

**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-00085-LTS-RHW**

**NATIONWIDE MUTUAL FIRE INSURANCE COMPANY**

**DEFENDANT**

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

**INTRODUCTION**

Nationwide spends a great deal of time arguing about issues that have already been decided by this Court and/or conceded by Plaintiffs. These issues will be promptly addressed in turn.

Of significance in Defendant's Motion is its assertion, clearly contrary to its own 30(b)(6) deposition, that it did not act in any way to justify punitive damages. As that deposition makes clear, Nationwide has acted clearly contrary to Mississippi law in persisting in its reliance upon the concurrent cause exclusion even after this Court has ruled that such exclusion in Nationwide's own policy is invalid. In addition, of course, Nationwide's initial reliance upon the concurrent cause exclusion was clearly contrary to Mississippi law since 1961. Nationwide also has acted in bad faith by denying Plaintiffs' claim, clearly contrary to Nationwide's own engineer's report which concluded that the damage to Plaintiffs' property was primarily the result of wind. Nationwide has even,

without any explanation to the contrary, come up with a second report by the same engineering firm which it now uses to attempt to manufacture an arguable reason for its refusal to promptly and fairly handle Plaintiffs' claim.

### **FACTS**

Nationwide has admitted that the dwelling coverage was all risk unless an inclusion takes the occurrence out of the risk:

A. It would include all direct physical damage except those that are specifically excluded.

Q. And so you've got coverage for all risk unless you find an exclusion that takes out a risk; is that right?

A. Yes, sir, for all perils except those that are excluded perils.

*Exhibit 1 [30(b)(6) DEPOSITION; p.46, lines 7-15]*

Nationwide has admitted that hurricane winds and hurricane water would both qualify as accidental direct physical losses:

Q. Well, if the wind blows the house down, that's an accidental physical direct loss?

A. That would be a direct loss.

Q. Even if water knocks the house down, that's still an accidental direct physical loss, correct?

A. Yes, sir.

Q. But it may be excluded?

A. Yes, sir.

Q. You all come back after you determine it's a direct physical loss then you say, but is it an excluded loss; is that right?

A. Yes, sir.

Q. That would be in the Glovers' case and that would apply to the Glovers' building, correct?

A. Yes.

*Exhibit 1 [30(b)(6) DEPOSITION; pp.48-49, lines 20-11]*

Nationwide has admitted that under its policy it did not have to pay if a "concurrent loss" occurred:

A. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event

contributed concurrently or in any sequence to cause the loss.

Q. So under the policy, you believe that you were entitled to not pay if it was a concurrent wind/water loss?

A. Yes, sir.

Q. And you would rely upon that so-called concurrent loss exclusion in the handling of this claim as well as other claims in connection with Katrina; is that correct?

A. That is a matter that is still being addressed in the court system.

*Exhibit 1 [30(b)(6) DEPOSITION; p.53, lines 3-17]*

Nationwide admitted that even though Judge Senter had ruled against it on the concurrent cause exclusion, Nationwide was not taking any action to change the way it had handled claims relying upon that exclusion:

Q. Judge Senter has ruled against you?

A. Yes, sir.

...

Q. He ruled against you, and now have you gone back in any of these claims and said, including this one— Well, wait a minute. We can't use that concurrent cause exclusion. Let's revisit this claim. Have you done that?

A. No, sir.

*Exhibit 1 [30(b)(6) DEPOSITION; p.54, lines 4-5; 12-17]*

Nationwide received an engineer's report that stated that the damage to the Glover home was the result of wind and Nationwide realized that that was evidence to suggest that it owed the entire claim:

Q. And you've got some engineers' reports, correct?

A. Yes, sir.

Q. And the first one said it was wind damage, correct?

A. Yes, sir.

Q. So wasn't that some evidence to suggest that you owed the entire claim?

A. It may have been.

Q. You didn't like that one so you got another report, didn't you?

A. No, sir.

Q. You got another report anyway, whether you liked it or not?

A. Yes, sir.

Q. And it says just the opposite of the first report, doesn't it?

A. Yes, sir.

Q. And it's from the same company, isn't it?

A. Yes, sir.

*Exhibit 1 [30(b)(6) DEPOSITION; pp.68-69, lines 16-11]*

The first engineer's report clearly concluded that the primary cause of damage to the house was the wind:

Q. And under Conclusions he says: Considering the location of the house and the evidence present at the site, the primary cause of damage to this house was the wind.

Did he say that?

A. Yes, sir.

...

Q. The rising flood water caused cosmetic damage but not structural damage.

Did he say that?

A. Yes, sir.

*Exhibit 1 [30(b)(6) DEPOSITION; p.72, lines 13-18; p.73, lines 12-15]*

Nationwide did not go ahead and pay the claim once it received the first engineering report, choosing instead to do nothing:

Q. Why didn't you just go ahead and pay once the engineer said that the primary cause of damage to the house was wind? Why didn't you just pay for all of the damage to the house?

A. We had paid what we believed was the wind damage to the house.

Q. That's before you got the engineer's report, correct?

A. Yes, sir.

Q. Now you've got an engineer's report, and you decided to just not follow that; isn't that correct?

Q. Isn't that correct?

A. No, sir.

Q. Well, what did you do besides choose not to follow it?

A. I don't know that anything was done.

Q. So you chose not to do anything?

A. At that point nothing happened in that time frame.

Q. Do you know that you have a continuing duty under Mississippi law to use good faith in handling claims?

A. Yes, sir.

Q. Even after suit is filed?

A. Yes, sir.

Q. But you did nothing once you got this report?

A. It does not appear that any other action was taken relying upon this

report.

*Exhibit 1 [30(b)(6) DEPOSITION; p.74, lines 11-22; p.75, lines 1-18]*

Nationwide was unable to state nor provide any documentation to explain why the second contradictory report showed up:

Q. But here's what we do know: We know that you got a report of January the 11<sup>th</sup> and nothing was done in response to it, correct?

A. Yes, sir.

Q. We know that mysteriously one day we get a directly contrary report from the same engineering company dated March 18<sup>th</sup>, 2006, correct?

A. Yes, sir.

*Exhibit 1 [30(b)(6) DEPOSITION; pp.80-81, lines 25-7]*

Nationwide has admitted that, based upon its reliance upon concurrent cause language in its policy, that damage caused by flooding after damage caused by wind is not covered:

Q. We're back to our concurrent cause issue now, damage caused by flooding after damage is caused by wind. Is it your position that that damage that's caused by flooding on top of damage or after damage that's already been caused by wind, that you don't owe anything?

A. Yes, sir.

Q. That's your position?

A. Yes, sir.

*Exhibit 1 [30(b)(6) DEPOSITION; p.83, lines 10-18]*

Nationwide admitted that it applied that concurrent cause analysis in connection with the privacy fence:

Q. You didn't pay for the privacy fence or the chain link fence because you thought it was water damage, correct?

A. Yes, sir.

Q. And, yet, you don't know whether wind got there first and blew the privacy fence down, do you?

A. No, sir.

Q. You just know that there was enough of a storm surge to have knocked the fence down; and, therefore, based on your analysis of the concurrent cause language, you didn't think you owed it, correct?

A. Yes.

*Exhibit 1 [30(b)(6) DEPOSITION; pp.88-89, lines 20-8]*

Although Nationwide paid for contents damage in the attic, it refused to pay for contents damage in the attic above the garage on the basis of the concurrent cause language:

Q. "Keep in mind that if she is claiming wind damage prior to the flood for items in the garage attic, then the concurrent causation exclusion would apply"

Now earlier when said this was not a case that would involve concurrent cause exclusion, were you in error or is this an error, this reference here?

A. Well, I don't think that this is the case of concurrent causation because of the flooding, but he's made an accurate statement that if there was wind damage prior to the flood then— then flood occurred, then concurrent causation would apply.

Q. And that was y'all's position then and it's your position still to this day, correct?

A. At this time.

*Exhibit 1 [30(b)(6) DEPOSITION; pp.102-103, lines 16-6]*

Nationwide admitted that it covered water damage if it comes through holes in the roof which were caused by wind but if a flood ultimately takes down the structure, it owes nothing because of the concurrent cause exclusion:

Q. And then you do cover water damage if it comes through holes in a roof that were caused by wind?

A. Yes, sir.

Q. And so up to that point, the contents of the attic would be covered; is that correct?

A. I don't know how you could break out that in that the hurricane was an occurrence which took place over a period of time. And with the flood waters coming in, you just can't— I just can't break out just distinct wind damage to something that was taken down by flood.

Q. Because ultimately the flood takes it down—

A. Yes, sir.

Q. — so you say we don't owe anything anyway under our concurrent cause exclusion?

A. Yes, sir.

Q. Because of the concurrent cause exclusion, you didn't need to worry anymore about the contents in the attic, of the garage part of the attic, because that had all been washed away; is that correct?

A. It appears that flood took that part of the risk away.

Q. And that's why you didn't need to worry about it anymore; that's why

you don't owe it, correct?

A. I think that's why we did not pay it.

*Exhibit 1 [30(b)(6) DEPOSITION; pp.106-107, lines 21-24]*

Nationwide admitted that it had no specific evidence that any lawyer looked at the Mississippi decisions in 1961 through 1971 before the denial of the Glover claim and determined what Mississippi law was insofar as proximate cause and concurrent loss:

Q. My question to you is this: Do you have any specific evidence on behalf of Nationwide that any lawyer looked at the Mississippi decisions in 1961 through 1971 before the denial of this claim and determined what Mississippi law was insofar as proximate cause and concurrent loss?

...

A. In specifically on— prior to that claims decision, no.

*Exhibit 1 [30(b)(6) DEPOSITION; pp.131-132, lines 24-4; p.132, lines 20-21]*

### LAW

I Plaintiffs recognize that this Court's ruling in a case in which Plaintiffs' attorneys represent the Plaintiff, *Tejedor v. State Farm Fire and Casualty Company*, No. 1:05-cv-00679-LTS-RHW, controls the issue of Plaintiffs' entitlement to recover in excess of the sums paid under the flood policy. Therefore, Plaintiffs agree that they are entitled to recover the difference between the value of their real and personal property at the time of the loss and the sums paid under the flood policy. Although Defendant makes some arguments to the contrary, it apparently recognizes this same proposition:

“Using the maximum insured value of Plaintiffs' home, \$161,300.00.....would yield a maximum recovery of \$49,915.57 after subtraction of the actual insurance payments already received by Plaintiffs; with respect to Plaintiffs' claim for damage to personal property, this approach would yield a maximum recovery of \$45,120.96 once the total insurance payments already received (\$60,000.00 for flood and \$13,879.04 for wind) are offset against the maximum insured value of \$119,000.00.”

In sum, Plaintiffs are, under the Tejedor Opinion, entitled to recover up to \$49,915.57 for the total loss of their dwelling and up to \$45,120.96 for the total loss of their contents.

II Plaintiffs have conceded that they would not pursue any claims for misrepresentation or breach of fiduciary duty.

Even though Plaintiffs attorney advised Defendant's counsel that Plaintiffs would "not pursue any claims for misrepresentation or breach of fiduciary duty," Nationwide believes that it must spend two full pages arguing the point. Finally, Nationwide concedes what Plaintiffs concede that Plaintiffs will not pursue their claims for misrepresentation and breach of fiduciary duty.

III Nationwide is not entitled to summary judgment on Plaintiffs' claim for bad faith.

Defendant has acted in bad faith by denying a claim clearly contrary to Mississippi law, such law having long held that the concurrent cause exclusion relied upon by Defendant is invalid. Mississippi law has long held that a concurrent cause provision does not control a proximate cause analysis:

The rule is well established in this state that where the question presented to the jury was whether the loss was due to windstorm or to water, the entire question of proximate cause is treated as one of fact independent of the explicit application of any rule of law. *Commercial Union Ins. Co. v. Byrne*, 248 So2d, 777 (Miss.1971); *New Hampshire Fire Ins. Co. v. Kochton Plywood & Veneer Co.*, 242 Miss. 169, 134 So2d 735 (1961). It is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss. *Lititz Mut. Ins. Co. v. Boatner*, 254 So2d 765 (Miss.1971); *Kemp v. American Universal Ins. Co.*, 391 F.2d 533 (Fifth Cir.1968). *Grace v. Lititz Mut. Ins. Co.*, 257 So2d 217, 224 (Miss.1972). (Emphasis added.)

Defendant has persisted in this refusal to follow Mississippi law even after this Court

has made clear that that law applies to this Defendant. A refusal to pay clearly contrary to Mississippi law is bad faith.

[*Richards v. Allstate Ins. Co.*, 693 F2d 877 (5<sup>th</sup> Cir.1983).]

Nationwide has also, clearly contrary to its own engineer's report finding that the primary cause of damage to the Glover property was wind, taken the opposite position. In addition, Nationwide has apparently caused to be generated another engineering report by the same firm to manufacture an arguable reason for its denial. This conduct is also subject to punitive damages.

[*Odom v. Armed Forces Insurance*, No. 1:05-cv-00669-LTS-RHW (Memorandum Opinion August 31, 2006)(citing *Reserve Life Ins. Co. v. McGee*, 444 So.2d 803 (Miss.1984).]

### **CONCLUSION**

For these reasons and for the reasons set forth in Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment, it is respectfully submitted that Defendant's Motion should be denied except as conceded herein.

**RESPECTFULLY SUBMITTED**, this the 22<sup>nd</sup> day of November, 2006.

JOHN E. GLOVER and  
NANCY S. GLOVER  
Plaintiffs

BY: s/William C. Walker, Jr. \_\_\_\_\_  
WILLIAM C. WALKER, JR.

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**CERTIFICATE OF SERVICE**

I, WILLIAM C. WALKER, JR., attorney of record for the Plaintiffs, do hereby certify that I have electronically filed the foregoing pleading to the Clerk of the Court using the ECF system which sent notification of such filing to: Laura Limerick Gibbes, Esquire, Amanda Benefield Quave, Esquire, Padraic B. Fennelly, Esquire, Thomas A. Clare, Esquire, F. Hall Bailey, Esquire, and Daniel F. Attridge, Esquire.

This the 22<sup>nd</sup> day of November, 2006.

s/William C. Walker, Jr.  
WILLIAM C. WALKER, JR.