IN THE UNITED STATES DISTRICT COURT
FOR THE 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 TO STATE FARM'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S MISREPRESENTATION-BASED CLAIMS AND CLAIMS FOR REPLACEMENT COSTS, EMOTIONAL DISTRESS DAMAGES, DECEPTIVE ADVERTISING, NEGLIGENCE PER SE, BAD FAITH, AND EXTRA-CONTRACTUAL AND PUNITIVE DAMAGES [450]

COMES NOW, Plaintiff Robert R. Gagné, and files this his response and memorandum brief opposing State Farm's Motion for Partial Summary Judgment as to Plaintiff's Misrepresentation-based Claims and Claims for Replacement Costs, Emotional Distress Damages, Deceptive Advertising, Negligence per Se, Bad Faith, and Extra-contractual and Punitive Damages.

Summary Judgment Standard

State Farm, as movant, must prove the pleadings, depositions, discovery and affidavits show a lack of genuine issue of any material fact and its entitlement to judgment as a matter of law. F.R.C.P. 56(c). A summary judgment motion may be granted only if, viewing the facts and inferences supportable therefrom in the light most favorable to the non-moving party, there is no genuine dispute as to any fact which could affect the outcome. *Daniels v. City of Arlington, Texas*, 246 F.3d 500 (5th Cir. 2001). Furthermore, a defendant moving for summary judgment on the basis of an affirmative defense "must establish beyond peradventure all of the essential

elements of the . . . defense to warrant judgment in his favor." *Chaplin v. Nations Credit Corp*., 307 F.3d 368, 372 (5th Cir. 2002).

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, Part 1 – linked documents omitted) and March 17, 2006 AccuWeather Report for Gagné property, (Exhibit A, Part 2); 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. However, his property was not washed clean of all evidence (Exhibit B - Neil Hall Report; Exhibit C - Thomas field notes; Exhibit 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 (Exhibit 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 many 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 claims file and activity log shows no consideration of any witness statements, evaluation of tree damage on or adjacent to his property, or even any evaluation of the debris left behind on his property or adjacent property by the storm prior to the denial of Gagné's homeowner's claim on November 11, 2005 (Exhibit F, activity log and Exhibit G Homeowners claims file).[1]

After her site visit in mid-September and her request for an engineering report, Rachael Savoy concentrated her work on the Gagné claims on processing the paperwork seeking authorization to pay Gagné the policy limits under the flood policy State Farm had sold him. When State Farm issued the flood proceeds check, she specifically remembers Gagné being concerned about whether accepting the proceeds would be an acknowledgment that his losses were caused by flood rather than wind. She remembers assuring him that the cause of his loss was still being investigated and that acceptance of the flood proceeds did not mean that he did not have wind damage or would not be receiving wind damages after further investigation. Gagné remembers her assuring him that accepting the flood check would not prejudice his homeowner's claim or be used against him on the homeowner's claim.[2] (Exhibit K, Savoy

1 State Farm's Operation Guide, its Team Managers and Gagné's insurance claims handling expert all support the proposition that according to insurance industry standards of care, State Farm's handling of Gagné's claim must be judged according to what exists or does not exist in the claims file. Undocumented after-the-fact explanations and belated evaluations or criticisms of material in the file cannot be used to supplement the file or justify a decision not documented at the time as based on particular evidence in the file (Exhibit H - Dinsmore deposition at p. 33. Exhibit J, MID report, pg 14, "The Company's own Operations Guide states that 'claim files should always completely reflect all activities and support the conclusions reached.' Stated succinctly by one of the Company's Team Managers, 'the file speaks for itself.' Another Team Manager stated that all pertinent information used to make a coverage determination should be in the file..."

2 Robert Gagné testified that he was specifically informed when Rachael Savoy met him that they were going to tender money using the flood policy as a vehicle until such time as the

deposition at pp. 111-112, pp. 147-148; Exhibit L, Flood File; and See Exhibit F, Homeowner's activity logs.)

However, instead of showing further investigation on the cause of the loss as Gagné had been told would occur, the homeowner's claim activity log shows no activity until November 11, 2005 when State Farm manager Haddock canceled the order for an engineering evaluation of the causes of Gagné's losses. Haddock's engineering report log for claims assigned to his team shows that at the time he issued the order to cancel the report, State Farm was aware that the engineer had already visited the site on October 6, 2005 and thus should have had information available from the site inspection to transmit to the claims file, even if the report was canceled. His correspondence to Exponent canceled the assignment, requested that they not write the report and forward all investigative materials (Exhibit M). That same day, however, without allowing time for any materials from work already done by the engineering firm to be received, State Farm manager Kirk Angelle ordered Rachael Savoy to write a letter denying coverage for all property losses under Gagné's homeowner's policy based on the flood exclusion and to close the file. He did this despite admitting that a full and through investigation of the all the facts including any evidence supporting the insured's claim with a goal of extending coverage wherever possible under any part of the policy should be completed before any claim is denied. (See Exhibit F, Activity Log; See Exhibit G, Homeowner's File; Exhibit N, Haddock deposition at pp. 30-31; & Exhibit O, Angelle deposition at p. 57 and at pp. 59-63 on need for full investigation before denial.)

Angelle went on to explain that in deciding the claim should be denied based on surge, he assumed the surge in the area of Mr. Gagné's home was in the range of 30 to 33 feet, but that he

engineers could advise on causation. Once causation was determined – a reconciliation would occur and the proper policy would be assessed with responsibility for the monies owed based upon the causation determination. (Exhibit P, Gagné 08 deposition at pp. 30-31.)

did not even know or bother to find out the elevation of Gagné's home. See Exhibit O, Angelle deposition at p. 96. An exhibit dated October 5, 2005 in Exponent's second report on the Gagné residence shows that had Mr. Angelle even bothered to obtain available information on the surge levels specific to Mr. Gagné's and surrounding properties in South Diamondhead, he would have easily learned that the surge levels at Gagné's property were in the 10 to 15 foot range, less than half of what he assumed as a basis for denying the claim. Exhibit Q, Gagné-Engineer-Exponent 100300. He also claimed to have relied on the lack of damage or scarring on trees or evidence of other wind damage in photographs of Gagné's and surrounding properties. However, he said he had never seen photographs of an entire section of Gagné's next door neighbor's porch easily found just 400 feet from Gagné's house it where dropped from high above down into the center of a group of trees causing extensive scarring and showing other wind damage.[3] See Exhibit O, Angelle deposition at pp. 107, 113-115; Exhibit AA; and Exhibit LL. Furthermore, Angelle claimed to be unaware that an engineer had already inspected the Gagné site and others in that area and had determined that the homes had been destroyed by wind before the arrival of surge, another piece of evidence that should have been easily discoverable if Angelle had not so hastily canceled the engineering request and denied the claim on incomplete information. See Exhibit O, Angelle deposition at pp. 179-182, 185-187. Thus, Angelle could easily have discovered considerable evidence contradicting the assumptions he made in denying the claim if he had obtained readily available information specific to Gagné's property, not cut off the investigation

3 Had State Farm gone a bit further, it could easily have discovered the substantial body of tree evidence in the area of South Diamondhead and more specifically in the area of Gagné's immediate neighbors. This evidence, based on an examination by a highly experienced forensic arborist done immediately after the hurricane when all the evidence was at its best and still available, was made widely available to insurers and was even published on the Internet shortly after Hurricane Katrina. It would also have been readily available from Gagné if State Farm had even bothered to ask him for his evidence prior to denying the claim. See Exhibit E, Dennis depositions generally and specifically at p. 142 for availability of the information.

prematurely, canceled the engineering report, and made a decision without even obtaining the field notes from the investigation.

There is no evidence in the claims file documenting the basis for Mr. Angelle's decision to terminate the investigation and deny Mr. Gagné's claim on November 11, 2005. There is also no reference in the claims file at or before the date of Mr. Angelle's decision to deny the Gagné claim to the reports, weather data, surge data, web pages, photographs of the South Diamondhead area, engineering reports for other Diamondhead claims or documentation that everything in "that area had been completely destroyed" that Mr. Angelle testified in hindsight were the basis of his decision at the time. See Exhibit O, Angelle deposition at pp. 13-16, 18-19. However, Mr. Angelle could not even remember which undocumented engineering reports from other Diamondhead claims he had allegedly relied upon in denying the Gagné claim, so there is no way to evaluate whether the properties were even similar to the Gagné property or if the evidence available at the Gagné site or for the Gagné claims was similar to the evidence considered in those reports.[4] Angelle admitted that it would not even have been possible for another team manager or State Farm person to have reviewed the basis for his decision by reviewing the claims file. Even State Farm could not have done a review without asking Angelle what he based his decision on and trusting that he would still remember what he relied on and answer accurately. See Exhibit O, Angelle deposition at pp. 18-19. In short, Angelle has admitted there was no way to do an objective review of his denial of Gagné's claim.

Mr. Angelle also testified that he had no formal training in meteorology, hydrology, coastal engineering, structural engineering, any kind of engineering, or forensic study of trees

4 State Farm and Exponent, contrary to testimony in depositions in this case, were exchanging engineering reports prior to issuing them in October of 2005. The parties disagree whether to call these "interim" or draft reports but the finder of fact will have to decide if such a process was put in place for some reason other than getting feedback prior to issuing a final report. Exhibit R, email produced December 12, 2008, Denials in depositions, & Ficenic emails.

and foliage. While he has had the National Flood Insurance Program training in flood damage, he has not had any similar training on determining causation of wind damage. He testified that most of his experience was in handling flood claims with some experience involving hurricane claims where substantial parts of the structures remained. He admitted that Hurricane Katrina was his first experience in dealing with causation issues involving hurricane claims involving completely destroyed homes leaving only the slabs or foundations. See Exhibit O, Angelle at pp. 22-26.

Meanwhile, the evidence shows that the engineering firm that State Farm requested to make a determination of the loss had sent an engineer to do a site inspection, collect data, and make an initial determination of the cause of Gagné's loss. The field notes from that investigation showed the engineer determined Gagné's loss, like that of his neighbors, was caused by wind. See Exhibit C, Calvin Thomas field notes unaltered.

There is nothing in the Gagné homeowner's claim file between September 24 and November 11, 2005 to explain what precipitated the cancellation of the engineering report and the decision to deny coverage for all property losses without further investigation. However, there is strong circumstantial evidence of activity related to categories of claims that the Gagné claim arguably falls within which suggest the decisions on the Gagné claim were the result of improper claims handling fueled by wrongful motives.

Based on a thorough review of the claims file, the depositions of Angelle and other State Farm witnesses, Gagné's claims' handling expert, Donald L. Dinsmore, who has more than 25 years experience as a claims adjuster for State Farm and other insurers, including catastrophic hurricane claims, and more than ten years working as a claims handling consultant, has expressed the opinion that the handling of Gagné's claim was so grossly inadequate or

mishandled by insurance industry standards that State Farm lacked an arguable basis for its actions in denying and handling the claim and were so far from the standard as to constitute bad faith. See Exhibit H, Dinsmore deposition; and Exhibit S, Dinsmore report.

There is evidence that between the time State Farm ordered and canceled the engineering report on Gagné's property, managerial personnel at State Farm made decisions about how to investigate (or not investigate) and deny all claims in certain classes without individual investigations as to the cause of the losses and without collecting or considering evidence specific to the individual properties. See Exhibit J, MID report, pg. 17, "in my general area;" Exhibit T, Steve Burke deposition excerpts, *Guice v. State Farm,* 1:06cv00;, and see also DOC 365-5, 365-6, 365-7, & 365-8. There is evidence that State Farm made intentional decisions not to consider evidence from eyewitnesses (eyewitnesses such as Joel in these areas, including South Diamondhead where Gagné's property was located, even though they were aware that the statements existed. Exhibit V, Joel Salsbury deposition, p 90; and Exhibit W, Forensic emails regarding disregarding eyewitness reports. The team leader on the Gagné claim participated in meetings concerning these decisions and shortly after those meetings, he and his successor made decisions on the Gagné claim consistent with applying those decisions/policies/guidelines/recommendations to the Gagné claim. The lack of activity in the activity log for the Gagné claim strongly suggests these decisions and claims handling methods were being applied to the Gagné claim whether it was similar to these other categories of claims or not.[5] See Exhibit T and Exhibit Z.

There is evidence that the intent behind these group claim practices applied to the Gagné claim was a calculated corporate decision to shift the cost of State Farm's burden of proving that

5 Steve Burke was the Team Manager on the Gagné homeowners claim until October 25, 2005. He testified that if he had enough information by that date to make a coverage decision he would have done so. Exhibit X, Burke deposition at pp. 47:12-48:4.

the flood exclusion applied to its policy holders who lost everything forcing them to bear the burden of the long and expensive process of investigating and developing evidence on their own, of hiring lawyers and pursuing their claims through the courts with State Farm resisting and paying only those few with the resources and stamina to withstand the process. The evidence supports the inference that State Farm knew these policy holders were very vulnerable because of the circumstances and that most would be forced into accepting State Farm's decisions or settling their claims for pennies on the dollar by having to go through mediation of their claims with little evidence to support their claims. The evidence supports a reasonable inference that it was State Farm's intention that Gagné's claim would be one of those that State Farm would only pay "on the backside" if he could prove in court the portion of his losses caused by wind. See DOC 365-5 through 365-8.

Robert Gagné has been put through considerable stress and considerable expense to pursue his right to have his claim adequately and fairly investigated, adjusted and paid. Despite repeated requests which State Farm has not answered, he still would like to know exactly how State Farm concluded that he did not suffer even one penny of covered wind damage despite being on the front line in the longest and worst hurricane wind quadrant in South Mississippi history. See Exhibit G, extensive correspondence with State Farm in claims file and litigation history – *Gagné v. State Farm, et al*, 1:06cv711.

Rachael Savoy, the adjuster with nine years of experience, who asked for the engineering report after her site visit, testified candidly under oath she applied the wind/water protocol to the adjustment of the Gagné claim as she was instructed to, but that she disagreed with State Farm's decision to cancel the engineering assignment and deny the claim in its entirety. She believed there was evidence of some wind damage. Steve Burke was her supervisor and the Team

Manager assigned to the Gagné claim until October 25, 2005 when he was relocated by State Farm. See Exhibit K, Rachael Savoy Deposition at pg. 45:5-14, pp. 156:17 – 158:6. He testified that he was involved in meetings where the handling of slab or popsicle claims were discussed which were usually run by Rick Moore or Lecky King. He said his contemporaneous notes from meetings held on October 4 & 5, 2005 state "Denials –start doing now no need for engineers."[6] Exhibit U, Burke deposition excerpts, *Marion v. State Farm*, 1:06cv969.

A September 21, 2005 email from Lecky King to Dave Randel, Rick Moore, and John Deganhart sheds some light on the intent behind such statements in those meetings. It states she "was thinking about it late into the night" and thought that they should deny the claims (slab claims), have the homeowners pay for their own experts, and if *they* can prove wind damage, State Farm could pay the claims "on the backside." Exhibit Y, Burke deposition excerpt in *Marion v State Farm*, 1:06cv969. Kirk Angelle, the Team Manager who replaced Burke and signed the initial November 11, 2005 Gagné denial letter testified that it was his decision to cancel the engineering assignment and that it was not as a result of instructions from higher ups. However, this statement is in direct conflict with the testimony by State Farm personnel David Haddock and David Randel and with the cancellation order itself which states it is from Haddock. Haddock testified that engineering assignments on all slab claims were ordered to be canceled and that he received these instructions from Lecky King. See Exhibit Z, Haddock deposition excerpts, *Guice v. State Farm*, 1:06cv001.

Robert Gagné was forced by State Farm's tactics to adjust his own homeowner's claim at his own expense or negotiate with State Farm from a position of weakness. He commissioned several experts, preserved key evidence, and documented his claim in a manner that very few

6 Although these notes have been specifically and generally requested from State Farm, State Farm has refused to produce them, so it is unknown what else they say relevant to the denial of Gagné's claim.

policyholders have been able to do. His investigation turned up several key facts State Farm should have found with a reasonable investigation: 1) his next door neighbor's porch was transported high in the air and violently deposited amongst a grove of trees approximately 400 feet East North East of its original location. The trees were sheared by the force of the porch plummeting from high above in a manner consistent with a significant wind event; See Exhibit E at pp. 144:18-149:10 and Exhibit AA. 2) household items from inside the Gagné home were found flat on the ground under crushed rock that had moved in a northerly direction well before waters reached a height that could have impacted the elevated living space of the residence[7]; Exhibit BB. 3) Joel Salsbury, a South Diamondhead resident (and State Farm policy holder) watched his home and several others being destroyed by wind prior to the rise of the water. He advised State Farm of his observations shortly after the storm. Yet State Farm did not look for or consider any of this evidence prior to its initial denial. Exhibit CC; State Farm refusal to consider rock pile evidence attached as Exhibit EE, Gagné 07 p. 110-111, generally pp. 100, 104-105; and See Exhibit V, Joel Salsbury deposition generally at pp 50:25-68:9. As already noted above, there were also many facts assumed by Angelle in his hindsight description of his undocumented reasons for denying the claim which could have readily been discovered to be outright wrong, at least as applicable to Gagné's property, if only Angelle had not cut off the investigation prematurely or done a little specific investigation to see if the facts he assumed were in fact applicable to Gagné's property and supported by all the readily available evidence at the time he denied the claim.

7 State Farm's own expert, Dr. Robert Dean, when asked whether the rock pile evidence was consistent with the home being destroyed by wind prior to the water reaching a height that could damage the structure, testified that "it's plausible." Exhibit DD, Robert Dean deposition at pp. 39:9-41:13. Dean has attempted to modify his testimony at his deposition via an errata sheet. DOC 481-12.

Even after Gagné brought this evidence to State Farm's attention and State Farm initially refused and then finally agreed to review the file, this evidence is not mentioned anywhere in the later engineering evaluations and is not ever analyzed or explained by State Farm. An entry in the activity log notes that the engineering firm told State Farm in connection with its second report in March of 2006 it lacked the expertise to evaluate the AccuWeather report on the timeline of weather conditions specific to Gagné's property and the tree evidence. It sent the information back to State Farm for State Farm to obtain other expert reviews from qualified experts but according to the claims file, State Farm did nothing with the information other than forward it to in office coordinators. See Exhibit EE, Gagné 07 at pp. 100, 104-105; Exhibit FF, From Osteraas depositions: Gagné-Engineer-Exponent 100018-100022; Exhibit HH, Exponent's January 23, 2006 referral of Gagné's Jan 7, 06 email detailing new evidence to Osteraas; Gagné-Engineer-Exponent 100045-100070; See Exhibit G, pp. 100035-100038, Sherklian's Feb 27, 06 email forwarding Gagné's Feb 26 email with Dennis report on trees and AccuWeather Report on Gagné property to Osteraas and Meldrum; HO-24-Z447-028; and see Exhibit F, Activity log sheet showing Exponent's 4-4-06 report they lacked expertise to review AccuWeather and forensic arborist's report; activity log for 4/13/06.

After notifying State Farm that it lacked the expertise to evaluate the evidence Gagné presented, Exponent issue a second report to State Farm on May 8, 2006. After stating it lacked the expertise to evaluate the AccuWeather report and the forensic arborist report specific to Gagné's property, this report concludes that there is no basis for changing the earlier report stating that surge was the predominant cause of the damage. The report, which was requested allegedly to investigate the evidence Gagné presented, barely even mentions the evidence remaining at the Gagné property, does not mention the second site inspection by Exponent's

second engineer, Sherkerlian at all, and discusses Diamondhead generally rather than the damage on Gagné's property and that of his nearby neighbors. It rejects Gagné's claims and evidence based solely on two grounds: 1) the absence of National Weather Service documentation of tornadoes at Diamondhead on August 29, 2005 and 2) a very general description of the overall damage driving along East Diamondhead Drive starting from a point half a mile away from Gagné's property and proceeding even further away from Gagné's property. It relies heavily on the absence of NOAA documenting tornadoes on the ground in the Diamondhead area on August 29th referring to a January 2006 NOAA web page documenting tornado in central Mississippi without mentioning that the same page describes NOAA "surveys indicated widespread damage comparable to F1 and F2 tornadoes...with areas bordering on F3 type damage" with the most severe of these areas being in southeast Mississippi[8] and without referring to the fact that NOAA's data for the entire area coastal area is incomplete and NOAA officially listed tornado activity related to Hurricane Katrina as "unknown" in its Hurricane Katrina Post-Tropical Cyclone Report, updated as of mid February 2006, because most of its weather stations failed long before the highest winds and surge struck Diamondhead.[9] Exhibit II, May 8, 2006 Exponent Report.

After two years of litigation, State Farm eventually decided to pay Gagné the amount of $37,805.79 after asking its experts to calculate the maximum possible amount of damages that they believed the evidence showed Gagné might have suffered as a result of wind. They claim this payment is not made as a concession of any validity to Gagné's claims, but there is no reason other than State Farm's continuing obligation to evaluate the evidence during litigation and to pay when it becomes aware of evidence supporting the insured's claim why an insurer

8www.srh.noaa.gov/jan/katrina
9www.srh.noaa.gov/lix/html/psh_katrina.htm

would litigate as tenaciously as State Farm has and then tender such a payment. The logical inference from the payment is that even State Farm's own experts concede that Gagné suffered at least some covered wind damage. It is clear, however, that State Farm would never have made even that small payment if Robert Gagné had not gone to the trouble of hiring his own experts, developed his own evidence, demonstrated that State Farm cannot meet its burden of proving all his losses were caused by excludable flood waters, hired lawyers, and gone to considerable expense and trouble to pursue his claims in court.

ARGUMENT
Replacement Costs

It has long been a well settled principle of insurance law that when an insurer categorically denies coverage on an insured's claim prior to the insured filing suit that the insurer thereby waives any other defenses under the policy including conditions required of the insured as prerequisites to coverage. See *Sears, Roebuck & Co. v. Zurich Ins. Co.*, 321 F. Supp. 1350, 1352 (N.D. Ill. 1971); *McFadyen v. North River Ins. Co.*, 62 Ill.App.2d 164, 209 N.E.2d 833, 836-37 (1965); *Continental Ins. Co. v. Wichita Federal Sav. & Loan Ass'n*, No. 84-1218, 1988 U.S. Dist. LEXIS 18253 (D. Kan. June 17, 1988) (denial precluded reliance on notice and proof of loss conditions); *Morris v. Reed*, 510 S.W.2d 234 (Mo. App. 1974) and cases cited therein *Armstrong v. Hanover Insurance Co.*, 130 Vt. 182, 289 A.2d 669, 673 (1972) and cases cited therein. This principle applies to the rebuilding conditions of replacement cost coverage precluding an insurer from relying on failure to rebuild to limit damages once the insurer has denied any coverage under the policy. See *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001) and cases cited therein.

Conrad Bros. explains several reasons for applying this rule even in the absence of bad faith by the insurer or an insurer's good faith but mistaken interpretation of the policy.

> The district court and court of appeals excused performance of the condition to rebuild based upon a finding that it would be a useless and unreasonable act without assurance of coverage. While this reasoning is sound, another doctrine exists that ... enables Conrad Bros. to obtain a judgment for the replacement costs without first replacing the buildings. ... [O]nce a party repudiates a contractual duty before performance is due, the other party may enforce the obligation by filing a claim for damages without fulfilling any conditions precedent. Restatement (Second) of Contracts § 253 cmt. b; 13 Williston § 39:37, at 666, 668. A repudiation of a contract is accorded the same effect as a breach by nonperformance. Restatement (Second) of Contracts § 255 cmt.
>
> ...In this case, John Deere denied any coverage on the claim by Conrad Bros. This denial of coverage, even though based upon a mistaken interpretation, was a clear intent not to perform. Thus, John Deere repudiated the contract. This conclusion is consistent with the general view that an insured is excused under the doctrine of repudiation from compliance with preliminary conditions of an insurance policy when "an insurance company indicates that it will not pay an insurance loss in any event." 13 Williston § 39:39, at 678. ...
>
> [T]here are three factors which mitigate any harshness of the result. First, insurers may resolve coverage disputes without repudiating the insurance contract by utilizing such procedural devices as declaratory judgments. See Restatement (Second) of Contracts § 250 cmt. d. Second, even though an insurer denies coverage in good faith, the result to the insured, or an assignee of the insured's claim, is the same. The insured or assignee will not obtain coverage by performing the condition precedent. Third, the insured is unable to use the insurer's repudiation as a windfall, because the insured must prove the repudiation materially contributed to its nonperformance. See Restatement (Second) of Contracts § 255.
>
> Under the applicable governing principles, Conrad Bros. was entitled to rely on John Deere's statements that it would not pay a replacement cost loss to an assignee. As a result, we conclude John Deere repudiated its obligation under the contract. The only remaining issue to determine is whether that repudiation also contributed materially to the occurrence of Conrad Bros.'s failure to repair or that such failure to repair would have occurred in any event. See id. & cmt. a. ...
>
> There is substantial evidence from which the court could have concluded Conrad Bros. would have repaired but for John Deere's repudiation. Consequently, that condition is excused, and Conrad Bros. is entitled to damages based on the full replacement costs.

While Mississippi courts have not considered the issue of whether an outright denial of coverage waives or precludes the assertion by the insurer of the prerequisite of replacement or

rebuilding in the context of a replacement cost coverage clause, Mississippi has long followed the general rule of precluding insurers who deny coverage from later raising such prerequisites or conditions as defenses when the insured files suit to recover on the policy. See *Planters' Ins. Co. v. Comfort*, 50 Miss. 662 (1874) (insurer repudiating liability based on failure to pay premiums barred from asserting insured's failure to submit timely notice and proof of loss); *Atlantic Horse Ins. Co. v. Nero*, 108 Miss. 321, 66 So. 780 (1914) (same); *Canal Ins. Co. v. Howell,* 248 Miss. 678, 688m 160 So. 2d 218 (1964) (denial on coverage grounds precluded assertion of proof of loss provisions); *United States Fidelity & Guaranty Co. v. Arrington*, 255 So. 2d 652, 656 (Miss. 1971) (same); *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. 13 (1894) (initial denial on other grounds precluded assertion of other policy provisions including proof of loss).

State Farm argues that this court's earlier rulings in several cases demonstrate it is entitled to judgment as a matter of law on this issue. However, the authorities and arguments raised here were not raised by plaintiffs in the other cases' replacement cost motions and were not addressed in those orders. See *Penthouse Owners Ass'n, Inc. v. Certain Underwriters at Lloyd's London*, No. 1:07CV568-LTS-RHW, [Docs. 173, 193]; *Aiken v. Rimkus Consulting Group, Inc.,* 1:06CV741-LTS-THW, Order at 2 (S.D. Miss. Nov. 29, 2007) [Docs. 265, 278], *Fowler v. State Farm Fire and Cas. Co.*, No.1:06CV489-SO-RHW, [Docs 370, 372][10]

Unlike some of the cases where Plaintiffs have rebuilt substantially different buildings than were originally insured, Gagné does not seek to introduce evidence of the cost of rebuilding a different home than the one he lost. His evidence is evidence of what it would cost him to

10 Although the Fowlers did briefly raise the repudiation theory, see Doc. 304 at pp. 33-35, they did not present specific case law applying the theory to bar an insurer from raising the failure to rebuild as a defense to replacement cost damages after a categorical denial of all coverage under the policy or present evidence that Mississippi courts had applied similar reasoning to bar insurers from raising other conditions precedent to recovery after a flat denial of all coverage.

rebuild the same home that was destroyed. Thus, there is no danger of confusing the jury or of evidence being presented that is not directly related to the specific coverage amounts which are the subject of this action.

Bad Faith

State Farm recites the familiar mantra concerning the usual requirement of showing a lack of an arguable basis for denial of a claim in order to succeed on a bad faith claim. While this is the most common method of proving bad faith, Mississippi bad faith law is actually much broader than just the single lack of arguable basis for denial type of claim. In *Stewart v. Gulf Guar. Life Ins. Co.,* 846 So. 2d 192, (Miss. 2002)[11], the Mississippi Supreme Court explained the broader nature of bad faith and that it is possible to make out a bad faith claim for punitive damages even in the presence of an arguable basis for denial of a claim.

> Before punitive damages may be recovered from an insurer, the insured must prove by a preponderance of evidence that the insurer acted with (1) malice, or (2) gross negligence or reckless disregard for the rights of others. If the insurer had a legitimate or arguable reason to deny payment of the claim, then the trial judge, after reviewing all the evidence, should refuse to grant a punitive damage instruction."Arguably-based denials are generally defined as those which were rendered upon dealing with the disputed claim fairly and in good faith."
>
> These principles, however, are not ironclad. ... . the issue of punitive damages may be submitted, notwithstanding the presence of an arguable basis, where there is a question that the mishandling of a claim or the breach of an implied covenant of good faith and fair dealing may have reached the level of an independent tort.. ...
>
> The question ... is whether Gulf Guaranty breached its contract with Stewart in such a way as to amount to an intentional wrong, or in doing so whether its conduct was so grossly negligent that the breach constituted an independent tort.. ... Because there is no dispute that Stewart's condition existed at

11 *Stewart* was decided approximately 15 years after *Pioneer Life Ins. Co. v. Moss*, 513 So. 2d 927, 930 (Miss.1987) and *Reece v. State Farm Fire and Cas. Co.*, 684 F. Supp. 140,145-46 (N.D. Miss. 1987) which State Farm relies upon for its position that the existence of an arguable basis for denial of coverage "utterly preclude[s] the submission of the issue of punitive damages to the jury." *Stewart* clearly holds to the contrary as does *Broussard v. State Farm Fire and Cas. Co.,* 523 F.3d 618, 629 (5th Cir. 2008). See also *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1186 (Miss. 1990)

the time the policy became effective, Gulf Guaranty contends that it was entitled to rely on the [pre-existing condition] exclusion.

This Court has held that the denial of a claim without proper investigation may give rise to punitive damages. "Proper investigation … means obtaining 'all available medical information relevant to [the policyholder's claim.'" Id. ... Before denying a claim, the insurer, at a minimum, must determine whether the policy provision at issue has been voided by a state or federal court, interview its agents and employees to determine if they have knowledge relevant to the claim, and make a reasonable effort to secure all medical records relevant to the claim. Methvin admits that she did no investigation before denying Stewart's claim. In fact, Methvin, in her letter, attempted to place the burden of submitting information regarding the claim on Stewart. ... This evidence suggests that there exist questions of fact regarding the adequacy of Gulf Guaranty's investigation of Stewart's claim and that the jury could have properly concluded that such a failure evidenced bad faith and gross negligence, entitling Stewart to an award of punitive damages.

Furthermore, there was evidence presented which would support a conclusion by the jury that Gulf Guaranty attempted to engage in post-claims underwriting in dealing with Stewart's claim. Post-claim underwriting occurs when an insured pays premiums and operates under the assumption he is insured against a specified risk, only to learn after he submits a claim that he is not insured.... Clearly, no effort was made by Gulf Guaranty to determine whether Stewart was in insurable health at the time the policy was issued..

... the trial court erred in granting Gulf Guaranty's motion for judgment notwithstanding the verdict as to punitive damages. Though the preexisting condition exclusion constituted an arguable basis for Gulf Guaranty's denial of Stewart's claim, the evidence at trial demonstrated a breach of the implied covenant of good faith and fair dealing which the jury may well have concluded reached the level of an independent tort. The jury had before it evidence from which it could reasonably conclude that Gulf Guaranty's conduct was grossly negligent. Id at ¶¶ 32-51

A delay in payment under provisions clearly providing coverage beyond the period permitted by the loss payment clause of a policy, when motivated by economic gain, will also support a bad faith claim particularly where the insurer has knowledge of the economic hardship caused by the delay in payment. This is true even where there is a legitimate dispute and an ongoing investigation as to other coverage under the same policy. *Travelers Indemnity Co. v. Wetherbee,* 368 So. 2d 829 (Miss. 1979)

Under Mississippi law, insurers have a duty to perform a reasonably prompt and adequate investigation of all relevant facts and make a reasonable, good faith decision based on that investigation," *Broussard*, 523 F.3d at 627-28. *Broussard* relied upon *Sobley v. S. Natural Gas Co.,* 302 F.3d 325, 335-36 (5th Cir. 2002) in holding that to "qualify for punitive damages for negligent claim investigation, "the level of negligence in conducting the investigation must be such that a proper investigation by the insurer would easily adduce evidence showing its defenses to be without merit." *Id*. This definition of negligent claims investigation, however, is the equivalent of saying that the insured must prove the lack of an arguable basis for denying the claims, and completely overlooks the *Stewart* holding that punitive damages can be awarded on the basis of gross negligence in claims handling despite the existence of an arguable basis for denying the claim and even despite the undisputed evidence that the pre-existing condition the insurer used as a basis of the denial existed at the time of the insurance application making the insured uninsurable.

Mississippi case law decided after *Sobley* makes it clear that there are ways in which an insurer can mishandle a claim so badly that punitive damages are appropriate despite having an arguable basis for denying the claim and the absence of proof that a proper investigation would easily have adduced evidence showing the proffered defense lacked merit.[12] *Stewart* decided two days after *Sobley* is just such a case. As the *Stewart* court made clear, no amount of investigation would have proved a lack of merit to the pre-existing condition exclusion defense because it was undisputed that the insured had the condition when the policy was issued and was uninsurable because of it at that time. Nevertheless, because a proper investigation prior to denial required a review of the medical records, the insurer made no effort to review the medical records before

12 Prior Mississippi case law not considered by *Sobley* is also clear on this point. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1186 (Miss. 1990)

denial, and the insurer knowingly put the burden on the insured to do his own investigation by producing contrary medical records himself instead of doing its own investigation of the medical records, the *Stewart* court held the jury could have properly concluded the level of failure to conduct a good faith investigation evidenced bad faith and gross negligence, entitling Stewart to an award of punitive damages despite the existence of a pre-existing condition falling within that exclusion.

If a jury could find bad faith and award punitive damages where an insurer denied coverage under a valid pre-existing condition exclusion where it was undisputed that the insured did in fact have the pre-existing condition because of gross negligence, gross inadequacy, or reckless disregard for the rights of the insured in handling the claim, it is clearly possible to have a bad faith claim based on the egregious mishandling of a claim even if the evidence does eventually provide some support for the insurer's decision that the loss was caused primarily by the excluded cause of flood. The claims handling in each case must be considered on its own facts considering only what evidence the insurer had to support this particular denial at the time of the denial and whether the insurer did in fact provide this insured with proper individualized claims processing or handled the claim in a grossly negligent or inadequate manner or with reckless disregard for this insured's rights.

In regard to what constitutes an arguable basis for a denial, recent Mississippi case law decided after *Sobley* and some of the other cases cited in *Broussard* also contains some very tough language about thorough investigations of claims prior to denial which must be read together with *Broussard's* sparse language on Mississippi's punitive damages law in considering on a case-to-case basis whether the facts warrant a punitive damages instruction based on claims handling.

In *United Am. Ins. Co. v. Merrill*, 978 So. 2d 613 (Miss. 2007), the Mississippi Supreme Court put some real teeth into its standards for determining whether an insurer can avoid punitive damages by relying on its investigation and cling to an arguable basis for denying a claim. The court made it clear that insurers must have substantiating evidence to support the basis asserted for a denial in its files *prior* to issuing a denial.

> An insurance company must present an arguable, good-faith basis for denial of a claim. See State Farm Ins. Co. v. Grimes, 722 So. 2d 637 (Miss. 1998); Standard Life Ins. Co. v. Veal, 354 So. 2d 239 (Miss. 1977). The record before us is devoid of any such basis. ... Insurance companies are not free to employ medical directors who are in a position to recommend arbitrary denials. A medical opinion put forth by a medical director, without substantiation, is insufficient to deny a claim. Insurance companies must comply with the mandate of this Court to demonstrate an arguable basis for denial.
>
> ... In this case, the relevant records are the records upon which denial was based. ... "An insurance company has exclusive control over evaluation, processing and denial of claims." Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1189 (Miss. 1990).... this is a lawsuit based on the denial of Natalie's claim, and United chose to base its denial only on the preceding three years, then United must be satisfied to use records from these three years to defend its denial.

Id at ¶¶ 69-73. The *Merrill* court went on to hold that the insurer could not later raise alternative bases for denial of the claim which it did not rely upon in its initial denial. *Id* at ¶¶ 73-75. In short, whether or not an insurer had an arguable basis for denial is determined on the basis of the information actually in its claim file at the time of denial and actually relied upon as the basis for that denial. Moreover, in order to have an arguable basis for denial, the evidence in the claim file must substantiate the reason stated for denial and cannot be based on the opinion of an expert without proper substantiation.

Merrill clearly demonstrates that State Farm cannot go behind its claims file as it existed on the date it denied Gagné's claim and subsequently build its evidence to support its basis for denial after the fact of denial. While subsequent evidence may be relevant to the contractual

issue of actual cause and coverage, the independent tort of bad faith claims handling is focused on the act of denial and the process of claims handling that resulted in the denial. Intentionally shifting the burden of investigating the cause of the loss to the insured and forcing the insured to prove the extent of the covered loss avoiding the insurer's obligation to substantiate that all the damages were caused by excludable causes or true concurrent causes creates a separate line of tort damages independent from the damages issues on coverage.

Reading *Stewart* and *Merrill* in conjunction with *Broussard* and *Sobley*, it is clear that a denial of a claim prior to the development of evidence in the claim file specific to the particular insured supported by substantiating evidence supporting the reason stated by the insurer in its denial letter constitutes gross negligence or reckless disregard for the insured in claims handling sufficient to support punitive damages under Mississippi law. It is also clear that under Mississippi law, the insurer must actually investigate the cause of the specific insured's loss and may not assume the loss was caused by an excluded cause based on proximity to other losses and general condition of an area and shift the burden to the insured to prove the amount of his losses falling within a covered cause.

Contrary to State Farm's position, *Broussard* does not stand for the proposition that an insurer has an arguable basis for denial of a homeowners claim based on the water exclusion as a matter of law solely because

> the house was located in an area known to have been subjected to extremely high storm surge, nearby houses in the storm surge area had also been completely destroyed while the houses beyond the storm surge line survived the hurricane, most with no or minor damage, and many trees and shrubs in the neighborhood retained their branches and foliage.

(Doc 453 at p. 2) The language from *Broussard* finding an arguable basis for denial makes it clear that an adjuster visited the Broussard property and looked at the actual evidence on that lot,

considered the damage to the trees on the Broussard lot and determined that the damage to the trees on that lot was more consistent with flooding than tornadic activity and concluded that the totality of the evidence specific to that lot demonstrated that the home was destroyed by flood waters prior to issuing the denial.

In the present case, prior to the denial, an adjuster, Rachael Savoy, visited the lot twice. She made measurements and took some pictures. She testified that these pictures in the file showed some evidence of wind damage as well as some evidence of water damage. Exhibit K, Savoy at 143-144. She also testified that there were homes in Mr. Gagné's neighborhood (South Diamondhead) which were damaged by wind. See Exhibit K, Savoy at 150. She described twisted trees and the presence of debris and requested an engineering assessment to determine how much of the damage was caused by wind. See Exhibit K, Savoy at 110. Unlike the adjuster in *Broussard*, she did not make a determination that the damage to the trees was more consistent with flooding than wind damage. She did not conclude, prior to the denial based on the flood exclusion, that the totality of the evidence specific to Gagné's lot demonstrated the home was destroyed by flood waters. Although she requested an engineering report, she testified no information was received on the claim from an engineering inspection or opinion prior to the file being closed with a denial based on the flood exclusion on November 11, 2005. See Exhibit K, Savoy at 113.

Instead, based on the activity log, it is clear that nothing happened in terms of receipt and consideration of evidence specific to Gagné's homeowner's claim and the extent to which his losses were caused by wind or flood between the time Rachael Savoy ordered the engineering inspection on September 17, 2005 and November 11, 2005 - the date Haddock canceled the engineering report that had been requested and Rachael Savoy was ordered by Kirk Angelle to

issue a denial letter based on the flood exclusion without even waiting for whatever evidence the engineers had collected prior to the cancellation of their work order. There is no explanation in the claims file as to what Kirk Angelle considered or did not consider in making his decision to deny the claim. Even considering Kirk Angelle's hindsight explanation based on an incomplete memory of what he considered, there is strong evidence that he based his decision on assumptions of facts not documented in the Gagné claims file. There is also strong evidence that if he had bothered to collect information specific to Gagné's property to determine if his assumptions on which he based the denial were accurate, he would have easily discovered that his assumptions were either not accurate or not applicable to Gagné's property. Furthermore, there was considerable evidence specific to Gagné's property which was readily available and not considered which strongly contradicts Angelle's conclusory assumptions. In short, a reasonably complete investigation of the Gagné specific facts instead of a gross over-generalization of conclusions drawn from materials which Angelle cannot even identify sufficiently to determine if they are applicable to or similar to the Gagné property would easily have revealed the inadequacies of Angelle's handling of the claim and its denial.

Meanwhile, during this same period, there is evidence that instead of investigating and adjusting Gagné's claim individually on the basis of the actual evidence specific to his home relevant to what parts of his loss were caused by wind and what parts by flood or concurrent wind and flood, State Farm made an intentional decision to cancel all requested engineering reports and deny all claims for claims in certain categories (slabs/popsicles) on the basis of the flood exclusion. There is evidence that it applied this decision to the Gagné claim without an individualized investigation and before it even had official storm surge heights and wind speed and duration measurements for Gagné's specific area. There is also evidence that at the time

these decisions were made and applied to the Gagné claim, State Farm had, but ignored eyewitness reports (e.g. Paul Russell, Exhibit JJ and Joel Salsbury, see Exhibit V) and even some evidence from fact witnesses with the expertise to qualify as expert witnesses which was specific to Gagné's immediate neighborhood in South Diamondhead. See Exhibit EE, Gagné 07 at pp. 74, 102-103, 112-113; EJ Dennis told Drain at time of his visit of proof of tornadic activity in form of how his house roof was dropped; also tree damage and scarring, Exponent had local meteorologist info at time of second report, but instead of addressing it they claimed they lacked the expertise to assess it and went back to incomplete NOAA data. Exhibit KK.

Furthermore, there is documentary evidence that at the time State Farm applied this generalized decision to the Gagné claim, field notes of an engineering inspection of the Gagné property requested by State Farm existed which would easily have provided support for coverage of wind damage and called State Farm's denial into question. This would have occurred if only State Farm had taken steps to make sure that the claim was not denied until after it obtained all field notes on the canceled engineering assignment instead of making sure that the claim was denied before such investigative materials could be submitted.

This is evidence from which a jury could draw the conclusion that there was either intentional action by State Farm to deny the Gagné claim without an adequate investigation or without a good faith arguable basis for denial of the entire claim or at the very least reckless disregard for Gagné's right to an adequate investigation. It is also evidence from which a jury could conclude that State Farm acted intentionally to impermissibly shift the burden of investigation of causation of the loss and proof of what portions of the loss were not caused by flood to the insured.

From what little information is available in published information on the specific aspects of claims handling in other cases, this evidence rises to the level at which this court has repeatedly denied motions such as State Farm's motion for summary judgment on bad faith claim handling claims. See e.g., *Douzart v. Baloa Ins. Co.*, Civil Action No. 1:07CV1057-LG-RHW, 2008 U.S. Dist. LEXIS 81655, October 14, 2008, Decided, October 14, 2008, Filed, Reconsideration denied by *Douzart v. Balboa Ins. Co.,* 2008 U.S. Dist. LEXIS 96194 (S.D. Miss., Nov. 25, 2008); *Payment v. State Farm*, Civil Action NO. 1:07CV1003, 2008 U.S. Dist. LEXIS 94616 (S.D. Miss., Nov. 28, 2008)

Gagné's counsel also has reason to believe that if the court would permit or compel some of the discovery State Farm has resisted to show that Gagné's claim was included in certain categories of claims, there is additional and more direct evidence of malice or reckless disregard of policyholder's rights by persons who may not have singled out the Gagné claim for individual review but whose actions effectively decided how the investigation of his claim would be cut short and that his claim would be denied prior to a full and adequate investigation.

Extra-Contractual Damages

Extra-contractual damages, such as attorneys' fees and certain other expenses, are available when an insurance company has tortiously breached its contract, and are an alternative to punitive damages even when bad faith has not been shown. See *Essinger v. Liberty Mut. Fire Ins. Co.,* 529 F.3d 264, 270 (5th Cir. 2008).

> When an insurance company breaches its contract with an insured but does not do so in a way that is so egregious as to permit the recovery of punitive damages . . ., the insured in some circumstances will have a right to attorneys' fees and other expenses that were reasonably foreseeable." Essinger I, 529 F.3d at 270; see also Broussard v. State Farm Fire and Cas. Co., 523 F.3d 618, 628 (5th Cir. 2008); United American Ins. Co. v. Merrill, 978 So. 2d 613, 630 (Miss. 2007); Universal Life Ins. Co. v. Veasley, 610 So. 2d 290, 295 (Miss. 1992).

Id. Thus, Mississippi law recognizes that negligent conduct of an insurance company can justify recovery of expenses and attorneys fees. Essinger, 534 F.3d 450 at 451; *Payment v State Farm, 1:07cv1003, order dated 11/20/08.*

Furthermore, under Mississippi law, an insurer has a continuing duty to re-evaluate the insured's claim even after the claim is refused and the insured files suit. *Broussard* at 629; *Gregory v. Continental Ins. Co.*, 575 So. 2d 534, 541 (Miss. 1990). Thus, State Farm had and continues to have a continuing duty to reevaluate Gagné's claim after Angelle's denial and even after Gagné filed suit. Yet there is strong evidence that despite Gagné offering to pay for a reconsideration and reinvestigation his claim, State Farm refused to consider the evidence Gagné brought to their attention for at least several months after their initial denial. Even when they did deign to agree to a technical reconsideration, they did not really consider the evidence he brought to their attention. Thus, it wasn't until long after Gagné filed this litigation and experts were designated that State Farm ever took Gagné's information seriously and made any attempt to actually evaluate it. Eventually, after more than two years of litigation, they did make some payment on his wind claim. Together this is evidence sufficient to support extra-contractual damages even if the evidence should fail at trial to be sufficient to support punitive damages.

Emotional Distress

State Farm seeks to strike Gagné's claims for mental anguish and emotional distress damages on the grounds that Gagné's attorney represented that he was not making any claims that would be supported by medical records. However, under Mississippi law, support by medical evidence is not an absolute requirement for recovery of mental anguish and emotional distress as a result of mishandling insurance claims even when the evidence does not rise to the level of punitive damages. In *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290 (Miss. 1992),

the court pointed out both that there was no medical testimony supporting emotional distress and that the claims handling errors were not sufficient to support punitive damages. Nevertheless, the court upheld for extra-contractual actual damages based on mental anguish saying:

> In addition to contractual and punitive damages, she sought extra-contractual damages. Veasley alleged that she suffered emotional distress as a result of Universal's mis-handling of her claim. She testified that Universal's refusal to pay her claim caused her worry, nervousness, and depression. She also claimed she had sleepless nights and little or no tolerance for children or noises. She stated she was taking tranquilizers for her problems. There was no medical testimony presented during the trial and Veasley admitted that she had some of the same problems before and after her daughter's death. ...
>
> We have traditionally held that for mental anguish and emotional distress cannot be considered in the absence of a finding of an independent intentional tort separate from the breach of contract. Aetna Casualty and Surety Co., 487 So.2d at 835 (Miss. 1986); State Farm Fire and Casualty Co. v. Simpson, 477 So. 2d 242 (Miss. 1985). Bad faith is considered such an independent tort. Pioneer Life, 513 So.2d at 931 (Robertson, J., concurring); Blue Cross & Blue Shield v. Maas, 516 So. 2d 495 (Miss. 1987). Here, the evidence supports only a finding of mistake, nothing more than simple negligence. Simple negligence is not such an independent tort that would support extra-contractual damages. See, e.g., Andrew Jackson, 566 So. 2d at 1187, quoting Simpson, 477 So. 2d 242 and Pioneer Life, 513 So. 2d at 930, ("As a matter of law, 'ordinary torts, the product of forgetfulness, oversight, or the like,' do not 'rise to the heightened level of an independent tort' which warrant imposition of punitive-damages liability"). Id.
>
> Some justices on this court have suggested that extra-contractual damages ought be awarded in cases involving a failure to pay on an insurance contract without an arguable reason even where the circumstances are not such that punitive damages are proper. Pioneer Life at 932. (Sullivan, J., concurring, joined by D. Lee, Prather and Robertson, JJ.). Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss. Additional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.
>
> In the instant case, while not voluminous, evidence existed to support Veasley's contention that the refusal of Universal Life to pay the claim caused her worry, anxiety, insomnia, and depression. Additionally, she experienced difficulty in coping with daily life and children, her grandchildren, in particular. Veasley stated that she did not have any of these emotional problems prior to her contact

> with Universal. Thus, the amount awarded by the jury for Veasley's emotional distress was no more than just compensation for her claims which, although contested, were presumably credited by the jury.

Id at 292, 295. It is readily apparent from this language in *Veasley* that medical evidence is not a prerequisite for recovery of mental anguish, emotional distress, and inconvenience damages on an extra-contractual or bad faith insurance claims handling case. Thus, there was no concession by Gagné or his counsel that no *Veasley* claims were being made. Accordingly, State Farm's motion on this point is misplaced.

Misrepresentation, Deceptive Advertising

Plaintiff does not oppose State Farm's motion for partial summary judgment on misrepresentation and deceptive advertising claims.

CONCLUSION

Most of State Farm's requests for partial summary judgment are not justified based on the law, the evidence in this case, or this court's past and recent orders in other recent insurance claims handling cases. Accordingly, Plaintiff respectfully requests this Court to deny this motion with the exception of the portions related to misrepresentation and deceptive advertising claims.

Respectfully submitted this 29th day of December, 2008.

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CERTIFICATE OF SERVICE

COMES NOW the Plaintiff, Robert R. Gagné, by and through counsel, hereby certify that I filed the foregoing ***Plaintiff's Response to State Farm's Motion for Partial Summary Judgment As to Plaintiff's Misrepresentation-Based Claims and Claims for Replacement Costs, Emotional Distress Damages, Deceptive Advertising, Negligence Per Se, Bad Faith, and Extra-Contractual and Punitive Damages)*** with the Clerk of the Court using the ECF system which will send notification of such filing to ECF participants of record.

SO NOTICED this 29th day of December, 2008.

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