IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

GREG FLORES, BRIAN FLORES, SUSAN F. HAMILTON DONALD FLORES, JR. and MARK FLORES — PLAINTIFFS

VERSUS — CASE NO.: 1:08-CV-0471-LTS-RHW

STATE FARM FIRE CASUALTY AND INSURANCE CO. — DEFENDANT

RESPONSE BRIEF IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

The plaintiff's property was located on the Jordan River in Bay St. Louis, Mississippi which endured the pounding winds of hurricane Katrina's northeast side for hours before the eye wall crossed it and then endured many more hours of wind after the eye passed. Eventually, storm covered the property, but not before the property endured the maximum sustained winds well as one of the longest periods of sustained hurricane force winds in recorded history. During this onslaught, their entire property was destroyed on August 29, 2005, and the plaintiff's lost all of their personal possessions located upon the premises as well. [See photo as Exhibit A].

Plaintiff's reported their loss to State Farm, through its national call center while they were still evacuated in Northwest Louisiana. State Farm eventually assigned adjuster, Heather Keyt, an inexperienced adjuster to adjust the plaintiff's claims. Ms. Keyt quickly recommended that the claim be denied without supporting evidence except for a alleged report by the plaintiff on the cause of the loss being storm surge.

State Farm has filed a motion for partial summary judgment attempting to dismiss the claim for extra-contractual damages, attorneys' fees and punitive damages. Because there exist

questions of fact precluding the granting of the motion, the motion should be denied as the issues presented are more properly resolved in a full trial by jury.

INSURANCE PREMISED ON GOOD FAITH AND FAIR DEALING

The relationship between an insurance company and its insured customer is one of a fiduciary obligation. Indeed, an insurer owes to his insured a duty of good faith and fair dealing. "Under Mississippi law, insurers have a duty 'to perform a prompt and adequate investigation and make a reasonable, good faith decision based on that investigation' and may be liable for punitive damages for denying a claim in bad faith." ***Broussard v. State Farm Fire and Casualty Co.*, 523 F.3d 618, 627 (5th Cir. 2009), citing, *Liberty Mut. Ins. Co. v. McKneely*, 862 So.2d 530, 535 (Miss.2003); *U.S. Fid. & Guar. Co. v. Wigginton*, 964 F.2d 487, 492 (5th Cir.1992).**

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. National Credit Corp*., 307 F.3d 368, 372 (5th Cir. 2002)**.

THE QUESTION OF PUNITIVE AND/OR EXTRA-CONTRACTURAL DAMAGES IS A DISPUTED FACTUAL ISSUE

The record does not support judgment on the issues of punitive damages, extra-contractual damages, and attorney fees. State Farm and its employees were predisposed to deny

the homeowner's wind claims, and concluded that, despite the direct loss, and the existence of an all-perils policy: more likely than not, that every single part of the property was unblemished by wind or wind-borne debris damage before the tidal surge reached levels that could totally destroy the remains of the property.

State Farm claims this Court can rule as a matter of law that punitive damages, as well as other extra contractual damages, are not recoverable in this case, based on the facts presented. ***Stewart v. Gulf Guar. Life Ins. Co.*, 846 So.2d 192 (Miss. 2002)**. Significantly, State Farm has not provided this Court with any evidence to demonstrate it had an arguable basis for its delays, its failure to properly adjust the claim, its false conduct, or any other improper acts. In fact, as the evidence and testimony below will show, State Farm's actions reveal a disturbing practice of collecting the data to adjust its claims. Additionally State Farm wrongly interprets the pertinent standard when State Farm alleges that its adjuster's "observations of substantial evidence of storm surge flooding at plaintiff's property" somehow, as a matter of law, allows them to conclude that the entire damage to the Flores home was caused by an excluded cause.

State Farm recites its preferred verbiage 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 the denial of a significant claim. In ***Stewart v. Gulf Guar. Life Ins. Co*., 846 So. 2d 192, (Miss. 2002)**, 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 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 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. ***Id.*, at 200-201**.
>
> 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 the time the policy became effective, Gulf Guaranty contends that it was entitled to rely on the [pre-existing condition] exclusion. ***Id.***
>
> 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 claim, and make a reasonable effort to secure all medical records relevant to the claim. Methvin admits that se 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. ***Id.*, at 203-204**.
>
> … the trial court erred in granting Gulf Guaranty's motion for judgment notwithstanding the verdict as to the 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 a level of an independent tort. The jury had before it evidence from which it could reasonable conclude that Gulf Guaranty's conduct was grossly negligent. ***Id.*, at 205**.

A delay or denial in payment under provisions clearly providing coverage, 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 reasonable, 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*** relying on ***Sobley v. S. Natural Gas Co.*, 302 F.3d 325, 335-36 (5th Cir. 2002)** in holding that to "Qualify for punitive damages for such 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 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. ***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.

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 reasonable to have a bad faith claim based in 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 addressed 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*** 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 reinforced 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 Inc. Co. v. Grimes*, 722 So. 2d 637 (Miss. 1998); *Standard Life Ins. Co. v. Veal*, 354 So. 2d 239 (Miss. 1977)**

The ***Merrill*** holding demonstrates that State Farm cannot go behind its claims file as it existed on the date it denied the plaintiff's claim, then 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 actual evidence in the claim file, specific to the particular insured and 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 unverified information and the 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 in 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 survived the hurricane, most with no damage or minor damage and many trees and shrubs in the neighborhood retained their branches and foliage.

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. He then 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 comparison to the ***Broussard*** facts, the general wind conditions were substantially less severe than they are in the case of at bar.

Hurricane Katrina, like other hurricanes, had severe winds and eventually storm surge. After every hurricane properties near the coast will have substantial evidence of storm surge flooding. There will also be substantial evidence of high wind and accompanying wind-borne debris that accompanies every major hurricane. An insurance company must do more than conclude, conveniently, that the excluded event caused all the damage. They must in fact, do the opposite. They must assume the direct accidental loss is a covered event their adjustment of claim reasonably indicates that, more likely than not, individual portion of the damaged by excluded events. The facts and handling of this case in direct conflict with legal obligations imposed on State Farm.

STATE FARM'S CLAMIS HANDLING

The initial focus of the punitive liability of State Farm is on its adjuster Heather Keyt. First, Keyt was an extremely inexperienced adjuster who was an employee of Worley Claims,

which was working for State Farm following Katrina. Second, at its basic core, an adjuster gives the benefit of the doubt to its insured when gray areas of coverage arise. This axiom is maintained in the State Farm's Catastrophe Certification [Exhibit B, P.47], which is consistent with Keyt's employer's, Worley Claims, manual [Exhibit C] when it expresses,

> An insured with an "all risks" (open perils with or without the word "all") policy only needs to prove *that a loss occurred and is not expected or required to establish the cause of the loss*. This is far less involved for the insured as he or she must simply establish the property is damaged. *Since the insurer covers all risks not otherwise excluded, the burden of proof is on the insurer to determine the claim is excluded from coverage. In the case of "Losses Insured", the insurer must show that loss was proximately caused by an excluded event.* (Emphasis added)

Ms. Keyt's position, however, is directly in conflict with this accepted insurance mandate,

> Q. Let me ask you it a different way. In handling a claim and when there is a potential gray area, isn't it true that the policy and processes of State Farm and Worley were to give the benefit of the doubt to the insured?
>
> A. No.
>
> Q. That's not the case?
>
> A. No.

[Exhibit D; Keyt Depo at p.85; http://bit.ly/cK4fYZ].

When one considers the backdrop of this adjuster's predisposition against the insured, it is equally disturbing to learn how she was trained by State Farm on the evaluation of a total loss property like the Flores home, where wind and water had caused the loss:

> Q. Ok. Did the course in Alabama involve any type of education or presentation on causal conditions of damage to property?
>
> A. Yes.
>
> Q. And could you describe for me that was taught or explained to you on the issue of causation of damage?

A. Just go out and, you know, look at the damages that we seen and give then our best judgment on it.

Q. Ok. Did they give any type of videotapes or examples of other properties or samples of damaged property to sort of compare or, how did that come about?

A. There was videotapes on, you know, how to tell the difference or what - - excuse me -- what to look for.

[Exhibit D; Keyt Depo at p. 20; http://bit.ly/bJX7c7].

When asked what other instructions she was given, her testimony was,

Q. Did Bob or Julie Simon ever provide with any type of course, materials, videos, education by way of handling claims?

A. No.

Q. Besides what we talked about, the videotape, what other instructions were you given on how to handle or evaluate the causal question involving Katrina damaged homes?

A. Just to use our best judgment.

[Exhibit D; Keyt depo at p. 23-24; http://bit.ly/bqPwrB].

Q. What other information would you need to make a determination on whether the property would be denied under the wind side?

A. We would go out- - you know, I'd go out, inspect the property, you know, and do my best judgment on what I thought, you know if it was wind, or of it was water.

[Exhibit D; Keyt Depo at p. 45; http://bit.ly/dzK7NX].

The consistent refrain is that as the adjuster she would "use my best judgment" to determine the cause of this property that was reduced to a slab. Throughout her entire testimony she failed to list any type of detailed protocol or system to inspect a property. In exchange for consistent premiums payments by its customer, the insureds were provided with an adjuster with

no experience in catastrophe claims, with a predisposition against the insured, and sent out by State Farm with directions to just "use your best judgment."

One specific educational source that was identified by Ms. Keyt was an instructional video on "how to tell the difference" in causation questions over wind versus water. State Farm has not produced that video under an assertion of some proprietary argument. That video is not under seal, but was disclosed in the case of ***Watkins v. State Farm Fire & Casualty Co.*, #CJ-2000-303, Grady County Court (Ok. 2007)**, and is entitled "Which Was It … Wind or Water?" [http://bit.ly/8Y4JMe]. In the 23 minute video the instructor suggests as a general rule that to determine the cause as either wind or water, "go across the street, lean against your car look, at the building, and ask yourself, which was it wind or water?" [Exhibit E; Part 1 at 7:05; http://bit.ly/a4fTFB]. This general suggestion is consistent with the testimony of Ms. Keyt, and it forms the framework for the inspection that was conducted by State Farm's adjuster.

When one reviews the Worley Claims manual, it is apparent that the types of losses and damage pattern of the Flores property are consistent with a catastrophic wind event. At page 30 of the Worley manual [Exhibit C], it states, "as wind speeds increase, hurricane destruction becomes severe. In August 1992, Hurricane Andrew crossed southern Florida with sustained winds in excess of 130 miles per hour, obliterating homes and essentially causing the same damages as a thirty-mile wide tornado." This same damage pattern can be seen in the photos of the Flores property, yet this consideration is completely ignored by the adjusters in this case.

Additionally the State Farm adjuster, Ms. Keyt, was also familiar with the portion of the State Farm policy referred to the anti-concurrent cause clause. This clause was the subject of the Mississippi Supreme Court's pronouncement in the case of ***Corban v. USAA*, 20 So.2d 601 (Miss. 2009)**. In ***Corban***, the court restricted the use of the anti-concurrent cause clause in

denying a claim on the exact factual situation presented here, where there exists no property to determine the cause. ***Corban*** expressed that the insurer is obligated to indemnify the policyholder for all losses which cannot be established, by a preponderance of the evidence to have been caused, or concurrently contributed to by flood damage. ***Corban*** further explains that, "'contributed to' comes into play only when 'flood damage' is a cause or event contributing concurrently to the loss. Pursuant to the policy language, only if proof of a 'concurrent' cause is presented to a jury for consideration would the jury receive an instruction including the policy phrase 'contributing concurrently'" ***Corban* at 619**. In this case there is a factual dispute as to the causal basis for the loss of the property. The issue of causation and under the guidelines of Corbin, "these determinations are for a jury." ***Corban* at 619**, citing ***Grace v. Lititz Mutual Ins. Co.*, 257 S.2d 217, 224 (Miss. 1972)**.

In the testimony of Ms. Keyt, she explained her application of the anti-concurrent cause clause:

> Q. Were you ever instructed that - - or was it given to you that the anti-concurrent cause part of the policy denies coverage for wind if water touches the property?
>
> A. Yes.

[Exhibit D; Keyt Depo at p.40; http://bit.ly/aj34Iu].

> Q. In your understanding of the anti-concurrent cause portion of the policy, is it correct if water touches the property in any sequence, the wind side of the policy would be denied?
>
> A. It was on our, you know, judgment by what we seen, you know, I mean as far the damages. Like some houses had water lines in them. You know, if a water line and below if they didn't have flood coverage, it wasn't covered.

[Exhibit D; Keyt Depo at p.41; http://bit.ly/cDM1Pb].

Next, when asked to explain how she came to determine that the house was a total loss due to flood, Ms. Keyt's consistent and yet unreliable "fact" was a description made in the initial claim recorded by State Farm at its national call center received immediately following Hurricane Katrina. This section of the claim file that maintained the initial information is referred to as the "Facts" section. [Exhibit F]. Mark Flores, one of the insureds and a joint owner of the home, made the initial reporting of the claim. Mark Flores was evacuated to Natchitoches, Louisiana, approximately 40 miles from the Texas border, at the time he made the call to make a claim, and could not have known the cause of the loss of his home. [Exhibit G; Mark Flores depo., pp. 13-14].

Q. And in this particular case, there was an entry or some information you had from the claim file that the actual insured said property was taken down by a twenty-seven foot storm surge; correct?

A. Correct.

Q. Did you ever ask the insured hey how did you know it was a twenty seven feet of storm surge?

A. Yes. And they said it's because, you know, the water - - you it's below water level. They said it was just- - it was taken out by water. They said that, you know, they thought that the water did it.

Q. And how did they come to the twenty-seven foot level?

A. I mean that, I don't know.

Q. And that's my question. Did you ask them that?

A. That, no.

Q. Did you ask them had they been back to the property prior to your inspection?

A. Yes.

Q. And what did they tell you?

A. They told me- - before the inspection?

Q. Correct.

A. Yes, they said that they had been back there.

Q. Ok. The entry before that factual section says, probable cause; flood. Who enters that?

A. The people when they first call in, I'm assuming.

[Exhibit D; Keyt depo pp. 78-79; http://bit.ly/cAhwVa].

The adjuster repeatedly restates this basis throughout her testimony in securing her decision that this was a flood loss:

Q. Sure. Let me ask it in a different way. In looking at the photographs and your recollection of the claim, is there any way for you to look at these photographs and say there is absolutely 0% wind damage to this property, there is 100% flood, 50-50, 60-40, is that any type of calculation that you made with regard to this claim?

Mr. Heidelberg: Let me object to the form of that question.

A. To me, it was 100% water. I mean, the homeowners -- like I said, the homeowners even said that a 27 foot storm surge- -

Q. Yeah, you mentioned that go to that page. What page is that, again? I'm sorry.

A. It's on the very first page, page 1.

Q. And you're talking about the section under the facts section that says the home was wiped out completely; 27 foot storm surge took it out; correct?

A. Correct.

Mr. Heidelberg: Took it down.

Mr. Denenea: Took it down. I'm sorry.

Q. In that entry how do you know that's from the homeowners?

A. This page is from when the homeowners call in to get their claim, and this is what they say.

Q. Ok. And is that something you took and wrote down, or is that somebody at the phone center took down, or do you know.

A. It's whoever takes the claims. I mean it's nothing that I did.

Q. Do you know when that would have been entered, that information?

A. It says date of loss, 8/29. So I don't know when. I mean, whenever the home owner had called in to file the claim, date and time of - - well, it's just the - -

Q. In your evaluation of the property, did you ever ask the homeowner how they came to conclude that the 27 foot storm surge took down the property?

A. Yes, and they told me it was water. I mean, they even told me the water was right behind the house, and there was nothing to protect it, you know, on either side. And, I mean, they said that it was water that took it out.

[Exhibit D; Keyt Depo pp. 75-77; http://bit.ly/bSvYO1].

Ms. Keyt again reverts back to the same assured storm surge assertion in describing her discussions with the insured,

Q. Did he describe the there is no flood policy, or was that something you had?

A. He told me there was no flood policy. He said that there was nothing left of the home. You know, he said the same thing as what was said in the facts, you know, about the home being wiped away by the storm surge.

[Exhibit D; Keyt depo at p.59; http://bit.ly/cMBCL4].

Again, when asked about other available resources that she used in the determination of wind or flood, Ms. Keyt returned to the same line on the surge level,

Q. And my question is, when you would utilize those maps for evaluation the properties, were you required to record that information in your claim file?

A. No.

Q. Why not?

> A. We just, I mean - - well like, one this one, the homeowner had said, you know, twenty-seven foot storm surge. So, you know, we just took that information, I mean, and then looked at the other houses around the area.

[Exhibit D; Keyt depo at p.28; http://bit.ly/cvW2hJ].

This same catchphrase was also relied upon as the basis for denying the Flores claim by Ms. Keyt's team manager at State Farm, Sherona Miller, who specifically stated that she relied upon that entry in denying the claim [Exhibit G; Miller depo. at p. 43].

A cursory review of the State Farm records would lead one to believe this to be a simple evaluation. The entire house is destroyed, there is no evidence at all to realistically distinguish whether this was a wind or flood event that destroyed the home, but the homeowner has admitted that a 27-foot storm surge took his house down. The reality is that the "27 foot storm surge took it down" statement exists only as a fiction, impossible to have been known by the insured, yet completely relied upon by State Farm as the basis of the denial of their homeowners' claim.

ROUTINE PRACTICE

The question that is raised from State Farm's creation of an insured's statement on causation is whether this was an isolated practice. In this case the call center representative entered specific information on the conditions of the property, purportedly from the insured, that the insured would not and could not have known. In fact, Mark Flores, the insured that made the call has declared that he would not have known what took down the house. In the case of ***Margiotta v. State Farm***, **USDC 06-4272, Section S, (E.D.La. 2008),** another State Farm slab case involving the call center, the exact creation of false data was exposed. The inquiry on this exact issue was explored in a deposition of Randolph Jackson a State Farm call center adjuster.

> Q. And we go down to the bottom of that boxed section. It says, 19 feet, as per insured.
>
> A. That's correct.

Q. Is that correct? This would have been specifically obtained by Ms. Margiotta?

A. That is correct.

Q. No doubt about that?

A. No doubt about it.

Q. Okay. Do you know or do you have nay recollection of how she determined that level to be?

A. I have no clue, sir. No recollection.

Q. And it says, the section says, did water – water entered the living area, circled yes, and it says, 19 feet, as per insured. Is that correct?

A. That is correct.

[Exhibit H; Jackson Depo. pp 71-72; http://bit.ly/dyEsZQ].

The call center adjuster was again questioned on how he obtained the information on the insured's home,

Q. Okay. So there's no doubt that she told you that the house was nine feet off the ground, and that there was ten feet of water in the house?

A. Well, I evidently, I wouldn't have entered that particular information if it wasn't relayed to me.

[Exhibit H; Jackson Depo. p. 72; http://bit.ly/aBUNdR].

Q. It shows, exterior waterline, yes, and it shows, ten feet zero inches. The same thing for interior water line, yes, nine feet zero inches. Do you know where that came from?

A. That was information provided by Ms. Margiotta, from the insured.

Q. Okay. She told you specifically - - or let me ask you this way. You asked her specifically about an exterior water line and an interior water line?

A. I asked her, standard practice, my standard practice was to ask how much water was in the home, and her indication to me was, the house was nine feet off the ground, according to the file. There is I believe, there is

another place in the file that actually states that the house was nine feet off the ground, and there was ten feet of water in the house.

Q. Okay. And that specifically would have come from Ms. Margiotta?

A. That's correct.

Q. No other location?

A. Not that I'm aware of.

Q. Okay. Were you aware that there was no house there to measure a water line?

A. No, sir, I was not.

Q. Did Ms. Margiotta tell you that her house didn't exist there any more?

A. No sir, she did not.

[Exhibit H; Jackson depo. pp.62-64; http://bit.ly/9xuzLw].

In the case of ***Weatherly v. State Farm*, 2009 WL 1247098 (E.D.La. 5/4/09),** the recorded statements of a call center adjuster were the subjects of a motion before the court. The adjuster had been involved in receiving and entering information on State Farm claims from its insureds following Katrina. The Court ruled that the statement was relevant and admissible. In this case, the ***Weatherly*** statements corroborate the routine practice of State Farm in collecting data of properties following the storm. Without returning to their property, the insureds were asked the condition of their property, including damage and water levels. The call center adjuster in Weatherly, Lorrie Beno, explained the process of collecting that data:

Q. My question here would be these folks had never been back to their house, nor had they any report from anyone as to what the condition of their home was or anything like that. So I'm wondering where that information would have -- the twenty-five feet would come from?

A. They probably told me that, or if they weren't sure and I did a bunch of them in that area, I said to them you know, a lot of that area saw like twenty five feet of water, so you think that's what your house would have

gotten because if you're not sitting up on a hill, which turns out after I had been down there, there weren't any hills down there.

Q. Um-hum.

A. Would your house have seen that much? Oh, yeah, you know okay and people agreed with it because they were traumatized and wanted to get paid the limit.

Q. Right.

A. And we knew that from mapping it was flooded out, so if it had been eighteen feet instead of twenty-five, the result would have been exactly the same.

Q. Um-hum.

A. So it didn't make that much difference. We were kind of getting a guess at it.

Q. Was that a State Farm approach or a Laurie Beano (sic) approach?

A. No, it was State Farm.

Q. Is that something that State Farm would suggest to you all, if they haven't been there and they haven't heard, then you know…

A. Absolutely.

[Exhibit I; Beno Statement 1/16/2009 at pp. 6-8; http://bit.ly/99TwCI].

This adjuster specifically confirms State Farm's method and practice of collecting hurricane data in the call center. Where the insured had not been back to the property the phone adjuster would either suggest the water level or have a guess at it. It was definitely not accurate information, and certainly not information to base a decision on a claim of an insured.

In the deposition of that adjuster on May 5, 2009, where the above statement was authenticated, the creation of fictional data is again revealed. In that deposition the adjuster confirmed the information on flood levels when asked how the flood levels would have been entered on the worksheet used in that case.

Q. In the middle of the document, it says, "Is there an exterior water line?" "Is there an interior water line?" And, for both of those, you have "yes." Now, that cannot be correct with regard to an interior water line, can it?

MR. HANNA: I am going to object to the phraseology of the question.

MR. TRAHANT: You may answer it. There is no house there to measure an interior water line, correct?

WITNESS: From what I was told, no, there was not a house there.

BY MR. TRAHANT:

Q. So then, an interior or exterior water line ---- I mean, there cannot be an interior or exterior water line on the house because there was no house there, correct?

A. Well, there would have been an interior/exterior water line before the house left if it was all water. I don't know if that part was actually generated by the computer or if I entered that in there. I would have put in twenty-five (25) feet. But, other than that, I don't know how much else I had done on it.

Q. And then, under "Settlement Information," you understood that this was the Weatherlys' primary residence, correct?

A. I don't recall that, but it says that on the documents and I can tell you that that was my handwriting on the next page for the Questionnaire, yes.

Q. I am on the Flood Claim Worksheet page right now, and section number 1 (one), letter "d.," says, "Is this the Principal Residence for the named insureds?" And somebody wrote in there, the word "No."

A. That is not in my handwriting.

Q. Okay. So, you did not put "no" in here, that it is not their primary residence?

A. Correct.

Q. To your recollection, you did not tell anybody that this was not the Weatherlys' primary residence, correct?

A. I don't have enough knowledge or remembrance on this file to know whether I had or not.

Q. Did you know that any of these flood documents had been altered or changed after you did what you did and submitted them?

A. As far as the first one, if there was a mistake made on it in adding or transferring the numbers over, they can be changed. Sometimes, it would come back to me ---- or, there have been times where I just made an error and they would write it in and let me know, or maybe they would not let me know other times, but I don't recall this one in particular.

Q. If you look at the bottom of the Flood Loss Questionnaire.

A. Okay.

Q. And ----

MR. HANNA: Bates number 53 (fifty-three)?

MR. TRAHANT: Bates number 53 (fifty-three). It has "Primary residence," and there is "yes" behind there.

BY MR. TRAHANT:

Q. Did you write that word, "yes?"

A. I would have circled it. That is correct.

Q. And then, somebody scratched through and circled "no" and put a question mark.

A. That is correct. I think it applies to the initials that are there. It looks like it is written below that word, "no."

Q. Can you make out what those initials are?

A. No, I don't know whose those are.

Q. Do you have any idea, as you sit here, what would have given anybody reason to believe that this was not the Weatherlys' primary residence?

MR. HANNA: Objection to the form.

WITNESS: None that I know of or can remember on this file.

[Exhibit J; Beno depo pp. 342-345; http://bit.ly/9ZFz1r].

The case of ***Taranto v. State Farm Fire and Casualty Insurance Co.*, 1:08-CV-1356-LG-RHW**, a case pending in this District, is presently considering this same issue in a pending motion. In ***Taranto*** an identical denial of coverage was made based on the insured's post storm call to the State Farm call center. In the deposition testimony of Rachel Savoy, the State Farm adjuster who handled both the flood and the wind claims for the plaintiff, the same discussion was had on the denial of the claim based on the "facts" section of the claim file, and the entry that the insured expressed that he thought that "storm surge completely demolished the home."

> Q. Well, let me back up and ask it this way. Is there a sit-down conference or a meeting or a telephone conference with people before the management review is determined?
>
> A. Well, I have visited with the policyholder upon the inspection. You know I review their claims, the notes that they say in the files, although limited. You know, when we receive the file on the flood, it says they thought the tidal surge knocked the house over, which is pretty much what I found to be true.
>
> Q. Where is that?
>
> A. On page 19, under the facts. These are the comments made by the policyholders, "extent of damage unknown. Thinks storm surge has completely demolished their home." That's the facts inputted on every claim. That's what the policyholder when they call in, that's where we put their comments.
>
> Q. Is that information a legitimate source of support for a determination of how a property is damaged?
>
> A. Well, we always consider what the policyholder tells us, yes. I think it's pretty valid. I mean it's not always - - They don't 100% know but they give us their opinion.

[Exhibit K; Savoy Depo at pp. 104-105; http://bit.ly/cxgg5r].

> Q. And if we look back on your claims file, and all of the information in the claims file itself, photos, etc. Was there any indication that this property was damaged as a result of any type of hurricane winds from Katrina?
>
> A. Is there any doubt?

Q. No, any information that would lead you to conclude that this property was damaged by wind at all or was this a completely exclusive flood loss of this property?

A. I believe it was a completely exclusive flood loss. This letter was basically sent to people- - because I did send some of these letter- - saying, we're not denying that there was wind damage to the property we're just saying that the flood was dominant. And so my understanding was this letter was saying we weren't excluding wind. We just didn't have any documentation to prove that there was wind, but we had substantial documentation to prove that there was flooding.

Q. And the substantial documentation is what?

A. Twenty six foot of tidal surge is pretty substantial to me.

[Exhibit K; Savoy Depo at pp. 84-85; http://bit.ly/9BM2m8].

Once again, the supposed facts as submitted by an insured immediately after the storm, and one who could not have had the personal knowledge of the cause of the loss of his home, are recorded by State Farm, and used to deny his claim. In the Flores case, State Farm's adjuster Heather Keyt specifically relied on a "27 foot storm surge" in denying the claim. This "State Farm fact" is exposed as a "bare assertion fallacy" or the Latin phrase - *Ipse Dixit*; State Farm says it's what the insured said, and without question it therefore shall be true. Although Keyt repeated the "27 foot storm surge" as her factual basis, she failed to inquire from the insureds how they came to conclude the "27 foot storm surge" took down their house. What is entered as the most critical fact, if not the only fact, in this case in State Farm's determination of causation is just accepted as a certainty. A homeowner with actual knowledge of a 27-foot storm surge cause is just as unlikely as an insured who would know that a tornado destroyed his home.

In comparison to what State Farm suggests, a dispute between wind and water, an interesting portion of the State Farm training video includes a depiction of a slabbed property identical to that of the Flores property with only piling remaining. In comparing the different

types of property destruction, the instructor ends the video while showing a slabbed property and states, "some we'll never be certain." [Exhibit E; http://bit.ly/aYRR7e]. Even with a tremendous tidal surge, State Farm possessed knowledge of similar properties where the cause was unknown. The unresolved determination that existed at the start of the Flores claim still exists today, but we may never know the cause.

EVIDENCE OF STATE FARM'S ROUTINE PRACTICE

The comparable cases above are evidence of the routine practice of State Farm in recording and utilizing data to suit its own financial benefit.

Rule 406 of the Federal Rules focuses on Habit and Routine Practice, and reads:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

In the case of ***S.E.C. v. Lyon*, 605 F.Supp.2d 531(S.D.N.Y. 2009)**, the court was faced with a similar issue on admitting deposition testimony regarding an investment organization's routine practice in the communication with its investors. "Rule 406 provides that 'evidence of ... the routine practice of an organization, whether corroborated or not ... is relevant to prove that the conduct of the ... organization on a particular occasion was in conformity with the habit or routine practice.' Fed.R.Evid. 406. The SEC's proffered testimony falls squarely within that Rule's ambit. It is relevant, and therefore, presumptively admissible." ***Id.*, at 543**. Permitting three witnesses to testify on the "process" or "procedure" or a "script to read" in handling investors communications is on point with the present case, is consistent with the literal reading of **Rule 406**, and supports the use of the deposition testimony above in similar State Farm cases. See also ***Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214 (5th Cir. 1975)**.

The issue of the processes and practices of the call center information gathering is not a surprise to State Farm. State Farm anticipates the issue of the propriety of the call center processes as it has recently added Christina Richards a call center representative as a witness, who purportedly took down the information from the insured in the "facts" section of the claim file. [Exhibit L]. Anticipating the question of fact on the impropriety of the information gathering, State Farm apparently will have Ms. Richards as a representative who can dispute or explain the information gathered by State Farm in the immediate aftermath of Katrina. Whatever her testimony includes, her knowledge and involvement of the gathering of hurricane data will absolutely eliminate any prejudice to State Farm, or confusion to the jury on this issue. See **Fed.R.Evid. 403**.

Perhaps State Farm had an arguable basis to conclude that some of the damage to the plaintiff's property was caused by storm surge. What they didn't have was an arguable basis to conclude was that ALL of the damage to plaintiff's property was caused by storm surge. That is the decision they made, and it was made on information that simply could not have existed. Given the obligation of god faith and fair dealing, unverifiable information on the cause of the damage of a home or conditions of the property following the storm should not be the basis of the denial of a homeowners' claim. Using information that is known to be unconfirmed, and likely erroneous, whether provided by the insured or anyone can only be considered anecdotal evidence and certainly not the type of reliable information to be used in determining cause of a loss, especially where there is no evidence remaining of the property.

State Farm's unjustifiable claims handling and denial gave them a tremendous economic advantage over their customer. That decision made it unlikely that the plaintiffs could rebuild their home. That decision was, plaintiffs' suggest, an overly aggressive business/litigation

decision and not a fair and reasonable adjustment of the claim. Based on what is shown to be an intentional manipulation of the claims data and denial of this claim, plaintiffs assert that they are entitled to a jury determination of whether State Farm abandoned its obligations as an insurer of good faith and fair dealing.

The facts and examples above illustrate a classic example of a question that cannot be decided as a matter of law on summary judgment, and which should be decided based on the facts adduced at trial. There are numerous facts of record to establish that State Farm did not have an arguable basis to deny payment to the plaintiffs, and that State Farm acted tortiously and improperly. The numerous examples of egregious behavior require this Court to deny State Farm's motion on this point outright. Failure and refusal to pay amounts that are undisputedly owed is the essence of bad faith conduct entitling the plaintiff to punitive damages.

This Court recently denied an almost identical motion for summary judgment filed by State Farm. In the case of ***Lebon v. State Farm*, 2010 WL 1064705 (S.D.Miss. 3/18/10)**, the court ruled, "On a motion for summary judgment, the Court does not weigh the evidence or evaluate the credibility of witnesses. The Court considers the evidence submitted by the parties in support of and in opposition to the motion and grants all reasonable inferences to the non-moving party. In other words, that evidence and those inferences drawn from the evidence are viewed in the light most favorable to the non-moving party." That same holding is applicable in this case, as the facts and circumstances of the total loss are almost identical to that of the ***Lebon*** plaintiffs. See also this Court's memorandum and order in denying a similar motion in ***Webster v. USAA Cas. Ins. Co.*, 2007 WL 2127594 (S.D.Miss. 2007)**.

Furthermore, extra-contractual damages, such as attorney's fees and certain other expenses, are available when an insurance company has breached its contract, and are an

alternative to punitive damages even when bad faith has not been shown. See ***Essinger v. Liberty Mutual Fire Ins. Co.*, 529 F.3d 264, 270 (5th Cir. 2008)**. When and 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 attorney's fees and other expenses that were reasonably foreseeable." ***Essinger*, 529 F.3d at 270**; see also ***Broussard v. State Farm Fire and Casualty Company*, 523 F.3d 618, 628 (5th Cir. 2008); *United American Insurance Co. v. Merrill*, 978 So. 2d 613, 630 (Miss. 2007); *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992)**.

CONCLUSION

State Farm alleges that plaintiffs' insurance claim is "a pocketbook dispute and nothing more," a mere negotiation of some sort. Plaintiffs' respectfully disagree. State Farm refused to pay at all. A refusal to honor its obligations under the insurance policy when its insureds have suffered a total and significant loss, under the circumstances of this case, is not a mere pocketbook dispute. Plaintiffs have alleged and have sought extra contractual damages, attorneys' fees and punitive damages in addition to the underlying claim. The factual inquiry as to whether the actions give rise to a recovery of punitive damages is a question for the finder of fact and not an appropriate issue to be resolved by summary judgment.

Accordingly, considering the submission above, State Farm's motion should be denied.

Respectfully Submitted,

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By: /s/ John H. Denenea, Jr.

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CERTIFICATE OF SERVICE

I, John H. Denenea, Jr., do hereby certify that I have this day electronically filed the foregoing *Response Brief in Opposition to State Farm's Motion for Partial Summary Judgment*, with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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THIS the 10th day of May, 2010.

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