heels of a ruling by the U.S. Fifth Circuit Court of Appeal, recognizing the Louisiana Supreme Court's opinion in *Cheramie Services Inc. v. Shell Deepwater Production Inc.*, 2009-1633 (La. 4/23/10), 35 So.3d 1053, as controlling authority in *IberiaBank v. Broussard*, 907 F.3d 826 (5th Cir. 2018) (quoting *Cheramie*, 35 So.3d at 1057-60).

Recently, in *Caldwell*, this Court provided:

> In Cheramie, the Louisiana Supreme Court noted that the LUTPA statute states that "*[a]ny person* who suffers any ascertainable loss ... as a result of the use or employment by another person of an [unlawful] unfair or deceptive method, act, or practice ... may bring an action." La. Rev. Stat. § 51:1409 (emphasis added); see 35 So.3d at 1056. Thus, **the court in Cheramie rejected any holding that limited standing to only direct consumers and business competitors clarifying that the statutory language allows anyone harmed by prohibited unfair or deceptive practices to file a private right of action.** See id. 1058.
> . . . .
>
> In the present action, the Court agrees that it is not required to follow *Cheramie*. **However, the Court now finds that its previous decision based on pre-*Cheramie* Fifth Circuit precedent regarding standing ignored the "bedrock principles of *Erie v. Tompkins*,** 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which require a federal court sitting in diversity to apply the law of the state as declared by its legislature or the state's highest court." *Burgers v. Bickford*, Civil Action No. 12-2009, 2014 WL 4186757, at *3, 2014 U.S. Dist. LEXIS 117323, at *7 (E.D. La. Aug. 22, 2014). "Thus, for a federal court the proper inquiry is not whether *Cheramie* is controlling authority in light of its plurality status but rather how the decision factors into the *Erie* 'guess' that this Court must make when applying state law. In the realm of *Erie*, *Cheramie* is not irrelevant even if the

[3] *Caldwell* is discussed in more detail *infra*.

> state's lower courts would consider it non-binding." Id. at *3, 2014 U.S. Dist. LEXIS 117323, at *7, 2014 WL 4186757.
>
> Caldwell correctly points out that following *Cheramie*, Louisiana appellate courts, and a number of federal district courts, have followed the plurality opinion and found that private parties have a right of action under the LUTPA. See *Jones v. Americas Ins. Co.*, 2016-0904 (La. Ct. App. 1st Cir. 8/16/17), 226 So.3d 537, 544; *Bogues v. Louisiana Energy Consultants, Inc.*, 46-434 (La. Ct. App. 2nd Cir. 8/10/11), 71 So.3d 1128, 1132; *J. A. Davis Properties, LLC v. Martin Operating P'ship, LP*, 2017-449 (La. Ct. App. 3rd Cir. 6/21/17), 224 So.3d 39, 43; *Prime Ins. Co. v. Imperial Fire & Cas. Ins. Co.*, 2014-0323 (La. Ct. App. 4th Cir. 10/1/14), 151 So.3d 670, 678; *Hurricane Fence Co., Inc. v. Jensen Metal Products, Inc.*, 12-956 (La. Ct. App. 5th Cir. 5/23/13), 119 So.3d 683, 688; *Rockwell Automation, Inc. v. Montgomery*, Civil Action No. 17-415, 2017 WL 2294687, at *2–3, 2017 U.S. Dist. LEXIS 80820, at *7 (W.D. La. May 24, 2017); *Swoboda v. Manders*, Civil Action No. 14-19-EWD, 2016 WL 1611477, at *5, 2016 U.S. Dist. LEXIS 53377, at *18 (M.D. La. Apr. 21, 2016); *Max Access, Inc. v. Gee Cee Co. of LA*, Civil Action No. 15-1728, 2016 WL 454389, at *4, 2016 U.S. Dist. LEXIS 14166, at *13 (E.D. La. Feb. 5, 2016). Accordingly, while *Cheramie* may not be binding upon this Court, it is instructive to the issue of standing. **In light of *Cheramie*, as well as the decisions of Louisiana appellate courts and the federal district courts decisions following same, the Court finds that Caldwell has standing to assert a claim under the LUTPA.**

Caldwell, 2018 WL 2209165 at *5-6 (emphasis added).

Therefore, *Caldwell* represents, at the very least, an "intervening change" in controlling law. *See, e.g.*, *HBM Interests*, 2013 WL 3893989 at *1; *Brown Estate*, 2018 WL 4520200 at *1. This Court has previously recognized its error in *Caldwell*, and, *a fortiori*, should do so again here, where Plaintiffs' claims are said to be "frivolous" or in "bad faith".

The basis of the Court's granting[4] of the Ogden Defendants' Motion to Dismiss as to Plaintiffs' LUTPA claims[5] was the legally erroneous assumption that, because these Defendants were "not dentists", Haygood could not possibly state a cause of action.[6]

[4] R. Doc. 110 (Memorandum Ruling); R. Doc. 111 (Order).

[5] R. Doc. 29 (Ogden Defendants' Motion to Dismiss).

[6] R. Doc. 110, at p. 12.

This Court quoted and relied upon *Cheramie*[7] for the following: (a) courts can determine the type of conduct that "falls into" La. R.S. 51:1405(A); and, (b) that "Plaintiff must allege conduct that 'offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantial[ly] injurious.'"[8] But, it failed to recognize or otherwise acknowledge what else *Cheramie* stands for: That recovery is permitted by "any person" suffering damage, not just "competitors."[9]

Furthermore, this was the **only** reason given by the Court in its Memorandum Ruling granting the subject Motion for Attorney's Fees:

> This Court dismissed the LUTPA claims, holding: "In the instant matter, Dr. Haygood fails to allege any act by these Defendants which would enable them to achieve an unfair competitive advantage over the Plaintiffs (no [sic] can he since none of these Defendants are dentists). Therefore, Defendants' Motion to Dismiss this claim is GRANTED."

R. Doc. 293, at p. 2 (*quoting* R. Doc. 110, at p. 12).

Because LUTPA **does, in fact,** contemplate lawsuits to be filed against "non-dentists" like the Ogden Defendants (as later admitted by this Court), it follows that Haygood's Complaint alleging a LUTPA cause of action against the Ogden Defendants was **not** groundless or brought

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[7] The court's reasoning on this issue, as with others in the Memoranda Rulings, adopts heavily and often verbatim from all of the Defendants' various memoranda. The first motion to dismiss filed by Dr. Hill, and adopted by the other Defendants, repeatedly mis-cites the controlling Louisiana Supreme Court LUTPA case as "*Sheramine Services, Inc. v. Shell Deepwater Production Company…*" and for the notion that imposition of liability under LUTPA is extremely narrow" (R. Doc. 24-1, at p. 43). In its rulings this court repeatedly adopts these mis-citations verbatim from defendants' briefs. (R. Doc. 108, at p. 9; R. Doc. 110, at p. 11; R. Doc. 182, at p. 14). More importantly, it adopts the defendants' characterization of "Sheramine" as narrowing the basis for LUTPA recovery, when *Cheramie* EXPANDS the basis for recovery beyond mere competitors. Thus, LUTPA, as interpreted by *Cheramie*, permits recovery from parties other than those dentists "who can obtain a competitive advantage."

[8] R. Doc. 110, at p. 11 (citing and quoting *"Sheramine*" [sic]). *See also* note 7 *supra*.

[9] Undersigned counsel notes that this Court made references to "conspiracy" to commit LUTPA violations, dispensing of the "conspiracy" for the "same reasons" it provided when dismissing the Sherman Act claims against the Ogden Defendants. (R. Doc. 110, at p. 11). However, in so dispensing of the LUTPA claim—as written—the Court relies solely on the fact that the Ogden Defendants were "not dentists". (R. Doc. 110, at pp. 11-12).

in bad faith (which are the requirements for the awarding of attorney's fees under La. R.S. 51:1409).

Therefore, this Memorandum Order (R. Doc. 293) and Order (R. Doc. 294) should be altered and reversed because of an intervening change in controlling law, error of law, and mistake and/or inadvertence based on: (i) this Court's ruling in *Caldwell*; (ii) its failure to apply all of *Cheramie*; and, (iii) this Court's acknowledgment in that it is *Erie* bound to apply *Cheramie* as to the scope of determining proper defendants and causes of action.[10] *See generally* Fed. R. Civ P. 54(b); Fed. R. Civ. P. 59(e); Fed R. Civ. P. 60(b); *HBM Interests*, 2013 WL3893989; *Brown Estate*, 2018 WL 4520200.

III. CONCLUSION AND REQUEST FOR RELIEF

Under consideration is the Court's granting of the Ogden Defendants' request for attorney's fees pursuant to La. R.S. 51:1409 for an alleged groundless, frivolous, or bad faith assertion of a LUTPA claim against the Ogden Defendants. This Court's dismissal of Plaintiffs' LUTPA claims against these defendants was in error, as expressly acknowledged by this Court subsequent to that dismissal. The Court should reconsider its ruling granting attorney's fees based on this error and, as a result vacate and reverse the same.

Respectfully submitted,

BY: */s/ Jerald R. Harper*

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[10] *See Caldwell*, 2018 WL 2209165 at *5-6.

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ATTORNEYS FOR PLAINTIFFS, RYAN HAYGOOD, DDS AND HAYGOOD DENTAL CARE, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **April 8, 2019**, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of this Court's electronic system.

/s/ Jerald R. Harper
Jerald R. Harper

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RYAN HAYGOOD, DDS, ET AL.	**CIVIL ACTION NO. 13-0335**
VERSUS	**JUDGE S. MAURICE HICKS, JR.**
BRIAN BEGUE, ET AL.	**MAGISTRATE JUDGE HORNSBY**

ORDER

CONSIDERING THE ABOVE AND FOREGOING "Motion for Reconsideration of and/or to Alter or Amend the Memorandum Ruling (R. Doc. 293) and Order (R. Doc. 294) Granting 'Motion for Attorney's Fees by Defendants Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead' (R. Doc. 230)" filed by Plaintiffs, RYAN HAYGOOD, DDS and HAYGOOD DENTAL CARE, LLC:

IT IS HEREBY ORDERED that Plaintiffs' Motion is **GRANTED** and the Memorandum Ruling (R. Doc. 293) and Order (R. Doc. 294), previously granting the Motion for Attorney's Fees filed by Defendants, Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead, are hereby vacated and reversed.

THUS DONE AND SIGNED in Shreveport, Caddo Parish, Louisiana on this the ______ day of ______________, 2019.

____
S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE