

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

MICHAEL PAYMENT, M.D.,

PLAINTIFF

VS.

**CIVIL ACTION NO.
1:07CV01003-LTS-RHW**

STATE FARM FIRE & CASUALTY COMPANY

DEFENDANT

**STATE FARM FIRE AND CASUALTY COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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State Farm Fire and Casualty Company (“State Farm”) respectfully submits this memorandum of law in support of its motion for partial summary judgment as to Plaintiff’s bad faith extra-contractual and punitive damages claims. Plaintiff’s bad faith, extra-contractual and punitive damages claims fail as a matter of law because State Farm had (at the very least) an arguable basis for its determinations as to the extent of covered wind damage and Plaintiff cannot show actual malice, bad faith, gross negligence or fraud in State Farm’s handling of Plaintiff’s claims.

I. INTRODUCTION

This action arises out of State Farm’s adjustment of Plaintiff’s insurance claims under his homeowners policy for damage caused by Hurricane Katrina. The record reveals that State Farm thoroughly investigated Plaintiff’s claims and concluded that, while there was some wind damage to Plaintiff’s property, storm surge flooding caused the vast majority of the damage. Accordingly, State Farm paid Plaintiff the policy limits of \$250,000 under his flood insurance policy for damage to Plaintiff’s residence and \$5,000 under his homeowners insurance policy for additional living expenses.

Plaintiff then submitted a Mississippi Katrina Claims Resolution form, upon which State Farm conducted a further inspection pursuant to the Mississippi Department of Insurance Reevaluation Process. According to the claims file, State Farm reviewed Plaintiff’s claim once again and made an offer to Plaintiff. *See* Homeowners Claim File Excerpts (Exhibit A)¹ at 0549-HO. State Farm made a settlement offer on or about July 18, 2007, which included an additional \$25,742 for previously-uncompensated wind damage. Ex. A at 0550-HO. However, Plaintiff rejected the offer and demanded policy limits despite having collected flood insurance proceeds of \$250,000. *Id.* at 0551-HO. State Farm tendered two checks totaling \$25,742 for this wind damage on April 1, 2008, on an unconditional basis. *See* State Farm letter dated April 1, 2008 (Exhibit B).

While Plaintiff contends that Hurricane Katrina was a “windstorm” as defined in his

¹ All exhibits referenced herein are attached to State Farm’s Motion for Partial Summary Judgment.

homeowners insurance policy, *see* Complaint ¶ 6, Plaintiff admitted that his home was inundated with at least 11-and-a-half feet of water. *See* excerpts of deposition of Plaintiff Michael Payment (Exhibit C) at 23:30 – 24:12. Moreover, under this Court’s prior rulings, “the plaintiffs’ receipt of flood insurance benefits constitutes a judicial admission that flood damage occurred and precludes the plaintiffs’ denying that at least the amount of damage represented by the flood insurance payment was caused by flooding”² Plaintiff, however, claims that he is owed full policy limits under his homeowners policy. Plaintiff also alleges that State Farm adjusted his homeowners claim in bad faith, entitling him to punitive and extra-contractual damages.

State Farm believes that its determination as to the respective amounts of wind and water damage to Plaintiff’s property after reevaluation was correct. However, even assuming *arguendo* that Plaintiff could prevail on his contract claim by establishing that there was some amount of unpaid wind damage, State Farm is still entitled to summary judgment as to Plaintiff’s claims for punitive and extra-contractual damages because Plaintiff cannot meet his burden to prove, by clear and convincing evidence, that (i) State Farm lacked an arguable basis for its adjustment of Plaintiff’s claims and (ii) State Farm acted with actual malice, gross negligence or reckless disregard, or committed actual fraud.

Under the Fifth Circuit’s ruling in *Broussard v. State Farm Fire and Casualty Co.*, 523 F.3d 618 (5th Cir. 2008), and this Court’s ruling in *Gunn v. Lexington Ins. Co.*, No. 1:07CV478-LTS-RHW (S.D. Miss. May 12, 2008) (Senter, J.) [Doc. 105], State Farm clearly had a legitimate basis for its determinations as to the respective amounts of wind and water damage and its investigation of Plaintiff’s claim was adequate. State Farm’s outside adjuster from E. A Renfroe & Company, Howard Crosby, examined Plaintiff’s property on October 27, 2005, and found no wind damage. Ex. A 0541-HO. Based upon his inspection, a denial letter was prepared to be sent to Plaintiff. Ex. A. at 0541-HO. On

² *McIntosh v. State Farm Fire & Cas. Co.*, No. 1:06CV01080-LTS-RHW, slip op. at 3 (S.D. Miss. Apr. 14, 2008) (Senter, J.) [Doc. 1180]; *see also Robichaux v. Nationwide Mut. Ins. Co.*, No. 1:06CV1165-LTS-RHW, slip op. at 3 (S.D. Miss. Sept. 21, 2007) (Senter, J.) [Doc. 24]; *Mills v. State Farm Fire & Cas. Co.*, No. 1:07CV73-LTS-RHW, slip op. at 5-6 (S.D. Miss. May 18, 2007) (Senter, J.) [Doc. 34].

November 21, 2005, State Farm sent a trainer, Mick Bergstrom to re-inspect the property with Plaintiff. *Id.* at 0542-HO. He explained to Plaintiff why his claim under his homeowners policy was denied: there was no wind damage to the metal roof and the neighboring home had an interior water line of five-and-a-half feet on the second level.³ According to the claim file, State Farm team manager Mark Drain, discussed this claim with George Dale, the Mississippi Insurance Commissioner at the time, and explained that it was denied because “it would be illogical to assume wind would move the house off its moorings, without causing some damage to the roof.” *Id.* The overwhelming evidence showed that Plaintiff’s house exhibited severe flood damage and minor wind damage for which State Farm made an unconditional tender to Plaintiff. Accordingly, as in *Broussard*, State Farm had an arguable basis for its adjustment of Plaintiff’s claim “based on the observations of its adjuster,” *Broussard*, 523 F.3d at 628, as well as the conclusions of the trainer who re-inspected the property. Moreover, the subsequent reports of State Farm’s experts confirm the reasonableness of the conclusions as to the cause of the destruction of Plaintiff’s home drawn by State Farm from the available information.

Furthermore, Plaintiff’s claim for punitive damages fails for the additional reason that there is no evidence—much less the requisite clear and convincing proof—of malice, gross negligence, reckless disregard, or fraud. Rather, this case is an ordinary pocketbook dispute about the amount of a covered loss, which is not a cognizable basis for punitive damages under Mississippi law.

In short, the facts of this case demonstrate that State Farm inspected the property, sent a trainer to re-inspect the property, conducted a full reevaluation of the claim, and made proper and well-supported conclusions about the amounts of wind and water damage to Plaintiff’s property. Moreover, State Farm made an unconditional tender of \$25,742 for wind damage it discovered during the reevaluation process. The record manifestly cannot support an award of punitive or extra-contractual

³ Mr. Bergstrom explained in his deposition that he could not enter Plaintiff’s home during his re-inspection because it was not safe to enter. *See* excerpts of deposition of Mick Bergstrom (Exhibit K) at 116:12 – 24. However, he did record the water line inside the second floor of the neighboring house to the east for comparison. *Id.* at 117:1-14.

damages. As this Court concluded in *Gunn*, the record “reveals a legitimate dispute over the cause and amount of covered damages,” and “[t]here is no substantial evidence that [State Farm] was attempting to improperly exclude wind as a cause.” *Gunn*, slip op. at 3 [Doc. 105]; see also *Bostwick v. State Farm Fire & Cas. Co.*, No. 1:07cv942-LTS-RHW, slip op. at 2 (S.D. Miss. Oct. 7, 2008) (Senter, J.) [Doc. 83] (granting summary judgment to State Farm on punitive damages claims in Hurricane Katrina case).

Accordingly, State Farm is entitled to partial summary judgment on Plaintiff’s claims for punitive and extra-contractual damages.

II. BACKGROUND

Plaintiff Dr. Michael Payment owned a house located at 5012 Payment Lane in Pass Christian, Mississippi. See Ex. A at 0539-HO. Plaintiff’s property consisted of 21 acres with a main house, a guest house, a pool and pump house and a boathouse. Ex. C at 8:17-19. The main house was one-story wood-framed structure with a second floor added on when Plaintiff bought the property. He also had metal roofs installed. *Id.* at 27:7 – 29:20; Report of Mark Watson (Exhibit D) at 3. During Hurricane Katrina, storm surge flooding and waves inundated and battered Plaintiff’s house starting in the early morning hours with peak surge elevations of twenty-five feet occurring at approximately 11:00 a.m.. *Id.* at 7. Although the elevation of Plaintiff’s residence was about ten feet above sea level, Hurricane Katrina’s storm surge surpassed twenty-five feet above sea level, excluding waves. *Id.*

A. Plaintiff’s Insurance Policies with State Farm

At the time of his loss, Plaintiff had a State Farm homeowners insurance policy. Compl. ¶ 4; Plaintiff’s Homeowners Policy (Exhibit E). That policy excludes “water damage,” which is defined to include “flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind[.]” Ex. E at pg. 10. The policy’s water damage exclusion is prefaced by anti-concurrent cause lead-in language providing that water damage and other “excluded events” are excluded from coverage even when a covered peril concurrently caused the loss. *Id.*

Specifically, the lead-in language states:

2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss. . . .

c. **Water Damage**, meaning: (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind

Id. Thus, under the relevant policy language, water damage is not covered if the damage would not have occurred in the absence of flood, waves, tidal water or the overflow of a body of water, even if there are other contributing causes of loss (such as wind) that are not excluded under the policy.

Plaintiff's homeowners policy covered Plaintiff's dwelling up to \$440,000, dwelling extension up to \$44,000, and contents up to \$330,000. Ex. A at 0527-HO. In addition to these benefits, Plaintiff's homeowners policy provided for additional living expenses. *Id.* The policy had a \$1,000 general deductible and a 5% or \$22,000 hurricane deductible. Ex. E

In addition to Plaintiff's homeowners policy, Plaintiff also had a flood insurance policy issued by State Farm and underwritten by the National Flood Insurance Program. *See* Flood Claim File Excerpts (Exhibit F) at 0046-FL. Plaintiff's flood policy had limits of \$250,000 for his dwelling with a \$2,000 deductible. *Id.*

B. State Farm's Investigation and Adjustment of Plaintiff's Losses

On September 1, 2005, Plaintiff submitted claims for damage to his dwelling and personal property under his flood and homeowners policies. Ex. A at 00541-HO; Ex. F at 0041-FL. On September 6, 2005, State Farm advanced Plaintiff \$5,000 under his homeowners policy. Ex. A at 00537-HO. Shortly thereafter, State Farm representatives contacted Plaintiff to schedule an inspection of his property and ascertain the extent of his loss. Ex. A at 00541-HO; Ex. F at 0060-FL.

The adjuster for Plaintiff's flood policy, Brady Hyde, inspected his property on September 12, 2005. Ex. F at 0060-FL. Mr. Hyde observed that Plaintiff's home had been completely knocked down, that the entire first floor was completely destroyed and the flood water line around the property was at the 15-20 foot mark. *Id.* Mr. Hyde determined that Plaintiff should receive full coverage under his flood insurance policy and a check was issued the same day. Ex. F at 0010-FL.

The adjuster for Plaintiff's homeowners policy, Howard Crosby, inspected Plaintiff's' property on October 27, 2005. Ex. A at 0541-HO. On November 1, 2005, State Farm sent a letter to Plaintiff to explain that Plaintiff's property was damaged as a result of storm surge, wave wash and flood, and that such damage was not covered under his homeowners policy. Ex. A at 0082-HO. On November 21, 2005, State Farm sent a trainer, Mick Bergstrom to re-inspect the property with Plaintiff. *Id.* at 0542-HO. He explained to Plaintiff why his claim under his homeowners policy was denied: there was no wind damage to the metal roof and the neighboring home had an interior water line of five-and-a-half feet on the second level. According to the claim file, State Farm team manager Mark Drain, discussed this claim with George Dale, the Mississippi Insurance Commissioner at the time, and explained that it was denied because "it would be illogical to assume wind would move the house off its moorings, without causing some damage to the roof." *Id.* The overwhelming evidence demonstrated that Plaintiff's house exhibited severe flood damage and minor wind damage for which State Farm made an unconditional tender to Plaintiff.

Plaintiff submitted a Mississippi Katrina Claims Resolution request, Ex. A at 00548-HO on or about July 5, 2007. State Farm conducted a further review of Plaintiff's claim pursuant to the Mississippi Department of Insurance Reevaluation Process on or about July 17, 2007. *Id.* at 00549-HO. Pursuant to the review, State Farm made a settlement offer on or about July 18, 2007, which included an additional \$25,742 for previously-uncompensated wind damage. Ex. A at 0550-HO. However Plaintiff rejected the offer and demanded policy limits despite having collected flood insurance proceeds of

\$250,000. *Id.* at 0551-HO. State Farm tendered two checks totaling \$25,742 for this wind damage on April 1, 2008, on an unconditional basis. Ex. B.

C. State Farm's Experts

State Farm retained several independent experts to re-examine the cause of Plaintiff's loss. The findings of these experts are consistent with the conclusions State Farm reached in adjusting the loss, *i.e.*, that storm surge flooding destroyed Plaintiff's house.

Dr. Forrest Masters is an assistant professor of Civil and Coastal Engineering at the University of Florida. He holds a Ph.D. in Civil and Coastal Engineering. Dr. Masters opined as to the forces that acted on Plaintiff's structure as well as the timing and magnitude of those forces based on his personal site inspection and his extensive field reconnaissance of the Mississippi coast hours before and after landfall of Hurricane Katrina, review of NOAA wind field analyses and aerial photography and review of storm surge and wave models. *See* Report of Dr. Forrest Masters (Exhibit G) at 2. Dr. Masters concluded that peak wind gusts in Plaintiff's neighborhood were 120 mph which were insufficient to cause any structural damage to Plaintiff's home or other structures. He concluded that "[t]he combined effects of storm surge and wave action on the subject property ultimately led to its destruction." *Id.* at 22.

Dr. David L. Kriebel is a professor of Ocean Engineering at the United States Naval Academy in Annapolis, Maryland. *See* Report of Dr. David L. Kriebel (Exhibit H) at 56. He has conducted primary research in hurricane-induced beach and dune erosion, wave statistics in severe storm events and wave-structure interaction. *Id.* He has published numerous papers on the effects of waves on standing structures. *Id.* Dr. Kriebel concluded, after using several lines of analysis, that "buoyancy and wave loading were by far the dominant environmental loads during the hurricane and were the most likely cause of damages to the home. Probable flood loads were found to be as much as 6 to 7 times larger than probable wind loads." *Id.* at 54.

Dr. Barry D. Keim, a climatologist, conducted an assessment of wind, rain and storm surge flooding during Hurricane Katrina. *See* Report of Dr. Barry D. Keim (Exhibit I). His report discussed the maximum sustained winds in the region, wind gusts, possibility of tornado occurrence, rainfall and estimated and measured storm surge at the site of Plaintiff's property. *Id.* at 1. Dr. Keim concluded from the available wind data that maximum 1-minute sustained winds were approximately 102 mph with 3-second wind gusts near 122 mph. *Id.* at 2. No tornado tracks were recorded anywhere near Plaintiff's property, indeed, none were recorded in the coastal counties of Mississippi. *Id.* at 3. Using storm surge simulations, Dr. Keim concluded that Plaintiff's property was inundated with approximately 16 feet of water at around 6:00 a.m. on August 29, 2005. *Id.* at 3-4.

Mark Watson, a structural engineer, reviewed Plaintiff's claim file photographs, Plaintiff's expert reports, State Farm's expert reports, Plaintiff's initial disclosures and aerial photographs to draw his conclusions. He also made an on-site inspection. *See* Ex. D at 1. He concluded that while some damage to Plaintiff's home was caused by wind forces, "severe structural damages and the collapse of the main home and cottage were not wind related." *Id.* at 22. According to Mr. Watson, "the compelling evidence indicates that the destruction of the main home was from the surge affects." *Id.*

III. ARGUMENT

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56, "[s]ummary judgment is warranted '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 and that the moving party is entitled to a judgment as a matter of law.'" *Legacy Condos., Inc. v. Landmark Am. Ins. Co.*, No. 1:06CV1108-KS-MTP, 2008 WL 80373, at *2 (S.D. Miss. Jan. 4, 2008) (quoting Fed. R. Civ. P. 56(c); granting partial summary judgment to defendant insurer on plaintiffs' claim for bad faith punitive damages). To support a motion for summary judgment, "the moving party . . . [has] the burden of showing the absence of a genuine

issue as to any material fact” *Burleson v. Tex. Dep’t of Criminal Justice*, 393 F.3d 577, 589 (5th Cir. 2004) (citation omitted). “For any matter on which the non-movant would bear the burden of proof at trial, . . . the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial.” *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 718-19 (5th Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

If the movant satisfies its initial burden, then the burden shifts back to the non-moving party to produce evidence indicating that a genuine issue of material fact exists for each essential element of its case. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 246-47 (5th Cir. 2003). The non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, “[i]n the language of the Rule, the nonmoving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’”⁴ *Id.* at 587 (quoting Fed. R. Civ. P. 56(e) (emphasis in original); *see also Legacy Condos.*, 2008 WL 80373, at *2 (quoting *DirecTV, Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005)).

Rule 56 “mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1520 (5th Cir. 1993) (citing *Celotex*, 477 U.S. at 322). “A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact.” *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988) (citing *Celotex*, 477 U.S. at 322-23).

⁴ These facts must be capable of being proven at trial through admissible evidence. *Geiserman v. MacDonald*, 893 F.2d 787, 792-93 (5th Cir. 1990) (affirming grant of summary judgment that did not take excluded expert affidavit into consideration).

B. State Farm Is Entitled To Partial Summary Judgment Dismissing Plaintiff's Claims for Bad Faith Extra-Contractual and Punitive Damages as a Matter of Law

State Farm is entitled to partial summary judgment on Plaintiff's claims for extra-contractual and punitive damages arising from State Farm's investigation and adjustment of Plaintiff's homeowners policy claim. Mississippi courts have repeatedly granted summary judgment in favor of insurers on punitive damages claims when, as in this case, the plaintiffs cannot meet the high burden of proof under Mississippi law. *See, e.g., Gordon v. Nat'l States Ins. Co.*, 851 So. 2d 363, 366 (Miss. 2003) (affirming summary judgment for an insurer on bad faith punitive damages); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 232 (Miss. 2001) (same); *Gunn*, slip op. at 4 (same in Hurricane Katrina case); *Lisanby v. United Serv. Auto. Ass'n*, No. 2007-00,147(3), slip op. at 2-3 (Miss. Cir. Ct. July 2, 2008) (same in Hurricane Katrina case) (Exhibit J).

Under Mississippi law, punitive damages "are considered an extraordinary remedy" and are allowed only "with caution and within narrow limits." *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (Miss. 2006). They "are to be awarded only in extreme cases." *Cnty. Bank v. Courtney*, 884 So. 2d 767, 783 (Miss. 2004) (citation omitted); *see also Soblely v. S. Natural Gas Co.*, 302 F.3d 325, 338 (5th Cir. 2002); *Standard Life Ins. Co. of Ind. v. Veal*, 354 So. 2d 239, 247 (Miss. 1977).

In this case, State Farm is entitled to summary judgment on Plaintiff's claim for bad faith extra-contractual and punitive damages because Plaintiff cannot show by clear and convincing evidence that (i) State Farm did not have any arguable or reasonable basis for its adjustment of Plaintiff's claim *and* (ii) State Farm committed a willful or malicious wrong, or acted with gross and reckless disregard for Plaintiff's rights. *See Polk v. Dixie Ins. Co.*, 897 F.2d 1346, 1350 (5th Cir. 1990), *vacated on other grounds*, 501 U.S. 1201 (1991). As the Fifth Circuit stated in *Polk*, "the plaintiff has a heavy burden to demonstrate to the trial court that there was no reasonably arguable basis for the insurance carrier to deny the claim," and "[u]nless he so demonstrates, the trial court as a matter of law is under a duty to

remove any punitive damages claims” *Id.* (citations omitted). The Fifth Circuit made plain that that same burden applies on summary judgment, stating: “The plaintiff’s burden in this respect likewise exists at the summary judgment stage where the insurance company presents an adequate *prima facie* showing of a reasonably arguable basis for denial so as to preclude punitive damages.” *Id.*

Moreover, Plaintiff’s evidence must be viewed “‘through the prism’” of the clear and convincing evidence standard applicable to his punitive damages claim. *Haygood v. First Nat’l Bank of New Albany*, 517 So. 2d 553, 555 (Miss. 1987) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)); *See also Jenkins*, 794 So. 2d at 232 (affirming grant of summary judgment on punitive damages because insurer had an arguable and legitimate reason to deny insured’s claim); *and* Miss. Code Ann. § 11-1-65(1)(a) (“Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.”).⁵ In contrast to Plaintiff’s heavy burden, “State Farm . . . ‘need only show that it had reasonable justifications, either in fact or in law, to deny payment.’” *Broussard*, 523 F.3d at 628 (citing *U.S. Fid. & Guar. Co. v. Wigginton*, 964 F.2d 487, 492 (5th Cir. 1992)).⁶

The evidence in this case establishes beyond dispute that State Farm had an arguable basis for its determination as to the amount of covered wind damage sustained by Plaintiff’s dwelling and as to the excluded flood damage. The evidence also demonstrates that State Farm did not act with malice, gross negligence, or reckless disregard of Plaintiff’s rights. Thus, Plaintiff cannot establish either of the essential showings for his bad faith/punitive damages claim, and summary judgment should be granted

⁵ *See also Cone Solvents, Inc. v. Corvin*, No. CIVA105CV419LGRHW, 2007 WL 628501, at *3 (S.D. Miss. Feb. 24, 2007) (granting summary judgment for defendant on punitive damages claim where “[t]here is no clear and convincing summary judgment evidence” that establishes the statutory requirements of Mississippi’s punitive damages statute, Miss. Code Ann. § 11-1-65(1)(d)); *Barber v. Balboa Life Ins. Co.*, 747 So. 2d 863, 867 (Miss. Ct. App. 1999) (citing *Pioneer Life Ins. Co. of Ill. v. Moss*, 513 So. 2d 927, 930 (Miss. 1987)).

⁶ Similarly, extra-contractual damages, which include “reasonable attorney fees, court costs, and other economic losses,” may be awarded only if the insurer had no arguable basis for denying policy benefits. *Windmon v. Marshall*, 926 So. 2d 867, 874 n.2 (Miss. 2006). Moreover, according to the Fifth Circuit, the “prevailing view” in Mississippi is “that attorney’s fees are not recoverable absent an award of punitive damages.” *Greer v. Burkhardt*, 58 F.3d 1070, 1075 (5th Cir. 1995).

in State Farm's favor on that claim.

1. Plaintiff Cannot Show that State Farm Did Not Have an Arguable Basis for Its Adjustment of Plaintiff's Homeowners Policy Claim

State Farm conducted a thorough investigation of Plaintiff's homeowners claim and found widespread evidence that storm surge flooding caused the vast majority of damage to Plaintiff's property. To the extent Plaintiff's property sustained flood damage, that damage is excluded under Plaintiff's homeowners policy under the water damage exclusion. State Farm's subsequent investigation during the reevaluation process also uncovered credible evidence that some separate and independent wind damaged Plaintiff's property. In accordance with the results of its investigation, State Farm made a settlement offer which included an additional \$25,742 for previously uncompensated wind damage to Plaintiff's home and personal property. Ex. A at 00550-HO. Moreover, Plaintiff accepted payment from State Farm for the full policy limits of \$250,000 under his flood insurance policy for flood damage to his dwelling. Ex. F at 0010-FL, 0060-FL. State Farm's determination of the amount of wind and water damage to Plaintiff's property more than met the arguable basis standard, and Plaintiff cannot establish otherwise by clear and convincing evidence, which precludes Plaintiff's claim for punitive and extra-contractual damages.

The question of whether State Farm had an arguable basis for its adjustment of Plaintiff's claims "is an issue of law for the court." *Broussard*, 523 F.3d at 628 (citation omitted). The Mississippi Supreme Court has defined an arguable factual basis for the denial of an insured's claim as "one in support of which there is *some* credible evidence," even though "[t]here may well be evidence to the contrary." *Blue Cross & Blue Shield of Miss., Inc. v. Campbell*, 466 So. 2d 833, 851 (Miss. 1984) (emphasis added). When an insurer has an arguable basis for adjusting a claim, that basis "*utterly preclude[s]* the submission of the issue of punitive damages to the jury." *Pioneer Life Ins. Co. of Ill. v. Moss*, 513 So. 2d 927, 930 (Miss. 1987) (emphasis added); *see also Reece v. State Farm Fire & Cas.*

Co., 684 F. Supp. 140, 145-46 (N.D. Miss. 1987). Thus, even though an insurer's denial of benefits may later be determined to be erroneous, the claim adjustment is still not in bad faith and will not support an award of punitive damages if the insurer had an arguable basis or had "arguable merit." *Soblely*, 302 F.3d at 342 (although jury found that exclusion relied on by carrier "did not actually bar coverage," it nonetheless "constitute[d] at least an arguable basis for denying the [Plaintiffs'] claim"); see *Broussard*, 523 F.3d at 628-29.

When an insurer has conducted an adequate investigation of the insured's claim and thereafter adjusts the claim in good faith reliance on a policy exclusion, the insurer will be deemed to have had an "arguable reason" to deny the claim. As the Mississippi Supreme Court explained in *Liberty Mutual Insurance Co. v. McKneely*:

The defendants are not required to disprove all possible allegations made by a claimant. They are simply required to perform a prompt and adequate investigation and make a reasonable, good faith decision based on that investigation. We find that, under the circumstances here, Liberty Mutual's investigation was adequate and that there was an arguable basis for discontinuing benefits.

862 So. 2d 530, 535 (Miss. 2003). In *Broussard*, the Fifth Circuit held that State Farm's reliance on its adjuster was sufficient as a matter of law to establish an arguable basis, which precluded submitting the punitive damages issue to the jury under Mississippi law. 523 F.3d at 628. Indeed, under Mississippi law, even a negligent investigation does not automatically amount to bad faith. *Id.* at 534; see also *Legacy Condos., Inc.*, 2008 WL 80373, at *5-6 & n.5 (granting summary judgment to insurer on insured's claim for punitive damages in a Hurricane Katrina case; "[plaintiff] relies exclusively on its argument that [defendant] adjuster's 'less than 3.6 minute per unit inspection' was insufficient to properly categorize the damage. Even if this were enough to establish a negligent investigation, that alone is insufficient to assess punitive damages against [defendant]. There is no evidence that

[defendant] acted maliciously or with a gross disregard for [plaintiff's] rights, and hence no genuine issue of material fact to survive summary judgment.”) (citations omitted).⁷

In this case, Renfroe claims representative Howard Crosby, on behalf of State Farm, visited Plaintiff's property and investigated the cause of the loss with respect to Plaintiff's claim under his homeowners policy. He concluded that Plaintiff's property sustained severe damage as a result of storm surge. State Farm trainer Mick Bergstrom re-inspected the property and came to the same conclusion. With respect to Plaintiff's claim under his flood policy, the State Farm claims representative recommended that Plaintiff receive the full limits under his flood policy, which Plaintiff accepted for flood damage to his dwelling. Plaintiff accepted and retained \$250,000 in flood payments for damage to his property. As this Court has held, Plaintiff's acceptance of flood insurance benefits constitutes a judicial admission that at least that amount of damage was caused by storm surge flooding. *See McIntosh*, slip op. at 3 [Doc. 1180]; *see also Gemmill v. State Farm Fire & Cas. Co.*, No. 1:05CV692-LTS-RHW, Jury Instruction at 2 (S.D. Miss. Mar. 26, 2007) (Senter, J.) (plaintiff's acceptance of \$128,000 under his flood policy “is an admission by the plaintiff that at least this amount of damage was caused by storm surge flooding”) (emphasis in original)⁸; *Mills v. State Farm Fire & Cas. Co.*, No. 1:07CV73, 2007 U.S. Dist. LEXIS 37411, at *13 (S.D. Miss. May 21, 2007) (Senter, J.) (“By offering and accepting the flood insurance policy limits, the parties have indicated their agreement that at least to the extent of these benefits the damage to the insured property was caused by flooding, and the parties are now judicially estopped from denying this.”).

State Farm also conducted a reevaluation pursuant to the Mississippi Department of Insurance Reevaluation Process. Ex. A at 0549-HO. State Farm reviewed Plaintiff's claim by examining the claim file, the homeowners policy, photographs of the property and the Mississippi Katrina resolution

⁷ The court in *Legacy* reached this holding despite noting that “factual issues as to damages and causation remain viable.” *Legacy Condos.*, 2008 WL 80373, at *5.

⁸ Available at <http://www.mssd.uscourts.gov/Insurance%20Opinions/Gimmell%20Jury%20Instruction%200326.pdf>.

form filled out by Plaintiff. *Id.* At this time, State Farm made a settlement offer which included an additional \$25,742 for previously uncompensated wind damage to Plaintiff's home and personal property. Ex. A. at 0550-HO. State Farm followed up its offer for this previously-uncompensated wind damage on or about July 24, 2007. *Id.* at 0551-HO. State Farm's reevaluator explained to Plaintiff's counsel that without further evidence to substantiate wind damage, State Farm could not offer more for wind damage. *Id.* However Plaintiff rejected the offer and demanded policy limits despite having collected flood insurance proceeds of \$250,000. *Id.* State Farm tendered two checks totaling \$25,742 for this wind damage on April 1, 2008, on an unconditional basis for previously-uncompensated wind damage to Plaintiff's property. Ex. B.

Accordingly, State Farm tendered payment to Plaintiff for the wind damage that was not paid for during the original claims investigation, and paid policy limits on Plaintiff's flood policy. State Farm's reliance on its adjuster, trainer and reevaluator make this case more ripe for summary judgment than cases like *Broussard*, in which State Farm's sole reliance on its adjuster was sufficient to establish an arguable basis as a matter of law. *Broussard*, 523 F.3d at 628.

Furthermore, State Farm had an additional arguable basis for its adjustment by relying on the express, unambiguous language in Plaintiff's homeowners policy, including the water damage exclusion, to adjust coverage. Plaintiff's homeowners policy unambiguously excluded damage due to storm surge and waves. *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 352-56 (5th Cir. 2007) (holding State Farm's water damage exclusion and anti-concurrent cause lead-in language are unambiguous, valid, and enforceable). "State Farm cannot be liable for punitive damages solely for relying on a legally valid and enforceable clause in its insurance contract." *Broussard*, 523 F.3d at 630. Thus, "[e]ven if . . . the ACC clause," water damage exclusion, and hurricane deductible all "played a role in State Farm's treatment of the [plaintiffs'] claim, this is not a basis for a punitive damages instruction." *Id.* State Farm relied on its water damage exclusion in light of the facts its claims investigation uncovered, which were

reinforced by the reevaluation process under the Mississippi Department of Insurance Reevaluation Process. State Farm's reliance on these express policy terms in Plaintiff's policy forms an additional arguable basis for its adjustment.

In short, all of the information that was available to State Farm established that storm surge flooding and waves caused the destruction of Plaintiff's property and that the wind damage to his property was no more than the \$25,742 payment tendered to Plaintiff by State Farm. Thus, as the court in *Campbell* held, there was at the very least "some credible evidence" to support State Farm's claim decision, and even if there were "evidence to the contrary," that would not make State Farm's decision unreasonable. *Campbell*, 466 So. 2d at 851. Therefore, Plaintiff cannot meet his burden of showing that State Farm had no arguable reason for its adjustment of his claim under his homeowners policy. Consequently, extra-contractual and punitive damages are impermissible as a matter of Mississippi law.⁹

2. Plaintiff Cannot Meet His Burden to Show that Further Investigation Would Have Easily Adduced Evidence in Support of His Homeowners Insurance Claim

This Court should also grant State Farm's motion in its entirety for the independent reason that Plaintiff cannot show that an additional investigation would have easily uncovered new evidence contrary to State Farm's determination that flood waters caused the preponderance of damage to Plaintiff's property. In *Broussard*, the Fifth Circuit confirmed that "[t]o qualify for punitive damages

⁹ See *Hans Constr. Co. v. Phoenix Assurance. Co. of N.Y.*, 995 F.2d 53, 55 (5th Cir. 1993) (affirming grant of partial summary judgment on punitive damages under Mississippi law where insurer invoked exclusion for damage caused by overloading of insured equipment: "[B]ecause [the insurer] hired independent experts to determine the cause of the crane failure, it had, at the very least, an arguable basis for denying the claim."); *Sharpe v. Employers Mut. Cas. Co.*, 808 F.2d 1110, 1113-1114 (5th Cir. 1987) (affirming grant of judgment notwithstanding the verdict on issue of punitive damages where insurer had relied on opinion of independent claims adjuster in making its decision to deny claim in a first party property case); *Sansone v. Liberty Mut. Ins. Co.*, No. Civ. A. 3:04CV-886BN, 2006 WL 286779, at *5 (S.D. Miss. Feb. 3, 2006) ("An insurer's reliance on a physician's opinion in denying a [worker's compensation] claim has generally been a sufficient ground, in and of itself, to constitute an arguable or legitimate reason for denial of coverage."); *U.S. Fid. & Guar. Co. v. King Enters., Inc.*, 982 F. Supp. 415, 417 (N.D. Miss. 1997) (Senter, J.) (insurer "based its denial on an independent investigation and, therefore, had an arguable reason for denying the claim"); *Reece*, 684 F. Supp. at 145-46 (insurer denied first party claim based on expert's conclusion that fire loss was caused by accelerant; court granted partial summary judgment in carrier's favor as to punitive damages because insurer "had an arguable reason for denying payment on this claim due to the various facts suggesting" arson); *McKneely*, 862 So. 2d at 534 (insurer had arguable basis for discontinuing disability benefits based on its expert's investigation).

for negligent claim investigation, ‘the level of negligence in conducting the investigation must be such that a proper investigation by the insurer would easily adduce evidence showing its defenses to be without merit.’” *Broussard*, 523 F.3d at 630 (quoting *Sobley*, 302 F.3d at 342); *see also Liberty Mut. Ins. Co.*, 862 So. 2d at 534 (the plaintiff must prove that the insurer’s “level of negligence in conducting the investigation [was] such that a proper investigation by the insurer ‘would easily adduce evidence showing its defenses to be without merit.’”) (citation omitted). “In other words, [plaintiffs] must show ‘that further investigation would undercover evidence that would have undermined at least the arguable merit’ of State Farm’s defenses.” *Broussard*, 523 F.3d at 630 (citation omitted). Accordingly, the Fifth Circuit in *Broussard* held that the punitive damages question should not be submitted to the jury because “[e]ven after extensive investigations by both parties, the question of whether the Broussards’ property was first destroyed by wind or water remains an extremely close one.” *Id.*

In this case, State Farm’s claim investigation included its adjuster’s inspection of the property, the trainer’s re-inspection, the re-evaluator’s inspection and tender of payment to Plaintiff for additional wind damage. All of the inspections established that storm surge flooding and waves caused the great preponderance of Plaintiff’s damages. Plaintiff cannot establish that a further claims investigation would have easily uncovered contrary evidence. Indeed, subsequent investigations by State Farm’s experts Dr. Masters, Dr. Kriebel, Dr. Keim, and Mr. Watson, uniformly reinforce State Farm’s conclusions. Their examination of all of the facts and extensive weather data establishes that a further claims investigation would not have “easily” undermined the arguable merit of State Farm’s adjustments. To the contrary, as in *Broussard*, “extensive investigations” by these post-adjustment experts confirmed the merits of State Farm’s claims decisions. Accordingly, as in *Broussard*, “[t]his is not a case in which further investigation has [or would] ‘easily adduce evidence’ showing that State Farm’s position lacks arguable merit.” *Broussard*, 523 F.3d at 630.

3. Plaintiff Cannot Make the Additional Required Showing that State Farm Acted with Actual Malice or Gross Negligence

To prevail on his claim for punitive damages, in addition to showing State Farm had no “arguable reason” for denying his claim, Plaintiff must also show by clear and convincing evidence that State Farm “acted with malice or . . . with gross negligence or reckless disregard for the rights of others.” *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888, 895 (Miss. 2006); *see also Broussard*, 523 F.3d at 628-29; Miss. Code Ann. § 11-1-65(1)(a).

In this case, even assuming Plaintiff could somehow show as a matter of law that State Farm’s handling of his claim had no arguable basis and the claims investigation was inadequate, there is simply no evidence (let alone clear and convincing evidence) from which a jury could conclude that State Farm engaged in any malicious or grossly negligent conduct of the kind that would justify an award of punitive damages. *See Lisanby*, slip op. at 2-3 (declining to submit the punitive damages question to the jury in a Hurricane Katrina case because the plaintiff failed to demonstrate that the insurer was malicious or grossly negligent); *see also U.S. Fid. & Guar. Co. v. King Enters. Inc.*, 982 F. Supp. 415, 417 (N.D. Miss. 1997) (“[T]he absence of an arguable reason does not per se establish that the insurer acted with malice or gross negligence or reckless disregard for the plaintiff’s rights, since denial of the claim could be the result of an honest mistake or oversight, which would amount to ordinary and simple negligence.”); *Weems v. Am. Sec. Ins. Co.*, 486 So. 2d 1222, 1227 (Miss. 1986) (“A failure to pay may result from negligence on the part of the insurer and punitive damages are not assessable, again assuming *arguendo* the objective absence of an arguable reason for such failure to pay.”).

Here, State Farm’s conduct throughout its adjustment of Plaintiff’s homeowners policy claim demonstrates that State Farm did not act with malice or gross negligence. In fact, State Farm readily considered all available information, re-inspected the property, and paid Plaintiff for covered losses. *See supra* Part II. Furthermore, when Plaintiff requested a reevaluation through the Mississippi Department

of Insurance Reevaluation Process, State Farm thoroughly reevaluated Plaintiff's claim, and made a settlement offer which included an additional \$25,472 for previously uncompensated wind damage to Plaintiff's home and personal property, and later tendered this amount to Plaintiff on an unconditional basis despite the fact that he did not accept the settlement offer made by State Farm at the end of the reevaluation process. Moreover, Plaintiff's acceptance of full payment under his flood policy establishes as a matter of law that, as State Farm determined, Plaintiff's property sustained extensive flood damage.

Indeed, any doubt as to whether State Farm can be liable for punitive damages should be put to rest by the Fifth Circuit's recent opinion in *Broussard v. State Farm Fire & Casualty Co.*, 523 F.3d 618 (5th Cir. 2008). In *Broussard*, the Fifth Circuit held that State Farm (i) had an arguable basis for denying the Broussards' claim, (ii) conducted an adequate investigation into the cause of the loss, (iii) and did not act with gross negligence or malice. *See id.* at 628-30. In *Broussard*, like the instant case, the Broussards' home was within the area inundated by Hurricane Katrina's storm surge, but in *Broussard*, the plaintiffs' house did not survive the hurricane, making it difficult to determine causation. *Id.* at 623. "The State Farm claims adjuster who inspected the site [of the Broussards' home] concluded that the '[e]vidence suggests [the] home was more damaged by flood than wind,' and State Farm denied the Broussards' claim in its entirety." *Id.* In *Broussard*, State Farm did not request an engineer to further investigate the claim but simply denied the Broussards' homeowners claim on the basis of its adjuster's investigation. *See id.*

On appeal, the Fifth Circuit held that the issue of punitive damages should not have been submitted to the jury. *Id.* at 627. Holding the Broussards had not met their burden to show by clear and convincing evidence that punitive damages were warranted, the Fifth Circuit found that State Farm had at least an arguable basis for denying the Broussards' claim, did not act with malice or gross negligence, and had conducted an adequate investigation into the cause of the loss. *See id.* at 628-30. The Fifth

Circuit held that even though State Farm refused to pay the Broussards anything under their homeowners policy after State Farm's trial experts determined that the Broussards' home suffered appreciable wind damage, such action did not rise to the level of malice or gross negligence required to warrant a punitive damages instruction. *See id.* at 629 (“[W]e hold State Farm did not act with sufficient ‘malice or gross negligence’ to merit punitive damages.”) (citation omitted).

The record in this case does not show any evidence, must less the requisite clear and convincing proof, of malice or gross negligence. Instead, the record “reveals a legitimate dispute over cause and the amount of covered damages sustained by Plaintiff[s].” *Gunn*, slip op. at 3 [Doc. 105]. In *Gunn*, this Court granted summary judgment for an insurer on the issue of punitive damages. The plaintiffs sued their insurer for additional homeowners policy benefits after Hurricane Katrina destroyed their house. *Id.* at 1. The insurer's initial adjuster recommended “full payment” under the policy as did subsequent inspectors, but none of these inspections attempted to distinguish wind from water damage. *Id.* at 2. The insurer continued its investigation and received substantial engineering evidence that flooding caused the plaintiff's loss, so the insurer rejected its adjuster's recommendations, concluded that more evidence showed that flood waters caused the plaintiff's loss, and denied the claim. *Id.* at 1-3. This Court applied the principles of *Broussard* and granted summary judgment for the insurer on punitive damages (among other issues) because the plaintiff offered “no substantial evidence that [the insurer] was attempting to improperly exclude wind as a cause.” *Id.* at 3. As in this case, the insurer “made several attempts to learn what physical damage was due to a covered event, as well as determine what physical damage was due to an excluded peril.” *Id.*

Plaintiff's failure of proof on this requisite element of malice or gross negligence is dispositive. Indeed, this Court recently granted State Farm's motion for partial summary judgment in a Hurricane Katrina case because the plaintiffs failed to present any substantive evidence that State Farm adjusted the claim with malice, recklessness, or gross negligence: while “Plaintiffs are entitled to dispute State

Farm's decisions, . . . they can not do so with general accusations having no underlying substantive support. State Farm's conclusions were reached in a legitimate way and were not the result of bad faith, malice, or gross negligence that would warrant punitive damages." *Bostwick*, slip op. at 2. Summary judgment on punitive damages is proper when "Plaintiffs have not come forward with any substantive evidence of State Farm having acted in a malicious, reckless, or grossly negligent manner that rises to the level of an independent tort." *Id.*

As in *Gunn* and *Bostwick*, State Farm's conclusions as to the amount of wind damage sustained at Plaintiff's property "were reached in a legitimate way and were not the result of bad faith, malice or gross negligence that would warrant punitive damages." *Gunn*, slip op. at 3.

4. The Undisputed Facts Show Nothing More Than a Pocketbook Dispute

In light of the undisputed fact that State Farm tendered payment to Plaintiff for \$25,472 for wind damage to his property during the claims adjustment process, it is apparent that this case involves a dispute over the value of a policyholder's net claim, rather than a complete denial of coverage. In such cases, as the Fifth Circuit has observed, "the Mississippi Supreme Court has been extremely reluctant to allow punitive damages in cases where the insurer did not deny coverage, but only disputed the amount of the claim or delayed payment." *Tutor v. Ranger Ins. Co.*, 804 F.2d 1395, 1399 (5th Cir. 1986); *Cossitt v. Alfa Ins. Corp.*, 726 So. 2d 132, 139 (Miss. 1998) ("[T]his case is nothing more than a pocketbook dispute and does not rise to the heightened level of an independent tort."); *Morgan v. Providence Wash. Ins. Co.*, No. 4:94CV232-D-B, 1996 U.S. Dist. LEXIS 21448, at *13 (N.D. Miss. Sept. 4, 1996) (granting summary judgment to insurer dismissing punitive damages claim: "[P]ocketbook dispute[s] . . . do not warrant an award of punitive damages even should [the insured] prevail on her underlying [contract] claim"). Mere "differences of opinion" over the amount of covered damage present does not rise to the level of "wanton, gross or intentional conduct in the nature of an independent tort." *State Farm Mut. Auto. Ins. Co. v. Roberts*, 379 So. 2d 321, 322 (Miss. 1980)

(reversing award of punitive damages where parties merely disagreed as to the amount due for a demolished vehicle); *see also Evangelista v. Nationwide Ins. Co.*, 726 F. Supp. 1057, 1060 (S.D. Miss. 1988) (noting that an insurer is not guilty of bad faith “simply because an insured believes her claim is worth more than the insurer offers”).

Plaintiff cannot show that this dispute is anything more than a legitimate “difference[] of opinion” over the amount owed. *See Roberts*, 379 So. 2d at 322. Because the parties “merely dispute the amount of damages suffered,” this case is simply a pocketbook dispute for which bad faith punitive and extra-contractual damages are not available as a matter of law. *See Morgan*, 1996 U.S. Dist. LEXIS 21448, at *14.

IV. CONCLUSION

For all the reasons discussed above, State Farm is entitled to partial summary judgment on Plaintiff’s claim for bad faith punitive and extra-contractual damages. There exist no material issues of disputed fact as to State Farm’s legitimate basis for its determination as to the amounts of covered and excluded loss, the adequacy of State Farm’s investigation, and the absence of malice, gross negligence and reckless disregard in State Farm’s adjustment of Plaintiff’s claim. At most, this case presents a legitimate pocketbook dispute regarding the total value of wind damage caused by Hurricane Katrina. State Farm is therefore entitled to partial summary judgment in its favor on Plaintiff’s claim for punitive and extra-contractual damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, **MATTHEW E. PERKINS**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

THIS the 14th day of October, 2008.

/s/ Matthew E. Perkins

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