

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

**JOHN E. GLOVER AND NANCY S.  
GLOVER**

**Plaintiffs**

**v.**

**Civil Action No.: 1:06-cv-85-LTS-RHW**

**NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY**

**Defendant**

**MEMORANDUM OF AUTHORITIES IN SUPPORT OF NATIONWIDE MUTUAL  
FIRE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT  
ON ISSUES OF DOUBLE RECOVERY AND PUNITIVE DAMAGES**

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## INTRODUCTION

Plaintiffs John and Nancy Glover seek in large part to recover under their homeowners' insurance policy for damage to their dwelling and contents that have already been adjusted and paid for under their flood insurance policy. This Court, however, has already held that plaintiffs such as the Glovers are not entitled to recover twice for the same loss. *See Tejedor v. State Farm Fire & Cas. Co.*, No. 1:05cv679-LTS-RHW (S.D. Miss. Nov. 6, 2006). To prevent such a double recovery — and, just as importantly, to ensure that Nationwide is not required to pay for flood damage not covered under plaintiffs' homeowner's policy — Nationwide is entitled to offset against the total value of plaintiffs' property any amounts that plaintiffs have previously claimed as flood damage. At a minimum, Nationwide is entitled to partial summary judgment with respect to any attempt by plaintiffs to recover amounts in excess of their actual damage. *Id.*

Plaintiffs also seek an award of extra-contractual damages, including punitive damages, based on unsupported allegations of misrepresentation, breach of fiduciary duty, and bad faith. Now that discovery has concluded and plaintiffs have been deposed, it is clear that these claims are no longer seriously at issue. Indeed, plaintiffs have agreed to drop their misrepresentation and breach of fiduciary duty claims. As for their remaining bad faith claim (and the accompanying request for punitive damages), plaintiffs have offered not a scintilla of evidence to show that Nationwide was grossly negligent or acted with malice in adjusting their claim or that Nationwide denied any part of the plaintiffs' claim without an arguable basis. To the contrary, the factual record is clear that Nationwide promptly inspected plaintiffs' property and paid them for damage covered under their homeowner's policy. In particular, with respect to their claim of bad faith denial, plaintiffs are unable to meet their "heavy burden" under Mississippi law to show that Nationwide "had no legitimate or arguable reason to deny payment of the claim." *Sentinal Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 972 (Miss. 1999)

(internal quotations & citation omitted). In the absence of any genuine issue of fact, Nationwide is entitled to entry of judgment in its favor with respect to plaintiffs' claims for extra-contractual damages.

Accordingly, Nationwide respectfully requests that this Court enter partial summary judgment in its favor with respect to (1) all claims for additional payments under their dwelling coverage, (2) claims for damage to personal property that would yield insurance payments in excess of the maximum insured value of their contents less the value of flood damage already claimed and the value of wind payments already received, and (3) all claims brought by plaintiffs for recovery of extra-contractual damages.

### **BACKGROUND**

Plaintiffs John and Nancy Glover lived at 754 Sharon Hills Drive in Biloxi, Mississippi, a canal-front property located within several hundred feet of the Back Bay of Biloxi and less than three miles from the Gulf of Mexico. *See* Exhibit "A" [DX 35] (Satellite Image of 754 Sharon Hills Drive, Biloxi, Mississippi). Prior to Hurricane Katrina, this property was appraised by the Harrison County tax assessor at a value of \$162,703. Exhibit "B" [DX 36] (Harrison County 2005 Official Landroll Information). According to that government appraisal, the property value was apportioned between plaintiffs' house, which had an assessed value of \$97,703, and the land on which the house stood, which had an assessed value of \$65,000. *Id.* On August 29, 2005, the structure sustained wind damage and suffered extensive damage caused by flooding from Hurricane Katrina.

Following the storm, plaintiffs submitted claims under both their flood and homeowner's insurance policies. In late September of 2005, plaintiffs received \$163,000 for flood damage to their dwelling and to their personal property during Hurricane Katrina. *See* Exhibit "C" [DX 15] (Sept. 26, 2005 Allstate Flood Insurance Program Dwelling Payment of \$103,000); Exhibit "D"

[DX 16] (Sept. 28, 2006 Allstate Flood Insurance Program Contents Payment of \$60,000). These payments were made by Allstate Insurance under a standard National Flood Insurance Program (NFIP) flood policy. The flood damage to plaintiffs' dwelling was estimated at \$121,021.82 and, after this amount was adjusted for depreciation and to take account of the applicable deductible, plaintiffs received their policy limits of \$103,000. *See* Exhibit "E" [DX 14] at 1 (Sept. 27, 2005 NFIP Final Report) (estimating "Gross Loss" of \$121,021.82 for flood damage to the building). Similarly, flood damage to plaintiffs' contents was estimated at \$83,700 and, after this amount was adjusted for depreciation and for the applicable deductible, plaintiffs received their policy limits of \$60,000. *Id.* (estimating "Gross Loss" of \$83,700 for flood damage to contents). In all, plaintiffs were paid \$163,000 for flood damage, reflecting their flood adjuster's estimate that they sustained \$204,721.82 in flood damage as a result of Hurricane Katrina.<sup>1</sup>

In October 2005, plaintiffs received additional insurance payments, this time from Nationwide for wind damage. Those payments — made under plaintiffs' homeowner's policy — totaled \$22,263.47. Of that amount, Nationwide paid \$8,384.43 for damage caused by wind to the roof of plaintiffs' house and \$13,879.04 for the loss of contents stored in plaintiffs' attic. Exhibit "H" [DX 33] (Nov. 30, 2005 Claim Check Copy 91-00793607); Exhibit "I" [DX 34] (Oct. 7, 2005 Check 91-00731860 and Nov. 22, 2005 Check 91-000377568). These payments brought plaintiffs' total insurance payments for damage to their dwelling to \$111,384.43 and brought their total insurance payments for contents damage to \$82,263.47.

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<sup>1</sup> In October or November of 2005, shortly after receiving the payment of \$163,000 from their flood insurer, the Glovers paid off the mortgage on their property in full. *See* Exhibit "F" (Oct. 31, 2006 N. Glover Dep.) at 34; Exhibit "G" (Nov. 1, 2006 J. Glover Dep.) at 37-38. Although the Glovers still own the lot at 754 Sharon Hills Drive, they currently have no plans to rebuild on that land or to sell the property. (Exhibit "G" at 31-32.) Instead, they have begun construction on a new home closer to family in Jones County, Mississippi where they plan to retire. *Id.* at 33-34.

In December of 2005, plaintiffs sued Nationwide for having “denied and/or refused to pay all of plaintiffs’ claims” and sought to recover “benefits due under the terms of the insurance policy.” (Complaint at ¶¶ 6, 12.) Although plaintiffs have failed to identify with any degree of specificity what additional items of damage they believe Nationwide should have paid for, they appear to seek to recover policy limits under both the dwelling and contents coverages of their homeowner’s policy. In addition, plaintiffs seek extra-contractual damages in the amount of \$5 million in punitive damages and an additional \$50,000 for alleged emotional distress.

### ARGUMENT

#### **I. PLAINTIFFS CANNOT RECOVER TWICE FOR THE SAME LOSS, AND NATIONWIDE IS THEREFORE ENTITLED TO OFFSET THE FULL AMOUNT OF FLOOD DAMAGE PLAINTIFFS HAVE ALREADY CLAIMED.**

This Court recently held that “the Plaintiffs’ actual loss is the maximum he may receive from all applicable policies of insurance for both his dwelling and personal property.” *Tejedor v. State Farm Fire & Cas. Co.*, No. 1:05cv679-LTS-RHW, slip op. at 2 (S.D. Miss. Nov. 6, 2006). That ruling is consistent with “well-settled law” in Mississippi and elsewhere, that “precludes double recovery” of insurance benefits. *Spencer v. State Farm Mut. Ins. Co.*, 891 So. 2d 827, 829 (Miss. 2005); *see also Carter v. Allstate Indem. Co.*, 592 So. 2d 66, 67 (Miss. 1991); *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 156-57 (Tex. App. 1994); *Madere v. State Farm & Cas. Co.*, No. 06-2889, 2006 WL 2644961, at \*2 (E.D. La. Sept. 13, 2006).<sup>2</sup> In order to

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<sup>2</sup> Not only is this principle well supported in the case law, it is reflected in the very insurance policy at issue here. Plaintiffs’ homeowner’s policy provides that: “When we [Nationwide] have paid you [plaintiffs] for a loss covered under this policy and you also receive payment for the same loss from another person, entity or organization, the amount received will be held by you in trust for us and reimbursed to us to the extent of our payment.” (Exhibit “J” [DX 2] at L12 (Nationwide Homeowner Policy 63 23 MP 681263) (describing subrogation right).)

If Nationwide were ordered to pay for damage already recovered by plaintiffs, this language would create a trust for Nationwide’s benefit to the extent of the excess payment. *See*

prevent plaintiffs from obtaining a “double recovery” in this case, however, it is not enough that Nationwide be permitted to an offset for the amounts ultimately paid under plaintiffs’ flood policy. Instead, to prevent plaintiffs from recovering for damage that they have already claimed was caused by flood, Nationwide should be credited for the full amount of flood damage on which plaintiffs’ flood payments were based.

In connection with the adjustment of their flood claim, the flood damage to plaintiffs’ dwelling was estimated at \$121,021.82. Exhibit “E” [DX 14]. After this amount was adjusted for depreciation and to take account of the applicable deductible, plaintiffs were paid their full policy limits of \$103,000. (*Id.*; *See also* Exhibit “I” [DX 34]. In effect, plaintiffs represented to their flood insurer that \$121,021.82 worth of the damage to their property was caused by flooding, and they were paid for this loss. Moreover, because the NFIP is a government program distributing government funds, plaintiffs made this claim under penalty of federal law. They accepted the payment without dispute. Accordingly, the receipt of the \$103,000 payment actually reflects compensation for \$121,021.82 worth of claimed flood damage to their dwelling. Having accepted payment for this damage under their flood policy, plaintiffs should be estopped from now claiming that any portion of the damage that comprised that \$121,021.82 estimate was actually caused by wind and is therefore covered by their homeowner’s policy.

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*Dunnam v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 668 (Miss. 1979) (finding similar language showed intent to create a trust for the benefit of the insurer to the extent of duplicative payment, though refusing insurer’s priority based on statutes not at issue in this case); *see also* Lee R. Russ & Thomas F. Segalla, *Couch on Ins.* § 241:45 (West 2006) (stating that a partially compensated insured that brings a claim against a third party for the full amount of the loss “holds the fund recovered in the action subject to a trust in favor of the insurer to the extent that the insurer is entitled to subrogation”). As a result, any order or judgment requiring payment by Nationwide for amounts already recovered by an insured would in most cases trigger a second lawsuit to enforce the terms of the trust. The Court can avoid this result by properly offsetting any recovery plaintiffs have received from other insurers to compensate for the same loss.

The maximum that plaintiffs can even arguably recover for wind damage under their homeowner's policy should therefore be limited to the actual value of their property less both the \$121,021.82 worth of admitted flood damage to the structure and the \$8,384.43 in wind damage already paid for by Nationwide. According to the 2005 tax assessment of plaintiffs' property, which puts the value of their house at \$97,703, plaintiffs have already recovered insurance payments greater than the value of the structure.<sup>3</sup> Any recovery over this amount would require Nationwide to pay for flood damage not covered under plaintiffs homeowner's policy — requiring Nationwide, in effect, to act as an excess flood insurer in order to make up for the fact that, as both conceded, plaintiffs were underinsured on their flood policy. Exhibit "F" (N. Glover Dep. at 243; Exhibit "G" (J. Glover Dep.) at 30-31. Accordingly, there can be no genuine issue for trial with respect to plaintiffs' right to payments from Nationwide in excess of the total value of their dwelling, and Nationwide is entitled to judgment as a matter of law with respect to claims based on the dwelling coverage of plaintiffs' homeowner's policy. *See Tejedor*, slip op. at 2.

Plaintiffs stand in a similar position with respect to their claims for damage to personal property. In connection with the adjustment of their flood claim, the flood damage to plaintiffs' contents was estimated at \$83,700. The payment for full policy limits of \$60,000 that plaintiffs

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<sup>3</sup> The 2005 Harrison County tax assessment of plaintiffs' property is the only direct evidence in the record concerning the actual value of their home. Exhibit "B" [DX 36]. Plaintiffs have not produced an appraisal of the property, nor have they offered any expert evidence as to its value. Indeed, when asked at his deposition what the pre-Katrina value of his home was, Mr. Glover said he did not know. Exhibit "G" (J. Glover Dep. at 193). The only other indication of the structure's actual value is its maximum insured value of \$161,300. Exhibit "K" [DX 1] (Feb. 17, 2005 Homeowner Policy Declarations). Even if, for purposes of the offset analysis, the actual value of plaintiffs' residence is determined by reference to this maximum insured value, plaintiffs total possible recovery for wind damage to their home would be limited to \$31,893.75. This amount constitutes the maximum insured value of \$161,300, less both the estimated flood damage of \$121,021.82 and the wind payment of \$8,384.43.

eventually received reflected adjustments for depreciation (\$15,265), the applicable deductible (\$500), and the policy limits (\$7,935). Exhibit “E” [DX 14]. Again, the critical fact is that plaintiffs were paid based on an estimate that \$83,700 worth of their personal property was destroyed by flooding. Having already accepted a payment for \$60,000 based on that representation, plaintiffs should not now be permitted to change their story and claim any portion of that \$83,700 as damage that was actually caused by wind. In addition, plaintiffs received payments from Nationwide under their homeowner’s policy totaling \$13,879.04 for miscellaneous items — principally holiday decorations and children’s toys — located in their attic. Exhibits “H” and “I”; [DX 33; DX 34] *see* Exhibit “L” [DX 20] (Fax from N. Glover to M. Nieto re Listing of Personal Property Loss).

Thus, although the parties will dispute at trial whether plaintiffs are entitled to recover any additional amounts under the contents coverage of their homeowner’s policy, what cannot be disputed is that Nationwide is not obligated to pay for flood damage to plaintiffs’ personal property. The maximum amount of plaintiffs’ recovery for contents damage must therefore be limited to the total value of their contents less both the total flood damage to contents and the wind payments already received. Although plaintiffs have not provided any valuation of the total amount of their personal property damaged by Hurricane Katrina, the maximum insured value of that property was \$119,000. Exhibit “K” [DX 1]. Accordingly, plaintiffs’ maximum recovery for damage to their contents cannot exceed \$21,420.96, the amount remaining after the estimated flood damage of \$83,700 and the Nationwide payments of \$13,879.04 are subtracted from the maximum insured value of \$119,000. Accordingly, Nationwide is entitled to judgment as a matter of law with respect to any claim for damage to personal property in excess of that amount.

Finally, even if this Court declines to grant an offset for the full value of the flood damage asserted in connection with the adjustment of plaintiffs' flood claim, Nationwide is clearly entitled to an offset in the amount of the actual payments they have received to date. *See Tejedor*, slip op. at 2. Under this approach, plaintiffs' total insurance recovery for damage to their home still exceeds the \$97,703 assessed value of the structure, and they are not entitled to further recovery.<sup>4</sup> With respect to plaintiffs' claims for damage to personal property, this approach would yield a maximum recovery of \$45,120.96, once the total insurance payments already received (\$60,000 for flood and \$13,879.04 for wind) are offset against the maximum insured value of \$119,000. Nationwide is, at a minimum, entitled to summary judgment as to any claims for damage in excess of these amounts. *See Tejedor*, slip op. at 2.

**II. PLAINTIFFS ARE NOT ENTITLED TO PUNITIVE DAMAGES OR DAMAGES FOR EMOTIONAL DISTRESS.**

In addition to attempting to recover contract damages they have already been paid, plaintiffs are also attempting to recover extra-contractual damages based on tort theories that are unsubstantiated by evidence in the record. In their complaint, plaintiffs asserted claims for millions of dollars in punitive damages, as well as damages for emotional distress, under tort theories of negligent or intentional misrepresentation, Complaint at ¶ 11, breach of fiduciary duty, *id.*, and bad faith denial of insurance coverage, *id.* ¶ 8. All of these claims must be rejected as a matter of law as there is no genuine dispute of material fact that Nationwide violated any such duties. As a result, plaintiffs are not entitled to any extra-contractual damages.

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<sup>4</sup> Using the maximum insured value of plaintiffs' home \$161,300, rather than the assessed value, would yield a maximum recovery of \$49,915.57 after subtraction of the actual insurance payments already received by plaintiffs.

**A. Plaintiffs Now Admit That Nationwide Neither Misrepresented The Coverage Provided By Their Homeowner's Policy Nor Breached Any Fiduciary Duty.**

In their complaint, plaintiffs' primary theory for recovering extra-contractual damages was that Nationwide and its agents negligently and intentionally misrepresented the scope of coverage under the homeowners' policy when plaintiffs purchased that policy and that "Plaintiffs' justifiably relied upon these representations and non-disclosure[s]" and thereafter "did not seek any additional coverage." Complaint at ¶ 5. Plaintiffs also sought to recover under this theory based on Nationwide's advertising and, in the alternative, under a theory of breach of fiduciary duty. As discovery progressed, however, plaintiffs' counsel represented to counsel for Nationwide that plaintiffs would "not pursue any claims for misrepresentation or breach of fiduciary duty." Exhibit "M" [DX 37 at 2] (Sept. 26, 2006 Fax from W. Walker to P. Fennelly). Plaintiffs' counsel has chosen to disclaim the allegations of misrepresentation and breach of fiduciary duty originally contained in the complaint because they have no basis in fact.

As an initial matter, plaintiffs themselves freely admit that there was no misrepresentation by Nationwide regarding the scope of their policy. Exhibit "F" (N. Glover Dep.) at 98 (Mike Heflin did not say "anything to me that ... I feel like was misrepresented"); *id.* at 94-96 (stating she did not discuss flood coverage with Nationwide representatives). Moreover, plaintiffs did not fail to obtain additional coverage for flooding, as discussed above. Accordingly, Nationwide is entitled to judgment as a matter of law with respect to any claims of misrepresentation asserted in plaintiffs' complaint. *See Odom v. Armed Forces Ins.*, No. 1:05cv669-LTS-RHW, 2006 WL 2541599, at \*1 (S.D. Miss. Aug. 31, 2006) (granting partial summary judgment where plaintiffs failed to substantiate allegations of misrepresentation).

Similarly, the record clearly demonstrates that the relationship between plaintiffs and Nationwide was an arms-length, contractual relationship, not the sort of relationship from which

fiduciary duties arise. During her deposition, Nancy Glover testified that she likely obtained homeowner's insurance from Nationwide simply because she already had car insurance through Nationwide and "you get a discount." Exhibit "F" (N. Glover Dep.) at 87. The few, purely commercial interactions with Nationwide that Mrs. Glover was able to recall do not reflect anything other than an arms-length commercial relationship. *Id.* at 92-95. A business relationship, such as that described by Mrs. Glover at her deposition, does not give rise to a fiduciary relationship under Mississippi law. *See Robley v. Blue Cross/Blue Shield of Miss.*, 935 So. 2d 990, 995 (Miss. 2006) (en banc).

Plaintiffs have abandoned their claims for misrepresentation and breach of fiduciary duty, and for good reason, given the complete absence from the record of any supporting facts. Accordingly, Nationwide is entitled to the entry of summary judgment on these claims.

**B. Nationwide Is Entitled To Summary Judgment On Plaintiffs' Claim For Bad Faith, Including All Claims For Punitive Damages, Because Plaintiffs Have Identified No Facts From Which A Jury Could Conclude That Nationwide Acted In Bad Faith.**

Plaintiffs allege both that Nationwide's "denial of plaintiffs' claim and/or refusal of benefits was clearly contrary to the facts, the policy, Mississippi law, and was made in bad faith" and that Nationwide "willfully and intentionally wronged Plaintiffs, or has treated them with such gross and reckless negligence as is equivalent to such a wrong, entitling Plaintiff[s] to punitive damages." Complaint at ¶¶ 8, 14. On the basis of these conclusory — and factually unsupported — allegations, plaintiffs seek to recover millions of dollars in punitive and emotional distress damages. The mere inclusion of boilerplate bad faith allegations in their complaint, however, does not entitle plaintiffs to a jury trial on a claim for punitive damages. To the contrary, on this record, which is completely devoid of any genuine factual issue on the question of bad faith, Nationwide is entitled to judgment as a matter of law.

Plaintiffs have completely failed to provide any factual basis for a claim that Nationwide adjusted their claim in bad faith. Mississippi law recognizes that an insurer “owes a duty to its customer to make a reasonably prompt investigation of all relevant facts” and “investigate . . . adequately” before denying a claim. *Murphree v. Federal Ins. Co.*, 707 So. 2d 523, 530-31 (Miss. 1997). An insured may seek punitive damages, however, only if he “goes beyond merely demonstrating that the investigation was negligent” and shows that “a proper investigation by the insurer would easily adduce evidence showing its defenses to be without merit.” *Id.* (internal quotations & citation omitted). Plaintiffs can make no such showing.

As an initial matter, the evidentiary record reflects no genuine dispute that Nationwide’s handling of this claim was anything other than prompt and thorough. Plaintiffs first contacted Nationwide in connection with their claim on September 2, 2005. *See* Exhibit “N” [DX 27] at NW-GLO001734 (May 10, 2006 All Activities Log). Within two days of that call, Nationwide had arranged to meet with Mrs. Glover in order to provide her with a payment of \$1,000 to help defray plaintiffs’ living expenses. *See id.* at NW-GLO001732; Exhibit “F” (N. Glover Dep.) at 250-54. And by October 6, 2005 — just more than a month after initial contact — Nationwide had inspected plaintiffs’ residence, adjusted their claim for wind damage, and issued a check to plaintiffs for wind damage caused to their house.<sup>5</sup> Plaintiffs cannot contend that this sequence of events constitutes unreasonable delay on the part of Nationwide in investigating and adjusting their claim. Nor did they make that claim at their deposition. Indeed, when pressed to identify

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<sup>5</sup> Nationwide did not issue an initial payment for wind damage to plaintiffs’ personal property until November 22, 2005. Exhibit “O” [DX 32] (Nov. 22, 2005 Claim Check Copy 91-000377568), Exhibit “H” [DX 33], and Exhibit “I” [DX 34] (reflecting payment of \$13,879.04 under the homeowner’s primary personal property coverage.) These payments followed later because plaintiffs did not provide an itemized list of their wind-damaged property until November 3, 2005. Exhibit “L” [DX 20]; Exhibit “N” [DX 27] at NW-GLO001721 (“Date: 2005-11-03 .... Received contents list from Mrs. PH ....”).

her criticisms of Nationwide's initial communications with plaintiffs' regarding their claim, the only specific complaint Mrs. Glover could articulate was that she "couldn't get anybody to tell me they'd send me a copy of my policy." Exhibit "F" (N. Glover Dep.) at 246.

Far from being an unreasonably lengthy affair, Nationwide's initial adjustment of the wind damage to plaintiffs' residence is comparable, in length of time and in thoroughness, to the adjustment of plaintiffs' flood claim, which Mrs. Glover testified was "rushed." *Id.* at 242. The flood adjustment was completed by late September, roughly one to two weeks before Nationwide made its initial payment under the homeowner's policy. Discussing the length of time the flood adjustment took, Mrs. Glover testified that, although she felt her flood insurer handled her claim "fairly," she also thought the adjustment process might have been "kind of rushed." *Id.* Having testified that an adjustment that concluded in late September 2005 was "rushed," plaintiffs cannot credibly claim that Nationwide's payment just weeks later was not "reasonably prompt."

Nationwide also conducted more than the "adequate" investigation required by Mississippi law. When the Nationwide adjuster arrived to inspect plaintiffs' property, Mrs. Glover discussed with him, in detail, the damage to plaintiffs' residence. *Id.* at 267-68. The adjuster "asked [plaintiffs] to give him an overview of the house and the rooms and the square footage." *Id.* at 267. He took an enormous number of photographs during his inspection of the house, which included climbing onto the roof to inspect for potential wind damage. Exhibit "P" [DX 7] (Nationwide Photographs.) Mrs. Glover also recalled that in response to the adjuster's questions about contents, she "went room to room and gave [him] an overview" of the function of each room of the house. Exhibit "F" (N. Glover Dep.) at 268-69.

Plaintiffs claiming bad faith denial face a "heavy burden" to show that "the insurance company had no legitimate or arguable reason to deny payment of the claim" and did so with

“malice, gross negligence, or wanton disregard of the rights of the insured.” *Sentinal Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 972 (Miss. 1999) (internal quotations & citation omitted). Plaintiffs simply cannot make this showing on the record in this case. There is no factual support whatever for the proposition that Nationwide acted with anything even remotely resembling “malice, negligence, or wanton disregard” of plaintiffs’ rights under their policy or that Nationwide denied their claim without a legitimate or arguable basis. To the contrary, the record is clear that Nationwide promptly and thoroughly inspected plaintiffs’ residence and then promptly made payment for what it reasonably determined to be wind damage to their property. Because plaintiffs are completely incapable of satisfying the requirements of bad faith denial under Mississippi law, Nationwide is entitled to summary judgment on that claim.

#### **CONCLUSION**

For the foregoing reasons, Nationwide respectfully requests that this Court enter summary judgment in favor of Nationwide with respect to: (1) all claims for additional payments under their dwelling coverage, (2) claims for damage to personal property that would yield insurance payments in excess of the maximum insured value of their contents less the value of flood damage already claimed and the value of wind payments already received, and (3) all claims for recovery of extra-contractual damages, including claims for punitive and emotional distress damages.

THIS, the 15th day of November, 2006.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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