

**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 STATE FARM FIRE
AND CASUALTY COMPANY'S MOTION TO EXCLUDE THE REPORT AND
TESTIMONY OF E.J. DENNIS [DOC. 437]**

COMES NOW, Plaintiff Robert R. Gagné, and files this his response and memorandum brief opposing State Farm Fire and Casualty Company's (hereinafter State Farm) Motion to Exclude the Report and Testimony of E.J. Dennis.

INTRODUCTION

Gagné's South Diamondhead home was covered by a State Farm homeowner's policy and a National Flood Insurance Program policy when it was completely destroyed by Hurricane Katrina. State Farm denied the homeowner's claim based on the policy's storm surge/flood exclusion.

The State Farm team leader who ordered the cancellation of the engineering report on the causation of the damage to Gagné's property and initially denied coverage of any damage under the dwelling and contents coverage of Gagné's homeowner's policy did not document the basis of his decision. However, in his deposition (Exhibit A), he stated that in denying the claim he relied primarily on his personal opinion that the trees in photographs of the Gagné property and the surrounding area did not show any significant wind damage. He reasoned that wind that was

not sufficiently strong to damage the trees would not have been sufficiently strong to damage the home prior to the arrival of the surge. (Exh. A at 12-13, 95, 97, 107-109, 113-114, 120-121, 125, 129-131).¹

Whether wind destroyed or damaged the home prior to arrival of the surge is a major issue. In determining that issue, the sequence of wind and water affecting the Gagné property and the immediately surrounding area, how long this area was subjected to damaging winds or damaging water, and the extent of damage to the immediate area caused by wind or water are crucial questions. Based on the testimony of the State Farm team leader denying the claim, the extent of tree damage in the immediate area and whether the tree damage was the result of wind or surge is a significant issue in this case (Exh. A at 130-131).

Gagné intends to call E. J. Dennis to testify both as a fact witness concerning his observations of the damage to, and location and condition of debris found from, properties in the immediate vicinity of the Gagné residence and as an expert witness concerning the damage to trees in the small part of the Diamondhead community south of Airport Road which is only a small part of the part of Diamondhead south of I-10. State Farm seeks to exclude his testimony alleging it fails the *Daubert/Kumho* standard. State Farm also seeks to exclude his report on tree damage in this part of South Diamondhead after Hurricane Katrina, which was widely

1. State Farm argues Plaintiff's reliance on Dennis' tree evidence is inconsistent with his position that Angelle's denial of his claim based on tree evidence was based on an inadequate investigation. (See Doc. 438 at p.7 n. 1) There is no inconsistency. There is a world of difference between an insurance team leader with no training or experience as a Forensic Arborist (or even more general knowledge of trees) denying a claim based on seeing some foliage on a couple of trees that were still standing in a few photographs when he: 1) did not examine the trees himself; 2) did not have someone with the knowledge of trees examine the trees; 3) did not complete an investigation of the other evidence concerning the site or other sites in the immediate vicinity, and relying on the evidence of a highly qualified Forensic Arborist who thoroughly examined 1500 trees in the immediate vicinity during the relevant time period. Dennis' work is one part of many different pieces of evidence from the specific site and surrounding sites examined by experts in their fields as part of a complete investigation. Contrast that with the evidence State Farm proffers – a non-expert observer of limited photographs, drawing a blanket and unsupported conclusion as the sole basis for the complete denial of a significant homeowners claim.

disseminated not long after it was written, on the theory that Dennis' report fails to comply with F.R.C.P. 26(a).

DENNIS' REPORT AND TESTIMONY

E. J. Dennis is a Forensic Arborist who is also a resident of South Diamondhead. His home was next to Robert Gagné's home and he is also very familiar with Gagné's home. He was one of the first residents to return to South Diamondhead after Hurricane Katrina and almost immediately he began a survey of the damage to the trees in the even smaller area of South Diamondhead which is south of Airport Road. He continued to observe the progress of this tree environment for several months as it struggled to recover from the ravages of Hurricane Katrina. In late February of 2006, he reduced the observations and conclusions from his study to writing and made it available to insurers and local residents. Shortly thereafter, it was also widely distributed to the public through the Internet. Because Dennis' study focuses on the trees in the whole neighborhood south of Airport Road instead of a particular property and was not done in anticipation of litigation, the identical study and report, along with Dennis' testimony about it, have been presented as evidence in several cases involving different pieces of property in that neighborhood including *Edward Willis v. State Farm Fire & Casualty Co.*, No. 1:06-CV-902-LTS-RHW (S.D. Miss.) and *Espinosa v. Nationwide Mutual Fire Ins. Co.*, No. 1:06-cv-00896-LTS-RHW (S.D. Miss). Dennis' August 16, 2007 Deposition in this case is attached as Exhibit B. His August 15, 2007 Deposition in *Espinosa* is attached as Exhibit C. Dennis' Report is attached as Exhibit D and his July 11, 2007 Deposition in *Willis* is attached as Exhibit E. As the study and report are identical, Plaintiff relies on Dennis' depositions in the *Willis* and *Espinosa* cases as well as the present case to demonstrate that Dennis' opinions and testimony satisfies the

requirements of, and is admissible under, F.R.E. 402, 403, 702 and 703. (Exh. B at 8-11 35, 46, 52, 139-140, 142; Exh. C at 66, 71-72, 75; and Exh. D).

State Farm's representation of the process by which Dennis examined the tree evidence and formed his opinions as being based solely on walking around looking at trees in the general Diamondhead area without taking photographs, after which he destroyed his notes, and not based on any calculations, meteorological data, or engineering data is highly misleading. State Farm's claim that Dennis performed no research to substantiate his conclusions, did not subject his methodology or conclusions to peer review, and testified that his opinion has absolutely no scientific basis to it at all are equally misleading. Dennis' opinions and testimony demonstrate that his opinions are based on the time-honored scientific tradition of careful field observation (albeit under extreme adverse conditions in this instance) in addition to a lifetime of experience and knowledge in examining damaged and injured trees and determining from those observations how they came to be in their condition.

Based on an examination, primarily in the first two days after Hurricane Katrina passed, of approximately 1500 damaged trees in the area of South Diamondhead on the bay side of Airport Road, the location of debris and house slabs in relation to damaged and undamaged trees, experiments which he performed himself or had performed by others, and his decades of experience and specialized knowledge in Arboriculture and as a Forensic Arborist, E.J. Dennis has expressed the following primary opinion² of relevance to this case:

1. Many large and medium sized pine trees were broken off below the high water mark in the same manner as breaks in such trees well above the obvious high water mark

2. This listing is not intended to be exhaustive of all of Dennis' testimony which is relevant to his case. Rather it highlights the incompleteness and undue emphasis that State Farm has placed on a very small part of his testimony from which it leaps to a conclusion that all his evidence should be struck.

indicating that the pine trees broken off both above and below the high water mark were broken off by high winds;

2. The winds which pummeled the south side of Diamondhead on the front side of the storm before the arrival of any surge waters were very high, turbulent winds which were strong enough to, and did, destroy houses, fell trees, and snap other trees off as evidenced by:

A. the presence of many felled trees with no sign of any bark scarring from water borne debris striking the trees - indicating they were felled by wind before the arrival of the storm surge which would have scarred them if they had still been standing when the surge arrived;

B. the presence of two such large pine trees on a vacant lot on the same street as, and very close to, the Gagné property - found intact but completely down across the bayou with no evidence of scarring;

C. the presence of several such unscarred felled trees which had fallen onto the floor joists of several houses with clean breaks and no twisting or side breakage (as would have occurred from crashing through the upper floors of a house or surge waters dragging house debris away after the tree fell) indicating that the houses were destroyed and the debris was borne away by the wind before the wind felled the unscarred trees - also before the arrival of the surge.

3. The winds pummeling the south side of Diamondhead prior to the surge were strong turbulent winds as evidenced by:

A. the unscarred trees being felled in all directions indicating winds shifting

direction;

B. tree tops being snapped off above the high water mark;

C. trees destroyed by twisting actions from turbulent shifting wind.

4. Both the number and the haphazard pattern of fallen trees in some areas was indicative of rotating or twisting, tornado like wind, rather than straight line wind.

5. Possible causes of the tree damage other than wind were ruled out including:

A. The trees did not fall as a result of soil failure from the water softening the soil as no trees were found felled with exposed long roots but many trees were found with broken roots indicative of forceful and sudden failure as is caused by wind;

B. Many trees were severely twisted in a way Dennis had never seen caused by surge in 40 years of inspecting tree damage in hurricane territory;

C. The needles on many pine trees had already turned brown and were already dead in a manner indicative of severe wind burn from prolonged exposure to wind and which based on previous experiments Dennis had done and could not have been produced by salt water intrusion from surge. (Exh. D).

These opinions are supported by numerous observations and detailed reasoning based on Dennis' extensive specialized knowledge of trees, experience as a Consulting Arborist and as one of the pioneers of Forensic Arboriculture on the Gulf Coast, course work as both a student and a teacher in various aspects of Arboriculture and Forensic Arboriculture, personal research into the reaction of trees to salt water exposure, experience in reconstruction of events from tree evidence and his life experiences living and working through numerous hurricanes and other storms in the area. (Exh. D; Exh. B at 97-133, Exh. C at 66, 71-72, 75).

Specifically, he explained he had observed different conditions in trees, and even more specifically in the pine needles after many different hurricanes including Betsy, Camille, Audrey, Bob and others. In lesser hurricanes with lower levels of wind, there was less damage in terms of drying out to the branches, leaves and needles. Whereas in stronger hurricanes with higher winds he had observed much greater drying in terms of winds drying out the trees to the point where no living chlorophyll remained in the branches, leaves and needles. He explained that the severe winds that caused the needle/twig death damage could not have been caused by exposure to even severe winds for a short time. By spring he could tell that the wind burn had reached and killed the Cambrian layer of the wood which would not have happened with an exposure to severe winds of short duration. While he could not specify the exact length of duration, he could say that the exposure to severe winds was of substantial duration.

Similarly, while he could not determine how high the winds were in Hurricane Katrina that caused the damage he observed, based on how the damage compared to damage he observed after Hurricanes Betsy and Camille, the wind in his neighborhood south of Airport Road in South Diamondhead would have had to have been at least as destructive as that of Hurricanes Betsy and Camille to cause the wind damage to the pine tree needles that he observed there shortly after Hurricane Katrina. He also observed as further evidence of the severity of the wind damage to the trees in this neighborhood that many of the pine trees died because the drying out from the wind was so severe that it penetrated the twigs at the ends of the branches killing them deep enough that they could not produce new growth to put on new needles. He observed far more of this kind of pine tree death (which does not occur in other types of trees which grow and recover differently after wind burn) in his neighborhood than he had ever seen after any other

hurricane ever.

Based on this comparison of damage from different severities of hurricanes and what the widely reported wind speeds from Hurricanes Betsy and Camille were, he estimated that the Katrina winds in his neighborhood would have had to be at least as high as the 125 to 135 mph winds reported for Betsy and Camille. He eliminated sudden exposure to high levels of salt water from the surge as an explanation for the sudden browning and death of so many leaves, needles and tree twig ends within hours of passage of Hurricane Katrina based on experiments he had done years earlier which showed that even needles on branches cut from trees which were unaccustomed to any salt water spray took weeks of immersion in salt water before they turned brown. (Exh. B at 97-106; Exh. E at 15-16, 20-22).

He also explained the reasoning for his observations that trees broken off or felled below the high water mark were damaged by wind and not water. Using an analogy to how pine trees are felled when clearing land with a bulldozer, he explained that the steady relentless pressure of water at or below the high debris marks would have resulted in the tree root balls breaking loose and felling the whole tree instead of breaking the trunks at levels below the high water mark because at the levels below the high water debris marks, the trunks are stronger than the root balls. Also, water that is moving fast enough to take out trees is not a narrow phenomenon. Instead of taking out one tree and leaving the next as wind can do, if the water is moving fast enough to take out trees, it takes them out in wide swaths. He didn't observe either of these water damage type patterns in the pines of this neighborhood. (Exh. B at 110-113).

He also pointed out how on some photographs the debris damage was visible 40 or 50 feet above the ground near the top of the tree. He explained that such high debris damage had to

be caused by wind borne debris because the water could not have carried debris that high. (Exh. B at 113-116).

Contrary to State Farm's "cherry-picking" sound-bite consisting of an out of context representation of Dennis' testimony, Dennis did not testify that his opinions are not based on sound tree science. He testimony only explains why his scientific technique is comprised of observation, comparison of conditions and effects in similar and somewhat different situations, and logical analysis of observations over a 40 year professional career rather than mathematical force calculations and why it would be extremely difficult if not impossible to reproduce the conditions of Hurricane Katrina on the trees in the area of Diamondhead south of Airport Road in a controlled laboratory setting. Testifying only on the point of why he did not do specific calculations based on the height of the reported surge, the height of the debris carried on top the surge, and the height of the debris marks on particular trees to determine the physics involved in the energy exerted on the particular tree to support his conclusions drawn from his observations, he testified:

A. No. I don't believe there's any way of calculating that because every tree is an individual, different heights, different species, different characteristics. They don't all grow uniformly. You would have to dissect the tree and see how it grew to see, is that the strongest direction the tree could have been blown in or is that the weakest direction.

Q. Are you aware or have you taken it upon yourself to go do any research regarding the publications that are out there regarding the force of pressure of floating debris in a hurricane on trees?

A. No.

MR. RAFFERTY: Objection.

A. No. I'm not sure there is any. You know, that --

MR. FOSTER: Q. If there is --

A. I'm not sure how they can even do that. What you are saying is somebody got out in a storm, in a storm surge and set up some kind of equipment to calculate the bend in this tree from storm surge, and you also got wind on top of that because the wind is blowing in the top of the tree, and then you've got to take -- after this

is all over with, then you have to take this tree and break it and come up with some kind of calculation. That, most probably, will never be capable of being done.

Q. So if it has been done, you haven't reviewed that material?

A. No. I don't know of anybody that attempted to do that. Because every tree is different. Now, they may try to put it in categories and hypothesize about what this could or would or should have done, but to actually do that on a tree, under hurricane conditions. Now, they may be able to so-called simulate it, but you would have to simulate it on your entire tree. And then the tree that they would have to simulate it on has to be exactly the same size and species as the next tree they tried it on because you can't try it on one tree. You've got to try it on a whole bunch to come up with an answer or some type of conclusion. I think there's going to be a lot of things that people have gut feelings on but I'm really not sure how they can scientifically calculate that.

Q. So you don't think it can be scientifically calculated at all?

A. I don't see how it can be. Even your species of pine trees are different.

Q. So your conclusion that you are drawing has absolutely no scientific basis to it at all, correct?

MR. RAFFERTY: Object to the form of the question.

A. That's correct. This is based only on what I have seen in the past 40 years of experience and what I've noticed on that. And I don't see any way some of this can be scientifically backed up.

MR. FOSTER: Q. And you haven't attempted to do that and have it peer reviewed and published?

A. No.

MR. RAFFERTY: Objection to form.

A. No. Absolutely not. I don't believe you realize or a lot of people realize the magnitude of that -- what it would entail to do that research. You would have to get perfectly healthy trees against a group of perfectly healthy ones, ideal and identical, against other trees that may have fusiform rust in it or phytox or some other type of virus or fungi.

(Exh. B at 122:23 to 126:6).

On the point of why he no longer had the scribbled notes made in his very first examinations of the trees in his neighborhood, why he did not document his observations with photographs, why he didn't talk to eyewitnesses, and why his report was not focused just on the Gagné property, Dennis explained:

Q. ... Did you take any photographs of the south Diamondhead area that would be included on this report in the Gagné case?

A. No, at the time. I did take photographs, a few, later on. When I did this report, it was amazing I was even able to get the report out. You know, everybody was in chaos. Everything was destroyed. I had no cameras, had no place to take the film. The reason -- I did most of this work within the first two months. The reason this report was not typed up and finished until 2/25/06 is because we were still in chaos and this was not high on my agenda. I lost my house. Almost all of my family lost every one of our houses, so we were still trying to put things together. We were living in a house the first few weeks with other families. Three of those other families, I never saw before, so you can imagine what that looked like. And then right about this time is when my wife and I settled down into another house and was able to get access to a computer to even print this up. I didn't take any photographs of any of this because, actually, I didn't think it was needed. My intent on this was just to document what I saw happen after the hurricane and a few weeks after the hurricane and put it together, just to help the insurance companies and the people to get together to figure out what went wrong with this hurricane.

Q. Okay.

A. You see, I did not investigate a particular lot. I did the whole area because I had -- that wasn't my intention at the time.

Q. And that's true for the Gagné property too?

A. That's correct.

Q. This report is not specific to the Gagné property?

A. No.

Q. It wasn't drafted with the intent of saying, this happened at the Gagné property?

A. No. No. It's in that whole little area, south -- and it will say in there, it includes the south -- only encompasses the south side of Diamondhead, which is south of the interstate, and that is -- really, my concern was from what I can see north of Airport Road and then everything south of Airport Road, where the major damage was. There was damage up on the other side a lot, but I really didn't go back that way. You couldn't even walk back there.

Q. The north side of Airport Road, did you happen to interview any witnesses who stayed behind in the storm?

A. No. I didn't interview any witnesses.

Q. Okay.

A. As far as people. I interviewed the trees. I studied the trees and found out exactly what they said happened to them.

Q. 2/25/06 is the signed, dated copy of this report here. Is that when you actually typed the report up?

A. That's correct.

Q. Prior to that, had you put this report in any other form, work form?

A. I had a few little small pieces of paper that I made notes on, but other than that, no.

Q. And do you still have those notes?

A. No. No. I got rid of all of that.

Q. When did you take those notes?

A. Writing them down?

Q. Uh-huh.

A. I probably started about -- it would have been two or three weeks after the hurricane. I did all of the -- a lot of walking in between, for two reasons. I was looking, trying to find what actually went on to some of my friends' houses in the area that I couldn't see and to study the trees more. I'm very, very interested in tree damage. In fact, I knew, when we drove in from Mobile, by the time we got to Gulfport, we didn't have a house there. The trees were already telling me that.

Q. Every time I do one of these depositions of an expert, whether it's someone in your field or an engineer or a meteorologist, I absolutely fall in love with what they do and I want to quit doing what I do to go do what you are doing. It's very interesting.

A. My wife says I'm obsessed with it because I can't learn enough about the field.

Q. That's not a bad thing. Where did you maintain those notes you were taking?

A. Where did I maintain them?

Q. Uh-huh.

A. In my pocket, mostly. I had them in my wallet, just a few little jotted down notes.

Q. And to the best of your recollection, as you sit here today, what did those notes reflect? What were you taking down? What observations were you making?

A. How bad the damage was to certain trees and which trees were rotating out of the ground. I knew that the -- I knew that the ground was going to recover, meaning it was going to start growing weeds up and starting to hide a lot of this information. So rather than me to try to go back and locate that particular tree again five or six or seven months later, to some insurance adjusters, maybe, because I'm sure they would be interested in it, I was under that impression, that I took notes. Unfortunately, I didn't have notes exactly where they were because I didn't know. And we didn't even have fire plugs in most of the places. They were all gone. And there was still too much debris. When they cleared the roads, it pushed it up on top of everything. So I knew that I needed to make my report or get all my field work done and observe as much as I could in a reasonably short period of time because I've seen FEMA's actions in the past 10 or 15 hurricanes, and when they come in, they just devastate and they erase everything, and that's exactly what they did.

Q. Okay. So if I understood your testimony, you have -- your notes indicated two general things. I'm sure there were additional items. But one of those was how bad the damage was.

A. Right.

Q. And the second thing was -- and I just want to be sure I've got this down correctly and I want you to explain it to me, how trees were rotating out of the

ground, is that what you --
A. That's correct.

(Exh. B at 22:15 to 28:19).

In short, Dennis' observations were not made for purposes of investigating a specific property as part of preparing to issue a report to be used in litigation of a specific case. His investigation is instead more akin to what a field researcher suddenly dropped down into the middle of a disaster full of evidence specific to his research interests that was about to disappear would have made in order to take advantage of a once in a life time short lived chance to explore an interest that he was obsessed with. He was not preparing for litigation and saw no reason to preserve unorganized scraps of paper with bits of notes on them. His notes did not reflect the specific locations of trees, which State Farm claims they would have if they were still available, because most of the time it was impossible for Dennis to determine exactly where he was on which street in the areas of his neighborhood other than in the immediate vicinity of his own home and that of Robert Gagné which was next to his. *Id.*

ARGUMENT

Relevancy of Dennis Observations, Opinions and Report

A primary issue in this case is whether wind damage to the Gagné home caused an economic total loss prior to the flood or surge waters reaching it. Causation may be proved either directly or indirectly by circumstantial evidence. *Thomas v. Great Atl. & Pac. Tea Co.*, 233 F.3d 326, 329-330 (5th Cir. 2000) citing *K-Mart Corp. v. Hardy*, 735 So. 2d 975, 981 (Miss. 1999). There was no equipment located on the Gagné lot which recorded the wind speeds as they happened. Substantially all of the structure of the elevated living floors of the house were washed or blown away and there were no eye witnesses to the actual destruction of the Gagné house.

Thus, circumstantial evidence will be a very important component of this case. Determining the cause of destruction of property in a storm from circumstantial evidence is not simply a matter of establishing wind speed from meteorological data and the forces the house could withstand by applying a mechanical formula to direct evidence of the home's construction. Rather the probable cause must be determined by examining factors of time, speed, force, duration, location, and destructive capacity of many facets of the broad weather phenomena associated with Hurricane Katrina in the area of the Gagné residence, the scars left behind, and the extent and cause of damage to the objects and plants not washed or blown away by the storm.

Relevant evidence means evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. F.R.E. 401. Hurricanes, particularly Hurricane Katrina, are not small isolated storms impacting only a narrow area. They hit and cause damage in a much wider swath than other weather phenomena. Thus, in determining the cause of hurricane damage, even more so than in other weather related damage, what happened in the same neighborhood around the property at issue is evidence having a tendency to make it more or less likely that certain events, or a certain order of events, happened at the subject property. See e.g., *Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217 (Miss. 1972), *Commercial Union v. Byrne*, 248 So. 2d 777 (Miss. 1971). Furthermore, evidence which supports the testimony of other witnesses testifying on points more directly at issue is still relevant evidence because it makes the facts the other witness is testifying to more likely to be fact. This is particularly true in circumstantial evidence cases where similar conclusions drawn from different bits and pieces of the evidence left behind are what reinforce each other and form the web supporting the conclusion drawn from the totality of circumstantial

evidence.

Under these principles, all or nearly all of E.J. Dennis' report, observations and testimony are relevant to establishing by circumstantial evidence that the destruction of the Gagné home was caused by wind prior to the arrival of storm surge waters. Relevant circumstantial evidence of causation would include, but would not be limited to: 1) the capacity of the wind experienced in the area prior to the arrival of the surge to cause severe damage; 2) the severity and extent of the damage caused by the wind prior to the surge arrival regardless of its speed; 3) the cause of various types of damage to the evidence that remained in the area after the storm; 4) the timing of wind and/or water damage to the evidence that remained in the area after the storm; 5) the capacity of the wind to carry debris away; 6) the timing, depth, and destructive capacity of the surge; and 7) the capacity of the surge to carry away or leave evidence behind.

Under F.R.E. 702, expert evidence is relevant if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue” As Dennis so aptly put it the trees are eyewitnesses to what happened and in what order in the neighborhood of the South Diamondhead south of Airport Road during Hurricane Katrina. While trees are a major portion of the remaining evidence and they can speak volumes on what happened, the language in which they speak is in many respects gibberish to laymen without explanation from an expert who understands it. Thus, expert testimony is admissible to assist the court and the jury to understand what the tree evidence has to say. State Farm's argument that much of Dennis' report is irrelevant to the present case takes far too narrow a view of relevance, is at odds with both relevancy and Fed. R. Evid. 702, and ignores the concept of circumstantial evidence.

E.J. Dennis is in the Unusual Position of Being Both a Fact Witness and An Expert With the Qualifications and Expertise to Assist the Jury in Understanding the Tree Evidence He Observed and Its Significance

Prior to Hurricane Katrina, E. J. Dennis was a resident of the south part of Diamondhead for about 10 years. He is a native of the Gulf Coast having lived in Louisiana or on the Mississippi Gulf Coast all his life. He returned to south Diamondhead around 9 am on August 30, 2005 immediately after the passage of Hurricane Katrina. Over the next couple of days, he walked the streets and floated his boat along the canals examining the trees that survived and that were damaged, assessing the damage to trees, the position of trees and debris in relation to each other, and the position of downed trees in relation to the remains of homes including slabs. He continued to observe the progressive effect of the damage on the health of the trees throughout the following months. More importantly, he made these observations not through the eyes of a layman, but through the eyes of a Forensic Arborist with more years of experience in the hurricane prone area of the Louisiana Mississippi Gulf Coast than almost every other Forensic Arborist around.³ There is no one in a better position to present to the court and the jury his observations as a fact witness or as an expert to assist the jury to understand the scientific aspects and implications of his observations of the damage to the trees. (Exh. B at 8-11 35, 46, 52, 139-140, 142; Exh. C at 66, 71-72, 75; Exh. E at 5, 45, 61, 97, 137-138. 145).

E.J. Dennis' Qualifications Under Rule 702

In 1963, after finishing two years of course work toward a degree in landscape architecture, Dennis left college because the landscape architecture program did not contain a sufficient focus specifically on trees to suit his interests. There were no urban forestry courses or

³ See discussion of qualifications and Exh. C at 66, 71-75; Exh. E at 25-27, 39-42; Resume attached as Exh. F; Guidry Affidavit attached as Exh. G.

degrees available in the south at that time. He was already working in the Arboricultural department of a large nursery/flowerist. Lacking the opportunity for formal education on his tree interests, he built his knowledge of Arboriculture on experience. Within a few years he went into business for himself as an Arborist. For 21 years he continued to work exclusively with all aspects of hands on Arboriculture (directly with trees). In 1992 he decided that the only way to continue to pursue his interest in studying what he describes as “strictly on the inside of the tree” and “the health of the tree,” was to sell his existing business and focus his work on being a consulting Arborist and a Forensic Arborist. (Exh. E at 40-42).

In his last 15 years as a Forensic Arborist, he had become experienced in reconstructing events from tree evidence and extrapolating from his examination of tree evidence, the cause of damage from trees falling on structures, people, and objects. This experience includes determining the cause of fires from tree evidence, determining why a tree fell and damaged a house, and reconstructing an accident where a tree hit a person. He has done such work for insurers, homeowners, attorneys and courts. These experiences include evaluation of weather conditions and their effect upon trees and correlations of tree response to wind speed data obtained from weathermen. They also included determining whether trees fell as a result of wind or other factors such as disease from fungi. (Exh. E at 25-27).

Dennis became one of the first licensed Arborists in Louisiana in 1967. A few years ago, he also became licensed in Mississippi. Louisiana and Mississippi are among the few states requiring a test for this license. The test is a rigorous one with high failure rates. (Exh. E at 42-43; Exh. C at 38-39). He is also a registered member of the American Society of Consulting Arborists and Board Certified as a Forensic Arborist by the American Board of Forensic

Examiners, both of which require passage of additional test of knowledge in these specialized areas of Arboriculture and compliance with rigorous admissions criteria. He is a fellow of the American Board of Forensic Examiners. He has participated in more than 35 courses and workshops for Arborists both as a presenter, teacher and attendee and has been an invited guest lecturer at the Burden Research Center at LSU, at Southern University's urban forestry courses, at the University of Arkansas and for numerous professional Arborist associations. He is recognized by the professional associations and colleagues in his field as a highly respected pioneer in Forensic Arboriculture. (Exh. F, Exh. G and Exh. E at 39-42).

Under F.R.E. 702, a witness may qualify as an expert by knowledge, skill, experience, training or education. These methods of qualification are disjunctive. An expert may qualify by any one of these means and is not required to have particular degrees or education. *Friendship Heights Assoc. v. Vlastimil Koubek*, 785 F.2d 1154 (4th Cir. 1986); *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.") Thus, State Farm's complaint that Dennis is not a meteorologist and its more general allegations that Dennis lacks the expertise to express opinions as to causation of damage to buildings does not indicate Dennis lacks the expertise to express opinions concerning the significance of his observations of the trees after the storm and the relationships between the impact of the storm on the trees, the debris and the ground in that area. Similarly, given Dennis' experience as a Forensic Arborist in previous matters also involving damage to structures and in matters involving the sequence of various events, he has the requisite qualifications to testify to opinions concerning other events and damage to other objects based on his observations of the evidence

left behind by and in the trees. See also *Brown v. Williams*, 850 So. 2d 1116, 1121 (La. App. 2003) (Arborist qualified by experience accepted as an expert on equal footing with other experts with professional degree in case concerning cause of felled tree in connection with storm winds).

Dennis' Opinions Are Based on Sufficient Facts And Data and Sound Scientific Methodology

Dennis returned to the south part of Diamondhead around 9 am on August 30, 2005, the morning after Hurricane Katrina passed through. The bulk of his examination of the South Diamondhead trees was done that day and the next, but he continued examining trees for at least a month and monitoring trees for several months. He examined about 1500 specific trees usually in groups of 10 to 15. He did not need to dissect any trees because trees were broken or ripped open where he could see the inside without having to do a dissection. He examined many of the downed or damaged trees very closely. He took notes of his observations. With a few exceptions, he observed that the tree damage throughout South Diamondhead south of Airport Road, which is also south of I-10 , was consistent. This consistency combined with the lack of street signs or numbers meant that he could not identify specific spots by street address. The piled up debris made it difficult for him to identify addresses by familiar landmarks. But he was later able to identify where many of the items of evidence he has referred to were located. (Exh. B at 8-11, 27, 35, 46, 52, 139-140, 142; Exh. C at 66, 71-72, 75; Exh. E at 5, 45, 61, 97, 137-138).

After observing more than 1500 trees and inspecting many of them very closely, Dennis formed his opinions based on his knowledge gained from observing trees for more than 40 years under all sorts of situations, his experience in reconstructing tree falls and determining their causes, and his extensive knowledge of trees, their health and illnesses, and their behavior in

response to various environmental stimuli and diseases. (Exh. B at 101-102, 125, 134, 145).

Some of State Farm's arguments appear to claim that Dennis' opinions are not based on sufficient facts and data to be reliable because Dennis did not interview witnesses, did not take lots of photographs or examine videotapes taken by witnesses in other areas of Diamondhead during the storm, did not obtain verification of wind speeds for past hurricanes used in comparing severity of damage, and did not keep the scribbled notes he took on scraps of paper when he examined the trees in the days immediately after Katrina once he had written his report.

This field investigation was done under extreme conditions which prevented Dennis from documenting what he did in the same way that he usually does for litigation. He lost everything in the storm, had no computer, typewriter or camera or any way to develop film if he had had a camera, particularly in the first few weeks after Hurricane Katrina. Thus, he could not do his usual contemporaneous documentation of his investigation. Moreover, when he did his investigation, he was living in a house with 7 families in very primitive conditions and did not anticipate his observations would be used in litigation so he didn't keep a project file with his notes. (Exh. B at 23, 52).

But while his documentation might not be up to his usual standards, his actual examination of the area was thorough. He testified that despite the conditions, he carefully examined the fallen trees to determine whether factors such as disease had weakened them, making it possible for lower levels of wind and water to fell them. He pointed out that from past experience, he knew it was important to get a thorough tree examination done as soon as possible as time would change things and FEMA's cleanup efforts would destroy tree evidence. He testified that it was difficult for him to identify specific properties he examined and the addresses

where trees he examined were located because of a lack of numbers, street signs and even fire plugs at the time of his investigation. He was, however, able to identify some locations very close to the Gagné home because it was next to his own on Puunani Place. For example, the report specifically uses an example of two trees at 316 Puunani Place, a vacant lot very near Gagné's address of 320 Puunani Place. In his testimony, Dennis was also able to identify one photograph of trees within 200 feet of Gagné's home which documented the type of observations described in his report. (Exh. D at p. 4; Exh. B at 27-28, 52, 76).

Dennis gave very valid reasons for not interviewing witnesses or examining engineering reports. What he does is examine the tree evidence and report what the tree evidence has to say. He does not want to be influenced by statements of engineers or lay witnesses because what many witnesses would say would be misleading as they don't really know what's going on with trees. Trees, and the debris in and around them or scarring them, on the other hand, do not lie or mislead. They simply show what happened more accurately than people report. Thus, he forms his opinions based on the unbiased evidence preserved for his observation in the trees which is his area of expertise. (Exh. C at 63-65; Exh. B at 11-20).

Similarly, he explained in the Willis deposition why he was able to rule out water as the cause of tree damage he attributes to wind without knowing the speed of the water. And he explained in his deposition in this case how he could determine that the tree damage caused by debris was caused by debris from a house that had already been destroyed when the surge came in. He also explained how he could rule out the impact of debris on the trees as the surge receded as an explanation for the tree damage without looking at anything other than the damage the debris caused to the trees. While it may be possible to use sound bites of his language taken out

of context to suggest that he did not consider sufficient data or rule out other causes in forming his opinions, when his explanations are read in full, it is clear that he considered his observations and found specific things he observed to be inconsistent with the theory that tree damage occurred as a result of surge and/or the drifting of surge created debris as the surge retreated. Between his depositions in this case, the *Espinosa* case and the *Willis* case, he testified that due to his past experience with hurricane surge, he knows if the speed of the surge water had been enough to damage trees, then it would have been too fast to have left behind the small items of debris from his own house that he found intact in the nearby bayou. If the water had been moving fast enough to damage trees, it would have swept these small items from his own home much further away. Also, if it had been strong enough to damage trees, it wouldn't have left behind his own in-ground sprinkler system pipes and wooden planters when it washed away his pine bark and mulch plant beds. Most importantly, he did not need to rule out water as a cause of damage by other means such as speed because the absence of the debris rubs, in connection with the jagged breaks in trees snapped by wind, eliminated water as a possible cause for these particular trees. These explanations demonstrate that Dennis did analyze and rule out other causes of the damage he observed just as a doctor doing a differential diagnoses rules out other causes of the symptoms he sees. (Exh. E at 64-66, 71, 83).

State Farm also claims that the wind speed data Dennis relied upon is suspect because it comes from weather data distributed to the public through news media weathermen. However, that does not make the data unreliable. An expert may use data from hearsay, third-party observations, and data collected by others in forming opinions as long as the data is of the type normally relied upon by experts in the field. *United States v Lundy*, 809 F2d 392 (7th Cir. 1987);

Southland Sod Farms v Stover Seed Co., 108 F3d 1134 (9th Cir. 1997). Dennis established that Forensic Arborists rely upon wind speed data provided by meteorologists who work for the media when discussing his experience in reconstructing events involving fallen trees. (Exh. E at 26).

The fact that Dennis did not reconfirm his memory of the reports of specific wind speeds from prior hurricanes before forming his opinions may be something that provides grist for cross examination, but it does not render his opinion inadmissible. It is data for which the reliability of Dennis' memory can be checked. Dennis' use of wind speeds provided by public news reports is similar to the situation in *Loeffel Steel Prods. v Delta Brands*, 372 F Supp 2d 1104 (ND Ill 2005) where the court rejected arguments to strike an expert's testimony because he relied on machine speeds and measurements provided to him by the buyer's employees, his own experience over the last 50 years and his observation of production runs to test the performance of a machine.

Even if Dennis' opinions were being offered to establish specific wind speeds, which they are not, the fact that Dennis knows of no other expert who has used such a method in litigation to establish wind speed does not render the opinion unreliable. What matters is not what experts have done in litigation but what Arborists have done in the field in drawing conclusions from their observations. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995); *Southland Sod Farms v Stover Seed Co.*, 108 F3d 1134 (9th Cir. 1997). Dennis testified that he was aware of formal studies on the connection between wind speed and tree damage, but at the time of his depositions, the studies had not yet been published. (Exh. C at pp. 37-38; Exh. E at 139). He also testified many others in his industry have observed the same connection between the wind speed and the severity of wind burn. It's been discussed at seminars and meetings, even

though as far as he is aware, it has not been published. However, he did describe a film from the study which was shown at one conference. (Exh. C at pp. 132-133; Exh. E at 141). He also testified while there are not yet any courses specifically directed at tree damage from hurricanes, such courses are currently in the development stage. (Exh. C at pp. 38).

This evidence indicates Dennis' observations concerning the connection between the severity of wind burn damage to trees and the intensity and damage capacity of the winds is not a novel concept or theory. Even if Dennis' conclusions were novel, it does not follow that they should be excluded. *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 153 (3d Cir. 1999) (expert testimony should not be excluded simply because conclusions are novel). Dennis' conclusions in regard to the wind burn damage and its correlation to the severity of winds capable of causing such damage are based on the time honored method of observation and the application of years of specialized knowledge concerning the reaction of trees to environmental stimuli. See also *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.")

Likewise, State Farm's claim that Dennis testified that his opinions could not be verified is an inaccurate interpretation of a piece of Dennis' testimony taken out of context. Dennis has merely explained why mathematical force calculations of the type engineers sometimes use in evaluating structural strength of houses and building is applicable to his field of assessing damage to trees. The language State Farm took out of context actually came from a question of its attorney whom seemed to think that the only methods that qualify as a "scientific basis" for an opinion are those based on calculations verifiable through either experiments reproducing

conditions or through prior publication of the opinion in peer reviewed research.

In this deposition and others, Dennis has testified about how some of his opinions have been tested with experiments and under the right conditions, how it might be possible with some future hurricane to get the equipment and people in position to take actual measurements and make observations during a hurricane to verify the accuracy of conclusions previously drawn from tree damage patterns. If landfall could be predicted accurately far enough in advance to get in place, it could be possible in the right conditions to test the science his opinions are based on. However, he has also testified that conducting the type of research State Farm's attorney was looking for would be extraordinarily risky and expensive and highly unlikely to be funded by grants and thus even less likely to show up in peer reviewed literature. Some aspects of it would be exceedingly difficult to test in controlled tests as opposed to observation based field science because of the difficulty of working with living species, but that doesn't mean its not possible to test his theories. It just means it isn't how scientist in his field would go about it. (Exh B at 122-126, 131-133, Exh. E at 141-142).

Like doctors who treat individual patients, Forensic Arborists make field diagnoses based on observing the symptoms of a particular tree and comparing it with the Doctor's/Arborists' extensive experience in examining other patients/trees. They rule out various possibilities to come up with the probable facts. That doesn't make their opinions any less scientific, reliable or less admissible than the opinions of other experts.

In *St. Martin v. Mobil Exploration & Producing U.S. Inc.*, 224 F.3d 402 (5th Cir. 2000), the 5th Circuit held that the testimony of an Ecologist who was not a Hydrologist was admissible on the issue of causation of damages to marshland. In upholding the admission of Dr.

Chabreck's testimony and opinions, based primarily on his observations, the 5th Circuit said:

Dr. Chabreck is a specialist in the ecology of the region and not an expert in hydrology. He has, however, spent many years in observation of coastal marshes in Louisiana and had visited and examined the marsh in question on several occasions prior to trial.

Defendants assert that Dr. Chabreck fails all of the non-exclusive Daubert factors, in that he is not a trained hydrologist, hasn't published an article relating to his specific hypothesis in this case, his hypothesis has not been subject to peer review and is not supported by specific studies and he hasn't conducted tests to verify his hypothesis. But see *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496, 507 (5th Cir. 1999) ("As long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function.").

Defendants' arguments on this point fail for several reasons. First, Dr. Chabreck's expertise in marshland ecology and in the erosion of vegetative mats in particular, along with his personal observation of the St. Martins' property, sufficiently qualified him to testify as an expert. ²

—Footnotes—

²Dr. Chabreck, a professor of wildlife at Louisiana State University, has studied marshland ecology extensively. He has published over 130 scientific and popular articles on wetlands and wildlife management and has planned and evaluated marsh development programs for marsh wildlife refuges for the State of Louisiana. He has professional experience with the U.S. Fish and Wildlife Service, as a refuge and research biologist, and has garnered significant acclamation for his work and publishing on marsh ecology and management.

—end footnote---

Defendants suggest that only a qualified hydrologist could have testified as to whether canal water intrusion occurred at sufficient levels and speeds to erode the vegetative mat. Cf. *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999) (in deciding whether to admit expert testimony, the district court considers whether the witness is qualified in an appropriate field).

While a hydrologist might be better trained than a marshland ecologist in the abstract physics of water forces, he would have less relevant expertise in the kinds and amounts of stresses on the organisms making up the vegetative mat that could cause degradation of the mat. A hydrologist could (and did) testify as to observed speeds of canal water intrusion into the marsh through the gaps in the defendants' canals' spoil banks; however, the significance of that information for the health and stability of the vegetative mat would be within the expertise of a marshland ecologist such as Dr. Chabreck. The district court did not abuse its discretion in finding Dr. Chabreck qualified to testify as to the dynamics within the St. Martins' flotant marsh. See *Watkins v. Telsmith Inc.*, 121 F.3d 984, 988 (5th Cir. 1997) (courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will

not be disturbed on appeal unless manifestly erroneous") (internal quotations omitted).

As to the substance of Dr. Chabreck's testimony, the district court made adequately supported findings that his report was sufficiently reliable and relevant to come in as expert testimony. The Daubert factors are non-exclusive and need not be rigidly applied in every case. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999) ("the test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case"); see also *Tanner v. Westbrook*, 174 F.3d 542, 546 (5th Cir. 1999).

Here, Dr. Chabreck's theory regarding damage to the St. Martins' marsh arose from his general understanding of the dynamics within flotant marshes and the environmental factors which can cause erosion of vegetative mats, combined with personal observation of the marsh in question. Among the experts presented at trial, Dr. Chabreck (along with plaintiffs' surveyor) was the only one to conduct an extended on-site observation of the St. Martins' marsh. He visited the property on five occasions, examining both the damaged areas near the spoil-bank gaps and identifying two test or control areas which were bordered by intact spoil banks. Those test areas did not exhibit the same damage to and erosion of the marsh mat as those areas exposed to gaps in the canal spoil banks. His direct observations of the marsh included photographs he took of portions of vegetative mat being carried out of the gaps in the canal spoil banks as waves exited the marsh.

Each marsh will have different forces acting upon it, depending upon its specific location and its surroundings. Thus, a court could not rationally expect that a marshland expert would have published a peer-reviewed paper on each possible permutation of factors or each damaged area of marsh. Dr. Chabreck's testimony was based on his personal observation of the marsh in question and his general and undisputed expertise on marsh ecology and deterioration. The district court properly considered alternative indices of his testimony's reliability and relevance. See *Kumho Tire*, 119 S. Ct. at 1175-76.

E.J. Dennis' report and testimony fall squarely within the holding and reasoning of *St. Martin*. Dennis is as well respected in his field as Dr. Chabreck was in his field. (Exh G - Guidry affidavit.) Based on his years of experience using observation-based methodology, Dennis applied this method to on-site field observations of the applicable conditions present immediately after Hurricane Katrina. This is a sound scientific method of ecological science as clearly demonstrated by *St. Martin*.

There Has Been No Violation of FRCP 26(a)

State Farm claims that FRCP 26(a) has not been complied with because Dennis' report is based on his observations, he did not take photographs at the time of his observations and his notes have not been produced because he no longer had them after he wrote the report. Plaintiff is not aware of any case law which requires an expert to create documentation or photographs of the evidence he examined in the field. An expert must disclose the evidence which he considered, and if the evidence considered consist of documents, then he must disclose those documents.

While there is some authority for the proposition that an expert retained to render an opinion in a case is required to retain copies of all information given to him for consideration in forming his opinions, see *Fidelity Nat. Title Ins. Co. of N. Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005) and cases cited therein, F.R.C.P. 26(a)(2) does not require the production of an expert's working notes. *Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21, 34-35 (1st Cir. 2004); *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1121 (D. Ore. 2006).

Moreover, when an expert is testifying as to his/her personal knowledge of facts pertinent to the case on which the witness is also qualified to express an expert opinion and the basis of that opinion is the facts of which the witness has personal knowledge independently of being retained as an expert in the case, the pre-trial report requirement of Fed. R. Civ. P. 26(a)(2)(B) does not apply to the personal knowledge of facts relevant to the case which the expert came to know of prior to being retained as an expert which serve as a basis for the opinion. *Connolly v NEC Am., Inc. (In re Tess Communs., Inc.)* 291 BR 535 (Bankr. DC Colo 2003). Dennis was not a retained expert for anyone at the time he made his observations of the trees and formed his

opinions. He was not a retained expert at the time he wrote the report which contains his opinions. Thus, he was under no duty to retain the scraps of paper on which he made his initial field notations prior to drafting his report.

Furthermore, State Farm cannot demonstrate that it will be prejudiced by the lack of Dennis' field notes. It had the opportunity to ask Dennis what information the notes he no longer has contained. It is clear from Dennis' testimony, the notes would not have indicated exactly where specific trees with specific markings or injuries or damage were because with the exception of ones located very near his own and Gagné's house, Dennis couldn't pinpoint where he was exactly when examining each tree because there were no street signs, houses, or even fire plugs to help him pinpoint the locations. The report itself describes what Dennis found in regard to trees at 316 Puunani Place. In regard to his testimony concerning another tree within 200 feet of Gagné's house, Dennis did produce and testify about a photograph of that tree. State Farm has produced no evidence that the notes would have provided it with information that was not otherwise disclosed as to the basis of Dennis' opinions. Thus, there was no prejudice.

CONCLUSION

None of the arguments or authority cited by State Farm renders the reasoning of *St. Martin* invalid or inapplicable. *St. Martin* is the controlling law, and it clearly demonstrates that E. J. Dennis' testimony is admissible. As the 5th Circuit pointed out, his direct on-site extensive observations and his conclusions drawn from years of relevant experience concerning trees are highly relevant to determining what happened in the immediate area of his observation.

Daubert was never intended to create a pre-trial substitute for cross-examination or to take the weighing of conflicting evidence out of the hands of the fact finder or jury. Nor does it

create a pre-trial process for resolving conflicting inferences or even conflicting expert evidence. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" remain "the traditional and appropriate means of attacking" perceived weaknesses in and even "shaky but admissible evidence." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996) citing *Daubert*, 113 S. Ct. at 2798. To the extent the points State Farm raises indicate any weaknesses in Dennis' testimony, they are merely points which should be explored on cross-examination. They do not demonstrate the type of unreliability which justify the gatekeeper closing the door and excluding the testimony.

Moreover, State Farm was presented with his evidence after their initial denial of Gagné's claim. It was evidence they had and chose not to consider in re-evaluating his claim even though they now claim that their initial denial was based on a far more cursory consideration of tree evidence by a person who lacked any expertise in tree science. A jury can hardly evaluate whether State Farm's failure to respond to Dennis' evidence, which was clearly presented to them on this claim after the initial denial, was justified or was evidence of bad faith or improper claims handling if they are not permitted to consider the evidence at all.

Accordingly, State Farm's motion should be denied.

RESPECTFULLY SUBMITTED, this 26th 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 State Farm Fire and Casualty Company's Motion to Exclude the Report and Testimony of E.J. Dennis* 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 26th_day of December, 2008.

By: /S/ Jesse B. Hearin, III
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