

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

ROBERT R. GAGNÉ

PLAINTIFF

VS.

CIVIL ACTION NO.:1:06-CV-0711—LTS-RHW

**STATE FARM FIRE AND CASUALTY COMPANY,
EXPONENT, INC., et al.**

DEFENDANTS

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT EXPONENT'S MOTION
FOR SUMMARY JUDGMENT [DOC. 426]**

LAW AND ARGUMENT

Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact, and the mover is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56; *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). The movant is entitled to summary judgment only if the evidence, viewed in the light most favorable to the non-movant, shows no genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In determining whether summary judgment is appropriate, all of the evidence introduced and all of the factual inferences from the evidence are viewed in a light most favorable to the party opposing the motion and all reasonable doubts about the facts should be resolved in favor of the non-moving party. *Boston Old Colony Ins. v. Tyner Associates, Inc.*, 288 F.3d 222, 227 (5th Cir. 2002).

Procedural History

Plaintiff filed suit against State Farm in July of 2006. During discovery he uncovered objective evidence that indicated that the engineering assignment and the circumstances related

to the ultimate issuing of an engineering report were suspicious. He amended his complaint and named various engineering defendants and alleged, in part, that Exponent had acted with gross negligence, malice, or reckless disregard for his rights as an insured. Plaintiff has recently filed a Motion to Dismiss the claims versus the individual engineers and Thomas & Luth, Inc., leaving Exponent as the sole remaining “engineering defendant.”

Facts and Evidence in the Light Most Favorable to Gagné’s Claims

Robert Gagné’s home was located in South Diamondhead which endured the pounding winds of Hurricane Katrina's northeast side for hours before the double eye wall crossed it and then endured many more hours of wind after the eye walls passed. Eventually, storm surge covered his property, but not before his property endured the maximum sustained winds as well as one of the longest periods of sustained hurricane force winds in recorded history. (See Henning Report dated March 19, 2008 (Exhibit A, linked documents omitted) and March 17, 2006 AccuWeather Report for Gagné property, (Exhibit B); see also *Palmer v State Farm*, 1:07CV039 LTS-RHW, 2007 U.S. Dist. LEXIS 36021 (S.D. Miss May 15, 2007 denying State Farm Motion to Dismiss).

During this onslaught, his entire home was destroyed on August 29, 2005, and he lost all of his personal possessions. But his property was not washed clean of all evidence. [See Exh. B - Neil Hall Report, Exh.C - Thomas field notes, Exh. D, photos taken by Savoy in State Farm claim file. Unlike many of his neighbors, however, who were paid the limits of their homeowner’s policies by their insurance companies, State Farm completely denied any coverage for the loss of Gagné’s home and personal property without actually evaluating the available evidence. [See Exh. E, Dennis deposition at pp. 88-92]. Gagné reported his loss to State Farm,

through whom he had purchased both an all-peril homeowner's policy and a flood policy, on August 30, 2005. State Farm assigned adjuster Rachael Savoy to Gagné's claims. She made two visits to his property on September 9 and September 18, 2005 during which she made some measurements and took some pictures. After the second visit, she requested that an engineer be assigned to determine wind versus water causation. She collected no further evidence as to the cause of the loss after requesting the engineering report.

The following is a time line of key events in the investigation of and the adjustment of Gagné claim:

August 29, 2005 – Gagné home at 320 Puunani Place destroyed by Katrina.

Early September - October 25, 2005 – Racheal Savoy (Pilot Catastrophe Services adjuster acting as State Farm field adjuster) and Steve Burke (State Farm supervising TM) assigned to the Gagné homeowner claim.

September 17, 2005 - Racheal Savoy inspects the home, "requesting engineer to determine wind vs. flood damages." Ex. F , Homeowners Activity Log at pg 16.

September 24, 2005 – State Farm retains Exponent Failure Analysis Associates of Menlo Park, California to inspect the home.

September 24 through November 11, 2005 – State Farm homeowners claim file reflects no activity for this forty-eight (48) day period except two erroneous entries unrelated to the Gagné claim. Ex. F, Homeowners Activity Log, pgs. 15 & 16.

Late September 2005 – Exponent hires Thomas & Luth, Inc. out of Baton Rouge to inspect the home.

October 6, 2005 – Calvin Thomas, a structural engineer who works for Thomas & Luth, Inc., inspects the home with Roger Bailey (an architect from New Orleans). Thomas' inspection notes conclude "wind caused the catastrophic failure." Ex. I., Thomas Field Notes

October 10, 2005 - Calvin Thomas faxes inspection notes to Exponent, Inc. Ex. I, Thomas Field Notes

October 19-20, 2005 – Exponent employee Joanna Meldrum forwards an "interim" report via email to State Farm. Report goes from Mark Wilcox to David Haddock to Lecky King. King comments she has concerns about apparent findings of wind damage. Ex. J

October 25, 2005 – Steve Burke relocated outside Cat area. Ex. G at pgs.

November 11, 2005 – State Farm issues a denial letter sighting global weather conditions and tidal surge. State Farm simultaneously issues a memo (signed by David Haddock) that instructs

Exponent to not write the report and to forward all “investigative materials.” Kirk Angelle signs denial letter, testifies he does not inquire whether property was inspected by an engineer (or what the engineer observed/concluded) despite the claims file reflecting an engineering assignment to Exponent, Inc. on September 24, 2005. Concludes no wind damage based upon six (6) pictures in claims files, points to trees as supporting his decision to deny the claim in its entirety. Field adjuster Rachael Savoy testifies she disagreed with this decision. Ex. L, Angelle at pgs 118, line 24 through pg. 121, line 13 , Ex. M, Savoy at pgs. 157, lines 19-25, pg. 158, lines 1-6.

November 11-30, 2005 – Exponent does not forward investigative materials and continues working on the report.

November 23, 2005 – Calvin Thomas sends John Osteraas of Exponent, Inc. (VP, in charge of State Farm Engineering Assignments) an email where he states that his original conclusions *may* need to be modified because he has been laboring under the misperception that Katrina had *sustained* winds of 160 to 175 miles per hour as it approached the Mississippi coast. Ex. N, Thomas email.

November, 28, 2005 – Thomas & Luth, Inc. receives over \$38,000.00 from Exponent, Inc. Exh. O, Payment to Thomas & Luth, Inc.

@ November 29, 2005 – Calvin Thomas signs off on the report that reverses his field notes and blames the loss on water. Report states that wind “possibly” could have damaged parts of the home.

November 30, 2005 – Exponent issued their standard global report supporting a denial based upon storm surge. The original conclusions of Thomas are not mentioned and the report fails to address any meaningful evidence particularized to the Gagné residence. Ex. P, Exponent 11/30/05 Report.

December 5, 2005 – Exponent’s November 30, 2005 Engineering Report is received by State Farm. Ex. F, Activity log, 12/6/05 entry.

December 6, 2005 - Lisa Wachter makes entry in activity log. Indicates she has received and reviewed the Exponent engineering report and states “send appropriate denial.” Ronnie Archer mails another denial letter along with engineering report to Robert Gagné. State Farm again concludes that Robert Gagné’s property received \$0.00 of covered damage under his homeowners policy. Ex. F, Activity log, 12/6/05 entry

January 2006 – Mark Drain meets with Robert Gagné at his home and is shown newly discovered evidence of household items underneath crushed rock that was moved north easterly by storm surge. Drain initially tells Gagné that a second inspection is not going to happen. Ex. S, Gagné 2007 at pgs. 108, line 23 through pg. 111, line 3.

February 10, 2006 – Steve Shekerlian re-inspects the Gagné home. He is shown the rockpile evidence. Ex. S, Gagne 2007 at pgs. 111, lines 19-25, pg 112, lines 1-9

May 8, 2006 – Exponent issues a second report, ignores the rockpile evidence completely and reaffirms their November 30, 2005 report. Ex. Q, Exponent Report issued May 8, 2006 (actually dated improperly as May 8, 2005).

July 21, 2006 – Robert Gagné files suit versus State Farm Fire & Casualty Co. [DOC 1].

State Farm contracted with Exponent, Inc. to do an engineering assignment to determine “wind vs flood damage to determine if any HO coverage exists for possible wind damage.” Ex. H, Engineering Assignment. It was implicit in this assignment that Exponent's actions would impact substantial rights of the Plaintiff. Exponent was put on notice, and had sufficient experience in handling insurance matters to fully understand the import of the work they tasked to perform. Ex. U, Exponent 30(b)(6) deposition at pgs. xx.

Plaintiff asserts that the Exponent was responsible for the actions of their agents in the field that they had a duty under Mississippi law as adjusters/administrative agents and under the Mississippi Board of Licensure for Professional Engineers and Surveyors regulations that provide, in relevant part:

The licensee shall contribute to the maintenance, integrity, independence and competency of the engineering and/or surveying profession as follows:

The licensee shall not perform any acts, allow omissions or make any assertions or representations which are fraudulent, deceitful, or misleading, or which in any manner whatsoever tend to create a misleading impression. *Mississippi Board of Licensure for Professional Engineers and Surveyors § 17.06 Ethics, paragraph 7*. Exponent's own expert on engineering ethics, William Charles Bracken, acknowledged in his deposition that engineers practicing in the State of Mississippi would be subject to Mississippi's statutory and regulatory guidelines. Ex. R at pg. 26, lines 21-24.

The Court stated in its prior 12(b)(6) ruling that: Plaintiff's cause of action against the engineering defendants should be straightforward.

It appears that the engineering defendants acted in the capacity of an adjuster or administrative agent in connection with the Plaintiff's claim. Under Mississippi law, an adjuster does not owe

the insured a fiduciary duty nor a duty to act in good faith. *Bass v. California Life Insurance Co.*, 581 So. 2d 1087, 1090 (Miss. 1991). Relying on *Dunn v. State Farm Fire & Casualty Co.*, 711 F. Supp. 1359 (N.D. Miss. 1987), *Bass* adopted the standard that “an adjuster has a duty to investigate all relevant information and must make a realistic evaluation of a claim. . . . However, an adjuster is not liable for simple negligence in adjusting a claim.” 581 So. 2d at 1090. Therefore, an adjuster “can only incur independent liability when his conduct constitutes gross negligence, malice, or reckless disregard for the rights of the insured.” *Id.*

Exponent jumped the gun when it began assisting State Farm with its legal defense while it was still operating under the mandates of *Mississippi Board of Licensure for Professional Engineers and Surveyors* and its duties as an adjuster/administrative agent in connection with the Plaintiff's claim. It did this in a consistent pattern of a considerable period of time.

Failure to Forward the Investigative Materials

Exponent's first ethical lapse occurred when they were instructed to “forward all investigative materials” on November 11, 2005. The materials that would have been in Exponent's file when they received the Haddock memo were Calvin Thomas' field notes which documented “the catastrophic loss was due to wind.” Transmission of these notes could have effectuated a correction of the Unsupported November 11, 2005 denial. William Bracken testified that if he would have received the Haddock Memo he would forwarded the investigative materials. Ex. R, Bracken depo at pg. 94, lines 7-23.¹ Exponent chose a different course of action. They decided to not forward the investigative materials and continue working on the report. Ex. V, Meldrum at pg. 80, lines 18-23. Exponent claims they based their decision to not forward the investigative materials upon the premise that they were basically finished with the report. Their own expert disagrees. Bracken testified that a report is not finished when the inspecting engineer who is to sign the report has not concurred in its conclusions. Ex. R.,

¹ The Haddock Memo stated in relevant part, do not write report, forward investigative materials with bill, send report if completed. Ex. DD, Haddock Memo dated 11/11/05.

Bracken depo at pg. 48 line 23 through pg. 49, line 6. Calvin Thomas email dated November 23, 2005, twelve days after the request for investigative materials indicates he may change his opinions based upon review of new weather data. Implicit in that email is a reasonable conclusion that he has not changed his opinion yet since he “may” change it in the future.² It is a question of fact whether Exponent did this for sublime reasons or whether Exponent, faced with the spectre of placing evidence of wind damage into their client's claim file, chose to ignore their duties and instead protect their economic interest in their financial relationship with State Farm. Depending upon how the finder of fact concludes as to the veracity of Exponent's explanation is dispositive. Either they are telling the truth and were merely negligent in ignoring the instructions of their principal or they are misrepresenting the facts. If they are misrepresenting the facts, the law does not require an expert to testify that this behavior is beyond mere negligence. A lay person with appropriate jury instructions can conclude that misrepresenting the facts to keep evidence of wind damage out of homeowner's claims file is a reckless disregard for his rights under his contract insurance.³

**Failure to Report Accurately the Likelihood of Wind Damage and Ratifying State Farm's
Position the the Gagné Home Received No Wind Damage**

Plaintiff has repeatedly asked defense witnesses in this litigation if they believed it was more likely than not that the Gagné home received no covered wind damage as result of Hurricane Katrina. No witness has ventured out in support of State Farm's position that it took on November 11, 2005 when it denied the claim in its entirety. Exponent's John Osteraas testified

² John Osteraas, testified that Thomas had not “signed off on the report as of November 14, 2005. Ex. U at pgs.

³ Exponent was on notice that their investigation would affect substantial rights of the Plaintiff under his contract of insurance. They were a sophisticated organization that had done lots of work on behalf insurance companies for several decades. Ex. u at pgs . The Request for an Engineer form filled out by State Farm and faxed to Exponent stated that the reasons for the request “wind vs flood damage to determine if any HO coverage exists for possible wind damage. See Ex. H., Request for Engineer Form.

at Exponent's 30b(6) deposition:

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17 Q. In concluding that, you didn't make a
18 determination that it was more likely than not that
19 wind damage occurred?

20 MR. WILLIAMS: Object to the form of the
21 question.

22 MR. FICENEC: Join. You can answer.

23 THE WITNESS: Yeah, I think I'm very clear in
24 stating the conclusion that wind damage may have
25 preceded the destruction of the building and then go

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1 on to enumerate the type of damage that we may have
2 seen in this building had this building been at a
3 slightly higher elevation.

4 BY MR. HEARIN:

5 Q. Okay. Well, you signed this report, you
6 oversaw this investigation. Is it your opinion more
7 likely than not the Gagne home received wind damage
8 during Hurricane Katrina?

9 MR. WILLIAMS: Object to the form of the
10 question.

11 MR. FICENEC: Go ahead.

12 THE WITNESS: That was my intent in writing
13 this paragraph, to make it clear that there could have
14 been some damage, and I would say more likely than not
15 is probably the standard there.

16 In other words, I think it is unlikely that
17 there was absolutely no wind damage, but I can't say
18 for certain that there was.

19 I think, based on what I know about damage
20 patterns in the air -- area, it's more probable than
21 not that there was some wind damage, and here are the
22 types of damage that we may have seen if the building
23 had not been destroyed by the storm surge.

24 BY MR. HEARIN:

25 Q. Why didn't you put that in your report?

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1 A. Well, I think that's exactly what I put in the
2 report, it's just -- we're just talking about slightly
3 different phraseology.

Ex. U, Exponent 30(b)(6) deposition.

William Bracken also testified as to the obligations of an engineer to review the data and report the data as honestly as he can and as accurately as he can. Exhibit R, Bracken at pg. 67,

lines 21-24. The engineer has duty to give a full and accurate opinion. Exhibit R, Bracken at pg 47, lines 1-6. Exponent underreported the likelihood of wind damage to the Gagné home when it chose to say it is “possible” the home received wind damage when its investigation revealed it was “more probable than not” that the property received wind damage. They compounded the harm to the Plaintiff when they ratified State Farm's denial via this under reporting. It is for the finder of fact to determine what weight to give such a crucial omission⁴

Exponent's Failure to Address the Rockpile Evidence in its May 8, 2005 Report

In early January of 2006, Plaintiff requested a second inspection based upon new definitive evidence that his home and personal property was destroyed by wind prior to any relevant storm surge arrival. This evidence included, in part, the discovery of debris from various parts of the house that was trapped under crushed rock. This crushed rock evidence clearly indicated that major sections of the home had collapsed before the crushed rock was moved on top of the debris by water. The debris that was covered by water deposited rock included kitchen utensils, items from bedrooms on the second floor of the home, and sections of the front porch, the roof and siding from the house. The debris had fallen to the ground prior to the crushed rocks being layered on top of it by the incoming storm surge.

After State Farm representative Mark Drain initially told Plaintiff that a second inspection “was not going to happen” State Farm sent out Steve Shekerlian of Exponent Failure Analysis Associates to investigate the new evidence on February 10, 2006. Neither Roger E. Bailey of Bailey & Associates nor Calvin C. Thomas of Thomas & Luth, Inc. was present at the

⁴ The accurate response supports payment under the Gagné homeowners policy. The phrase Exponent chose to use allows State Farm to continue to claim ignorance or a level of knowledge to support non-payment under the policy. Once again, Exponent is a sophisticated experience company familiar with insurance claims. Was such an omission mere negligence or intentional fudging of the report to meet the needs of their client?

second inspection. The crushed rock evidence and the debris *underneath* it were shown to Mr. Shekerlein. Several months passed yet the second report was not forthcoming. When Plaintiff inquired as to why the report had not been issued he was told by Mr. Shekerlian that he was waiting on direction from State Farm to complete his report. Supplemental Report Number 1 was finally issued on May 8, 2006. See Ex. S, Gagné 2007 at pgs. xx.

The report continues to follow the pattern of supporting State Farm in its tactic of admitting wind damage but refusing to definitively quantify it (failing to fully adjust the claim or offer money for the admitted damage) while claiming water eventually came (adjusting the policy exclusion only). It concluded that nothing in the correspondence, reports, interviews and supplemental inspection “would necessitate modifications of the conclusions of our November 30, 2005 report.”⁵ The report did not address the crushed rock evidence at all. The report was signed by Steve Shekerlian, Managing Engineer and John D. Osteraas, Practice Director and Principal Engineer. Ex. Q, Exponent Report issued May 8, 2006.

Exponent was forwarding Draft/Interim Reports to State Farm after they inspected the Gagné Property but Before they Issued their November 30, 2005 Report

Plaintiff recently came into possession of a series of emails that indicate the corporate representatives and key witnesses have been misleading Mr. Gagné about the objective nature of their evaluation. On October 19, 2005, Joanna Meldrum of Exponent, Inc. forwarded a status/interim report to Mark Wilcox at State Farm. Mark Wilcox then forwarded the email David Haddock and Sandy Schmidt. David Haddock then forwarded it to Lecky King with the instructions “Please review this report from Exponent.” Lecky King apparently reviews the

⁵ Exponent missed another opportunity to clarify their actual findings were that wind damage occurred “more likely than not” but failed to so. They reaffirmed their previous under reporting that wind damage was merely possible.

engineering report and emails Mark Wilcox, David Haddock and Dave Randel as follows: I have some great concerns... Look at the pictures in the file. There is little wind damage to the roof.”

Clearly Exponent is forwarding drafts to State Farm that are being reviewed substantively by employees at State Farm. (Exhibit J). This might not be a problematic for the Exponent if they had not misrepresented to the Plaintiff that this process was occurring. This objective evidence completely contradicts the testimony of John Osteraas, Joanna Meldrum, and State Farm given in depositions in the case at bar. This testimony is purposefully misleading and a continuation of State Farm's and Exponent's attempt to keep probative evidence of how the Gagné claim was handled away from the Plaintiff.

Why are the draft reports important? First, their existence has been denied by key witnesses in this litigation. It is well settled in the law that when a witness has testified untruthfully on one occasion, their testimony on other matters may be viewed with heightened skepticism. Secondly, Exponent has confirmed that reports that were not final were being exchanged with State Farm. The one report that Plaintiff is aware of was transmitted on October 19, 2005 and substantively reviewed at State Farm on October 20, 2005. What happened after that review (which involved an expression of displeasure at an apparent finding of wind) is unclear. Were additional discussions had that impacted how the November 30, 2005 Gagné engineering report was eventually written. Was the use of the “possible” rather than “probable” discussed amongst the two entities? To date, Exponent has acknowledged that 10 to 12 of these interim/draft reports were forwarded to State Farm but has been unable to confirm or deny whether any of these draft report exchanges involved properties in South Diamondhead.

**State Farm, Under Oath, Denied the Transfer of Draft Engineering Reports
between State Farm and Exponent, Inc.**

a. *State Farm's 30(b)(6) representative denies draft engineering reports or information going back and forth between Exponent and State Farm prior to issuing a final engineering report:*

Mr. Hearin

Q Okay, based upon your knowledge of the Gagne claim and your involvement in the Gagne claims, in particular your involvement in complying with the complaint to the Mississippi Insurance Commission, to the best of your knowledge, was State Farm aware of the findings of Calvin Thomas, when he did an inspection on October 6, 2005?

A. To the extent we had the report that was issued by Exponent following his inspection, we were. But did we know everything that Calvin Thomas compiled, only if it was sent to us.

Q. So you were unable to tell either way?

A I think we were aware of Calvin Thomas' field work? Well were were, because we got a copy of the report that, in essence, was based on his field work. So we were aware to that extent.

Q. Would there be anything transmitted to State Farm, other than the report, from the engineering firm?

A. No

Q Okay

A No

(Emphasis added)

Q As a practice, when you were working a claim file with, for example, Exponent, would you forward them internal State Farm documents that would, \you know, perhaps related to weather conditions or storm surge, or do--do you recall?

A No I wouldn't

Q You wouldn't?

A I would not

Q Okay. And how --what would you--would be relying on them to make those determinations as to those factors and their causation in

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the -- their effect on causation?

A Yes I would expect them to do the research that would allow them to come to an opinion, and that would be part of the research that I would expect them to do independently.

Q Okay And would there be any back and forth between

yourself and the engineering firm, a third-party engineering firm, during the evaluation of the claim prior to the report being issued?

A. No, No.
(Exhibit K)

b. John Oстераas, VP at Exponent and Project Manager on Katrina cLaims Denied that Exponent, Inc. Provided Draft Engineering Reports to State Farm

[being asked about the November 30, 2005 report]

Mr. Hearin:

Q The report was finalized prior to November 11.

A The report was essentially complete prior to November 11.

Q Was it finalized?

A It was not finalized, because it --if it had been finalized, it -- it would have been out the door.

Q Had the report been provided to State Farm as of November 11, 2005 --

Mr. Foster: Objection; asked and answered

Q-- whether in final form or in substantially completed?

A We -- did not provide drafts of any of our reports to State Farm. (emphasis added)

(Exhibit L)

IJoanna Meldrum of Exponent, Inc., the Person who Transmitted the Interim/draft report Denied Access or Control Over Draft Reports

Q: In your role, were you privy to draft reports?

Mr. Williams: Objection to form.

A. No

(Exhibit M)

This is her testimony, even though she is the very person who forwarded the draft report to State Farm that was recently provided in discovery. Plaintiff received the report in State Farm's Supplement tits Core Discovery Response on December 12, 2008, after the discovery cut-off had passed. [DOC 468]. This was after Plaintiff had sought answers based upon knowledge of the emails in prior depositions. The proffer by State Farm sheds no light on whether the property being discussed was located in South Diamondhead and could be relevant to how the Gagné claim was handled.

The desire to give one impression when another reality exists is circumstantial evidence that the person misrepresenting reality may be trying to cover-up other more troublesome facts. Why would Exponent and State Farm share reports in an interim or draft status. It can be particularly probative when multiple persons and/or entities misrepresent the same distinct set of facts that involve their joint behavior. One is hard pressed to understand why an interim/draft report would be forwarded unless the parties were seeking give and take on how the report should end up. If they were seeking innocent feedback, why would they misrepresent the facts in order to cover it up? Exponent's explanations are questions for a finder of fact to determine in assessing their conduct. They may reject it as unimportant, consider it mere negligence or find that it, in combination with the other circumstantial evidence indicates that Exponent had, and still has, a reckless disregard for the Plaintiff's rights.

A rational trier of fact may conclude that each individual instance where Exponent chose the course of action that harmed Robert Gagné and aided State Farm is mere negligence or it may conclude that the repeated giving of the benefit of the doubt to State Farm interests rises to the level of a reckless disregard, malicious conduct and/or gross negligence toward the Plaintiff. The Exponent Motion for Summary Judgment should be denied.

RESPECTFULLY SUBMITTED, this 30th day of December, 2008.

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CERTIFICATE OF SERVICE

COMES NOW the Plaintiff, Robert R. Gagné, by and through counsel, who hereby certifies that I filed the foregoing *Plaintiff's Response in Opposition to Defendant Exponent's Motion for Summary Judgment* with the Clerk of the Court using the ECF system which will send notification of such filing to the following ECF participants:

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THIS, the 30th day of December, 2008.

By: /s/ Jesse B. Hearin, III
Jesse B. Hearin, III