

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

THOMAS C. and PAMELA MCINTOSH

PLAINTIFFS

VERSUS

CIVIL ACTION NO. 1:06cv1080-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY, et al.

DEFENDANTS

**PLAINTIFFS' OPPOSITION TO STATE FARM'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO PLAINTIFF'S FRAUD CLAIMS**

In this case, State Farm dispatched Forensic Engineering to provide their expert opinion on the cause of loss to the McIntosh home. The resulting October 12, 2005 report that concluded that wind caused the loss was never provided to the McIntoshes. Instead, Plaintiffs discovered the report themselves almost a year after it was written and when they saw it, it was clearly not the same report State Farm had previously given them when it denied their claim. Moreover, the October 12 report that the McIntoshes received had a copy of a sticky note on it that stated "Put in Wind file – DO NOT Pay Bill DO NOT discuss." (emphasis in original) The facts in between the writing of the first report and the McIntoshes' receipt of the report in August of 2006 provide strong evidence of fraud. Notwithstanding that, State Farm has sought to dismiss Plaintiffs' fraud claims in this case.

In its motion, State Farm fails to address the following facts in this case:

1. The two reports by Forensic Analysis & Engineering Company contain different conclusions about what caused the loss.
2. The first report was never provided to Plaintiffs until after the litigation was filed and then it was without the aforementioned sticky note on it.
3. The second report was generated only after State Farm had already fired Forensic.

4. The second report never mentions the first report or the fact that a first inspection was performed by a different engineer for Forensic Analysis & Engineering Company.
5. The first report was received by State Farm; upon receipt State Farm's Lecky King called Forensic Analysis & Engineering Company.
6. The first report was later discovered by Renfroe personnel in the State Farm office with the note "DO NOT Pay DO NOT discuss Put in wind file." (Emphasis in original)
7. Upon finding that report, Kerri Rigsby presented it to Lecky King, whom she knew wrote the sticky note.
8. Upon receipt of same, Ms. King said that Rigsby was not supposed to see it and it was one of the many she would have to send back.
9. This first Forensic report was last seen in the hands of State Farm Flood Coordinator Lecky King who has "taken the 5th" in response to every question asked at two depositions in this case.
10. Her assistant, Lisa Wachter, to whom the note was written, has also "taken the 5th" in response to every deposition question.
11. The second Forensic report was drafted by Jack Kelly. It was his first assignment with the company having been trained by Brian Ford, the writer of the first report, for one day prior to the assignment.
12. The second report was not the result of real engineering work according to Kelly.
13. Kerri Rigsby agreed that her not telling the McIntoshes of the first report was fraud.
14. Rigsby agreed the first report was more than sufficient for State Farm to evaluate

the claim.

15. Mr. McIntosh did not know of the fact that there were two separate reports with different conclusions until after his meetings with State Farm lawyers Peter Barrett and Ken Turner in August of 2006. And when he found out it was from a third party.

These are but a few of the facts that exist in this case that have not been and cannot be rebutted. Their existence clearly defeats State Farm's motion.

I. STATE FARM'S HANDLING OF THE CLAIM WAS FRAUDULENT.

State Farm tells us simply that after the claim was adjusted, State Farm determined that they needed an engineer and that because the first report was incomplete, they got a second report that was complete. They follow this up by saying the engineer on the first report and one of the adjusters on the file agree that the second report is correct. This is a nice story. Maybe it applies to other cases but it certainly doesn't to this case. Because so many facts are left out and the ones that are presented are misrepresented, Plaintiffs submit the attached time line of all relevant events to State Farm's fraud in this case that are known from testimony elicited in this case and documents produced in this case. It reveals that State Farm actively manipulated the conclusions of engineering reports in this case and others and that they have been caught doing the same. It is attached as Exhibit "A" and the attachments to it are Exhibits "1" through "32."

II. KERRI RIGSBY'S TESTIMONY ESTABLISHES STATE FARM'S FRAUD ON PLAINTIFFS.

In its motion, State Farm takes a conflicting approach with Kerri Rigsby. Because she blew the whistle on their practices, they accuse her of stealing the original Oct. 12 Forensic

report.¹ Because they elicited out of context deposition testimony from her about McIntosh in another case, they act as if she is an expert on causation.

A. State Farm's Reliance on Ms. Rigsby's Deposition Testimony in Marion is Improper.

To support its tale that a second report was needed, State Farm relies solely on a few out-of-context quotes from Ms. Kerri Rigsby's deposition in an entirely separate matter, *Marion v. State Farm*, a deposition that State Farm took long after Ms. Rigsby's deposition in this case.² Notably, both counsel for *Marion* and counsel for Rigsby (as *qui tam* relator) properly objected to State Farm's eliciting testimony about the McIntosh claim in that deposition and further moved to strike it since it was beyond the scope of *Marion* counsel's direct examination and completely irrelevant to the claims in the *Marion* matter:

MR. VAN CLEAVE: John, if you would just allow me a continuing objection to questions regarding the McIntosh claim, I don't think it's -- I think it's beyond the scope of cross and also not reasonably calculated to lead to discovery of admissible evidence. Will you allow me a continuing objection?

MR. BANAHAN: Sure. Absolutely.

* * *

MR. BARRETT: And I know it's been said, but I join their -- join in their objection to anything referring to the McIntosh file.

¹ State Farm attempts to use this as their excuse for not providing the report to the McIntoshes even though no witness will support that story. Ms. Rigsby has been clear that she copied the report and handed the original back to King. *See* Timeline, *infra*.

² The reason why State Farm asked so much about McIntosh in that case was because Ms. Rigsby's deposition testimony in *McIntosh* severely weakens State Farm's position by revealing multiple acts and types of fraud.

* * *

MR. VAN CLEAVE: Let me just -- if you're going to leave that area of questioning at this point, I just want to move to strike all of the testimony regarding the McIntosh claim, consistent with the continuing objection you allowed me at the beginning of that line of questioning.

MR. BARRETT: I join.

See, Exhibit "B" Day 2 Depo. of K. Rigsby in *Marion vs. State Farm*, p. 131:23 - 148:16. As such, even the attempted use by State Farm of that deposition testimony in the pretrial matters in this case is highly improper and should not be allowed.

If, however, the deposition testimony of Ms. Rigsby in that matter is to be considered by this Court, at this stage, then the full gamut of her testimony in both cases should be known by this Court.

B. Ms. Rigsby's Deposition Testimony in *McIntosh* Establishes Overwhelming Evidence of Fraud.

- Rigsby candidly admits that State Farm intentionally paid flood claims when there was not flood damage. The McIntosh claim was one such claim.

THE WITNESS:

I believe that there were instances where flood [was] paid, yes, intentionally when wind was the cause of the damage, absolutely.

* * *

Q. Well, what specific facts? Well, let's start with this: Is there a specific claim that you remember?

A. There's a few claims that I remember.

Q. Well, do you remember any names?

A. Sure.

Q. What are they?

A. I remember the **McIntosh claim**.

See Exhibit “C” Depo. of K. Rigsby in *McIntosh*, p. 123:24 - 124:17. Ms. Rigsby further testified that there were a number of instances where an engineer, sent by State Farm, reviewed the loss with the policyholder at the home and told them what their opinion of the loss was and then, inexplicably, the final report would show up several weeks later with a completely different conclusion. *See Id.* at p. 129-130. It became clear later in the deposition that the reason for the change in reports was that Lecky King was sending the engineering reports back to be rewritten because she didn’t like the conclusions reached by the engineering company. (“There was a large stack [of engineering reports] on Lecky’s desk, and she said all of them had to go back.”) *Id.* at p. 137-138. When asked why the reports had to be sent back, Ms. Rigsby relayed that Ms. King was adamant that the engineering reports were too favorable to policyholders.

Q. Okay. Did you inquire of her when she made that comment about any of the reasons, if any, that may have existed as to the reasons the engineering reports were going back?

A. She said that – her comment was that they [the engineers] – they all must be related to the policyholders.

Q. That’s what Lecky King said?

A. Uh-huh, and that’s why they needed to go back.

Id. at p. 139.³

³Ms. Rigsby testified that the stack of engineering reports on Lecky’s desk that had to go back were about 2 feet high. *Id.* at p. 158-159. (Note that the average engineering report is 3-4 pages.)

- Ms. Rigsby further testified that Lecky King instructed the adjusters to alter flood claims in order to maximize flood policy payments, which Ms. Rigsby candidly testified was inappropriate. *Id.* at p. 211-217.

- Ms. Rigsby testified that the McIntosh claim was clear evidence of State Farm wrongdoing.

Q. Okay. Then I take it you don't know personally of your own knowledge why anyone made a decision to cancel engineering reports?

A. I did hear Lecky ranting about these engineers must be related to policyholders and that they are stupid. I heard that, and the engineering reports are going back, I don't know how much more I need[ed] to hear to know what is going on. I think that is pretty clear.

Q. Okay. Is that all you needed to hear to make it really clear?

A. Well, that, and when I got the McIntosh report that said wind, and eight days later said water. That – that kind of sealed it as well.

Id. at p. 219-220.

- Ms. Rigsby stated that the second McIntosh report did nothing other than change the conclusions of the first report. *See Id.* at p.220.

- Ms. Rigsby admitted that she wrongfully characterized the McIntosh wind damage as flood damage in her adjusting work for State Farm and Renfroe. *Id.* at p. 238-239.

- Ms. Rigsby admitted that she participated in concealing the first Forensic engineering report from the McIntoshes which effectively “defrauded” them. (“I knew there were two reports and I didn't tell them.”) *Id.* at p. 264-265.

- Ms. Rigsby admitted that State Farm defrauded the McIntoshes. (“When I found the report [the first report with the sticky note on it] I considered it to be State Farm defrauded them. But the fact that I did not call them, I participated in that.”) *Id.* at p. 264:17 - 265:13.

- Ms. Rigsby testified that State Farm trained their adjusters to call everything water damage and not wind damage. *Id.* at p. 265.

- Ms. Rigsby emphasized that the concealment of the first report was wrong. *Id.* at p. 373.

- Ms. Rigsby testified that State Farm began shredding documents after subpoenas from government officials started to issue.

Q. Subsequent to the serving of the grand jury subpoena, were documents from [the State Farm catastrophe office] shredded?

A. Yes. . . . and then we got to this location in Biloxi and the subpoenas were – coming out, all of a sudden, we started seeing shredder trucks often, I had been on CAT [catastrophe duty] for 8 years and I don’t know that I have ever seen a shredder truck at the office, I knew we shredded, but I don’t know what, why they would need one so often all of a sudden.

Id. at p. 425-426.

- Also, State Farm’s lawyer argument that Ms. Rigsby stole the original October 12th Forensic Engineering report, and that is why State Farm did not give it to the McIntoshes, was flatly rebuked by Ms. Rigsby (and no witness has refuted that testimony).

Q. And your testimony under oath is that you didn’t take it, right?

A. I took a copy of it. I made a copy and put it back.

Q. You didn't put it in the wind file that it needed to go into, did you?

A. I gave it to Lecky King.

Q. But you didn't put it in the homeowner's file?

A. I did not.

Id. at p. 430-431.⁴

C. **Ms. Rigsby's Deposition Testimony in *Marion v. State Farm* Likewise Establishes Overwhelming Evidence of Fraud.**

To the extent the Court is interested in considering the testimony of Ms. Rigsby in the *Marion* matter, Plaintiffs hereby call the Court's attention to additional portions of the deposition that State Farm fails to mention in their motion without the benefit of citations, to make the point that there was no front-end fraud.

- Before Katrina, State Farm never went against an engineering report's determination. *See*, Exhibit "D," Depo. of K. Rigsby in *Marion vs. State Farm*, 5/25/07, at p. 67.
- In Katrina, State Farm instructed adjusters to pay flood claims (with federal government money) before even assessing the real cause of loss. *Id.* at p. 84, 90.

⁴Plaintiffs asked Lecky King all about what she did with the October 12th report. Because she took the 5th in response to every question, there will be an inference at trial that:

- Ms. Wachter hid the report in the file that King kept under lock and key (See Exhibit "10) to Exhibit "A" hereto, King Depo. p. 39:16-21)
- The report with the sticky note attached to it stayed in Ms. King's files and is still in her files in State Farm's office. (*Id.* at 40:9-14)
- State Farm has this document in their files today unless they have destroyed it. (*Id.* at 40:15-22)
- Ms. King saw to it that the October 12 report with the sticky note attached that she wrote was never put in the McIntoshes' claim file. (*Id.* at p. 41:5-10)

- In the initial adjusting of Katrina claims State Farm instructed adjusters to deny claims if water touched the property whatsoever, even though water came hours after maximum wind speeds. *Id.* at p. 94-95; 101; 136-138.
- Katrina was unique in that engineering reports were cancelled en masse, because Lecky King wasn't getting the answers that she wanted. *Id.* at p. 138-142.
- Lecky King instituted a policy where she would review all engineering reports before they went out to the team managers. *Id.* at p. 152-153.
- Lecky King sent engineering reports back to engineering firms to be changed to be consistent with her fore-ordained conclusions. *Id.* at p. 161-163.
- Before Hurricane Katrina State Farm's policy was always to adjust on a case-by-case basis. During and after Katrina they used the HAAG report to prejudge every case. *Id.* at p. 174-175; 256.
- The HAAG report was used as the "Bible" to "arm" State Farm adjusters so they could deny all slab cases. *Id.* at p. 178-181, 182.
- Lecky King would not pay for engineering reports unless the conclusions were changed. *Id.* at p. 212.
- For NFIP claims, State Farm instructed adjusters to falsify information about the home, if necessary, in order to pay the maximum amount on the flood policy. *Id.* at p. 257-260.
- In cases where there was a cancelled engineering report, State Farm trained personnel to explain it away using the HAAG report, even though it didn't contain data on specific policyholders' property. *See*, Exhibit "B," K. Rigsby Depo. in *Marion v. State Farm*, Day Two, 6/20/07. at p. 15-17.

- Ms. Rigsby attributed the infamous sticky note to Ms. King. *Id.* at p. 143.
- In the past, State Farm had accepted many engineering reports that were as cursory as the first McIntosh report. *Id.* at p. 145-146.
- Ms. Rigsby explained that the first McIntosh engineering report could have supported a flood payment since State Farm instructed them to find flood without any investigation. *Id.* at p. 253-256.

In short, Ms. Rigsby's testimony more than amply supports Plaintiffs' fraud claims.

III. LECKY KING'S, LISA WACHTER'S, AND DAVE RANDEL'S TESTIMONY ESTABLISHES STATE FARM'S FRAUD ON PLAINTIFFS.

Lecky King was State Farm's Flood Coordinator for Katrina. (*See* Exhibit "10" to Exhibit "A" attached hereto) Lisa Wachter was a trainer for State Farm and King's assistant. (*See* Exhibit "11" to Exhibit "A" attached hereto) Dave Randel was King's boss, the man in charge of the State Farm Catastrophe Operation on the Gulf Coast for Katrina. (*See* Exhibit "E")⁵ All of them took the 5th in response to every question asked.

As mere examples: Mr. Randel does not deny that he implemented a "corporate decision" to deny "claims before State Farm ever sent out a single engineer or adjuster to inspect" the properties, and that he gave Ms. King and Ms. Wachter "direct orders" to tell the engineering companies "that they wouldn't be paid unless they falsified their reports to say that water caused

⁵Mr. Randel's deposition was taken in *McFarland v. State Farm*. Given that large number of potential witnesses in this case and the limit on depositions in the Case Management Order, Plaintiffs have declined to take Mr. Randel's deposition once again in this case. *See* Text Order, 10/12/2007 (cancelling Plaintiff's fact depositions for going beyond ten), and Text Order 10/19/2007 (allowing certain additional specified depositions by the Plaintiffs). Notably, State Farm repeatedly relies upon depositions from other cases in defending the McIntosh claim and in its current motion even though such witnesses were deposed in this case.

all the damage or substantially all of the damage.” Randel Depo. Exhibit “E” at 8:1-11:2. Ms. King does not deny that she personally instituted a new policy of reviewing engineering reports before they were sent to policyholders or used for adjustment, that she ordered that reports adverse to State Farm would be changed so as not to implicate insurance coverage, and that she did so with regard to the McIntosh claim in particular. King Depo., Exhibit “10” to Exhibit “A” hereto, at 12:1-17:20. Ms. Wachter does not deny that she did the dirty-work for Ms. King and Mr. Randel, calling the engineering companies to reject the adverse reports on threat of non-payment, all while hiding the original reports from the policyholders. Wachter Depo., Exhibit “11” to Exhibit “A” hereto, at 11:6-14:18. And obviously, many other questions were asked of these witnesses and the response was unfailingly the same.

IV. BRIAN FORD’S TESTIMONY ESTABLISHES STATE FARM’S FRAUD ON PLAINTIFFS.

In an effort to defeat the idea that the second Forensic report was generated for a fraudulent purpose, State Farm argues that the engineer who prepared the first report “in fact agrees with the conclusions of the October 20 report including that there was extensive water damage to the first story.” State Farm Brief at p. 6. Even if one were to forget about the fraudulent nature of how the second report came into being as shown in detail in Exhibit “A” (the Timeline), Mr. Ford’s testimony is not so cut and dry in State Farm’s favor. In fact, his testimony, read in its entirety fully supports the view that his October 12 report was correct and complete. Ford testified that:

- He would not change the conclusions of his October 12 report. Exhibit “F”, Ford depo. at p. 99.

- “It is [his] conclusion that the envelope of the structure was ruptured by wind and wind-driven debris that allowed the winds and debris to enter the home and cause interior damage.” *Id.* at p. 99
- Forensic CEO Robert Kochan “reviewed” that report. *Id.* at p. 100.

Thus appreciated, the fact that he admits that there was later water damage is of no moment. The cause of the loss according to Mr. Ford was wind. He thought so at the time he wrote his report and thinks so today.

V. THE MCINTOSHES WERE UNAWARE OF STATE FARM’S FRAUDULENT ACTIVITY UNTIL AUGUST 2006 AND WHEN THEY FOUND OUT IT WASN’T FROM STATE FARM.

In an effort to absolve themselves of the implications of their fraudulent conduct, State Farm does not deny the fraud. In fact, they don’t really address it.⁶ Instead, they argue there could not have been fraud on the McIntoshes because a third party, the Mississippi Attorney General’s Office, made Plaintiffs aware of the fraud in Spring of 2006. See State Farm Motion at p. 11. Even if this were true (which it isn’t) it is at best uncertain how a third party’s telling a victim that he was defrauded absolves the defrauder of wrongdoing. But we need not answer that question because Plaintiffs were not aware of the fraud until ABC news alerted them to it on August 21, 2006, after Plaintiffs’ meeting with two outside attorneys from State Farm, Peter Barrett and Ken Turner, who did not tell Mr. McIntosh that there were two engineering reports on his property.

⁶In their current motion they never even mention Lecky King’s name or any of her dealings with Forensic Analysis & Engineering Company that led to the second report.

Mr. McIntosh found out that there were two different engineering reports with different conclusions after his several conversations with David Stanovich (State Farm agent), Tamarra Rennick (State Farm in-house counsel) and Peter Barrett (State Farm's outside counsel). He did not find out about the fact that there were two different engineering reports with different conclusions until ABC News' Joe Rhee told him about it after his August 21 meeting with Peter Barrett.⁷ Moreover, there is no testimony that any State Farm witness ever told Mr. McIntosh that there were different reports with different dates, different conclusions and different authors. In fact, the testimony and documents reveal that Ms. Rennick and Mr. Barrett both told Mr. McIntosh that there were two copies of the same report, by the same authors, with the same conclusions.

A It's my recollection that Mr. McIntosh told me that an investigator from the Mississippi Attorney General's office told him that there were two reports.

⁷State Farm has previously disingenuously stated that there is "simply no indication that he [Wayne Drinkwater, their lawyer] or anyone else for that matter, passed this information [being questioned about the fraudulent report by 20/20] along to Ms. Rennick before the McIntosh interview. Instead, Plaintiffs submit surmise and conjecture." D.E. 497 at p. 37 There is much more than "an indication." There is proof that word of the situation was widespread among State Farm personnel across the country. *See*, Exhibit "G," MCI 7244 through MCI7247. An individual named Robert Gagne sent an email on August 14, 2006 to hundreds of people, one apparently being State Farm's John Deganhart, detailing his account of the 20/20 interview of Wayne Drinkwater and even quoting verbatim the October 12 sticky note. Deganhart, in turn sends the news out via email the very next day to State Farm employees Fraser Engermann, Dave Randel, Rick D. Moore and Terry Blalock. Blalock responds the same day copying all, and additionally copying Mike Tucker and James Burwell. In response to that email Fraser Engermann responds copying all (the same day at 10:56 p.m.) who by his comments already knew all about it. ("ABC put this document in front of Wayne Drinkwater during the interview this afternoon. They pushed Wayne pretty hard on this. . . .")

The reason why there is no "indication" Rennick herself knew is because State Farm has blocked every effort to get a document that shows her name. Plaintiffs are currently seeking a decision from this Court on the Magistrate's decision to not allow Plaintiffs access to Ms. Rennick's files on the McIntosh matter.

Q Okay. And what did you say about that?

A I don't--my recollection is is that I told him that I had seen two copies of the same report. And I believe that he told me that he doesn't care if there are two reports. State Farm has treated us well. And then he went on to describe that it was his recollection that there were two engineers who had come to his home. One that he had spoken with and then one who had been asked a question by a yard man that worked for Mr. McIntosh.

Q So in response to his noting that the Attorney General's office had told him there were two versions of his engineering report, you indicated that you saw two copies of the same report?

A That's my recollection, yes.

Q Okay. And what were the dates of those two copies of the same report, if you recall?

A As they were copies of the same report, the dates were the same, and I believe they were both October 20.

Q And how did the copies differ, if at all?

A I think that the only manner in which I recall them differing had to do with the copying process. I don't, I seem to recall that the typeface on one at least to me appeared to be somewhat smaller, and it appeared to be a copying type issue.

Exhibit "H", Rennick Depo. at p. 68:19 - 70:3. Those statements are now known to be false.

Mr. McIntosh did testify that the Attorney General's Office contacted him in the Spring of 2006 and mentioned two engineering reports on his property. Even though the reports had been written by Forensic and relied upon by State Farm some five months earlier, State Farm had not told the McIntoshes at that point about the existence of the two reports. When the Attorney General's Office contacted Mr. McIntosh, they did not provide him with any information about the two engineering reports because Mr. McIntosh quickly rebuffed them for fear of his being

involved in an investigation or litigation that would cause him to lose insurance. His deposition testimony is quite clear on all of these points.

- He did not ask to see the two engineering reports when contacted by the Attorney General's Office. (Exhibit "I", McIntosh deposition at p. 207:19-21)
- The Attorney General's Office did not discuss anything with Mr. McIntosh or his wife about the two reports. (*Id.* at p. 182:14-17)
- The Attorney General's Office did not mention anything about the findings of the two reports. (*Id.* at line 18-21)
- McIntosh quickly rebuffed the Attorney General's Office representative ("I told him we had absolutely nothing to gain from participating in it [his investigation] and did not want to participate in it.") (*Id.* at p. 183:9-12)
- He did not want to become involved for fear of losing his insurance. (*Id.* at line 20-22)

After this very short and abrupt conversation, Mr. McIntosh heard nothing more about his reports until August of 2006, where, again, **a third party**, ABC News' Joe Rhee, contacted him about the two reports. This occurred on August 21, 2006, mere days after 20/20 had discussed the two engineering reports with State Farm's attorney, Wayne Drinkwater. On August 21st Joe Rhee called Mr. McIntosh for the first time and introduced himself. *See*, Exhibit "J," documents produced by Plaintiffs, McIntosh 239-245. Mr. McIntosh's notes of that conversation, and his testimony in his deposition, reveal that he was quite against being involved in such a news story from the beginning and in fact told Mr. Rhee at that time that he did not want to be involved in any investigation or news story. ("He [Rhee] came across our inspection report doing research. I

asked how he got it. . . . He went on to say that there was a note (sticky note) on our report that said, ‘Put into wind file – do not pay do not discuss.’ Did I think that strange? I said, yes. . . . At this point [I told him] we have everything to loose (sic) and nothing to gain by being involved in any controversy or it’s a nonissue. At this point I have to think of my family first. . . I thanked him for his time but told him we did not want to be a part of any of this.’) *Id.*

Later the same day, before the meeting with the State Farm attorneys, Mr. Rhee called again to relay “some very important and damning information.” McIntosh was resolute to not be involved in the process and gave Rhee the familiar “call me later” excuse to get him off of the phone. “I told him I had a 2 p.m. meeting with State Farm attorneys and to stop right there. I wanted to be able to tell them the truth. Don’t tell me anymore. Call me later in the day. He pressed. I stopped him and we reset 5 p.m. Central for him to call me back, which he did.” *Id.* (emphasis added)

In his deposition McIntosh confirmed that the reason why he didn’t want to have any discussion with Rhee about this information was that he didn’t want to participate in Rhee’s investigation for fear that if he did that the State Farm lawyers, who he was getting ready to meet with, would terminate his insurance.

Q. . . . What does what he told you have to do with whether you would tell State Farm’s attorneys the truth?

A. I did not want to compromise my family’s security or our insurability. And I made it clear to everyone up until that point and after that point, I didn’t have a dog in this hunt and didn’t want to be involved. So the more I know, the more I have to explain. I didn’t want to explain anything to the attorneys who had the ability to terminate [our] insurability.

Exhibit “I,” at p. 223:22-25 - 224:1-7. While State Farm awkwardly implies that Mr. McIntosh didn’t want to know about what Mr. Rhee wanted to tell him so he could avoid lying to State Farm attorneys, the facts and testimony of Mr. McIntosh simply don’t bear that out. He didn’t want to know anything from Rhee then or before because he didn’t want to be involved in any way.

Q. Okay. Is it because you didn’t want to tell them [the State Farm attorneys] about whatever he [Rhee] might be tell you?

A. I did not want to be involved in anything that was going on and everyone was doing the best they could to drag us into it.

Id. at p. 225:3-7.

After Mr. McIntosh’s conversation with the attorneys was the first time that he realized that the “two reports” that everyone had been talking to him about (and the ones that Mr. Barrett and Ms. Rennick told him were two copies of the same report), were in fact two different reports. “Joe revealed that there were in fact two reports. One dated October 12th that had the post-it note on it and the conclusion was ‘failure due to wind’. The second report dated October 20th, I confirmed to him I had never seen that report while being with State Farm; conclusion was ‘failure due to rising water.’” *See*, Exhibit “J,” McIntosh000240.

So, State Farm’s bold statement that “Mr. McIntosh knew that there were two reports” is absolutely false in the timing described by State Farm. He clearly did not know of the two different reports with the two different conclusions at the time he was talking to the Attorney General’s Office in the Spring of 2006, Ms. Rennick earlier in August, and even Peter Barrett and Ken Turner from State Farm on August 21st at their 2:00 meeting in which Barrett hand –

wrote the statement for Mr. McIntosh to sign. Only after all of these conversations did he learn of the two reports from Mr. Rhee. Obviously, Mr. McIntosh then felt duped, once he learned of all of this fraud in all of these meetings with State Farm representatives.

Mr. McIntosh's later conversations with State Farm Claim Section Manager, Terry Blalock on August 31, 2006, revealed that his understanding why there were two reports on his property became a top priority after August 21. *See* Exhibit "J", McIntosh000242-243 ("I said there are two things that need resolving. . . . Two reports. We need to understand the two reports.") By September 8, 2006, Blalock, though he had previously said he would provide information on the two reports, called to state that he "didn't have much information [on the two reports]" and that an "investigation [was] ongoing around the country." Exhibit "J" McIntosh000245.

VI. THE ELEMENTS OF FRAUD ARE MET

State Farm has argued that even if it is shown that they defrauded the McIntoshes there is no claim because McIntosh wasn't damaged. They assert that their fraud simply delayed him filing suit. State Farm Memo at p. 18. State Farm misses the point.⁸ If the original report had been accepted as it should have been, the McIntoshes would have received full coverage for their loss, not the \$36,000 State Farm paid them. State Farm's covering up the first Forensic report allowed them to not pay contractually required payments under the policy forcing the McIntoshes to have to secure SBA financing and additional mortgage and consumer credit financing. State Farm is aware of this as they have subpoenaed these records and they have now been produced to

⁸The logical extension of State Farm's argument is that their fraud couldn't have caused damage to Plaintiffs because now Plaintiffs have a valuable bad faith claim and they didn't before.

Plaintiffs. See D.E. #763, SBA subpoena; #71, BanCorp South subpoena. To this day, Plaintiffs' full claim has not been paid.

State Farm also makes a run at showing that the fraud cover up cannot lead to liability because McIntosh could not have reasonably relied on their representatives' admitted fraud since he knew the truth from another source. They then try to impugn Mr. McIntosh's lack of knowledge by arguing that he should have known State Farm lawyers Rennick and Barrett weren't telling him the truth. "Nor would any reliance by the Plaintiffs on the information received from Ms. Rennick or Mr. Barrett that there were only two copies of the same engineering report be reasonable." SF Brief at p. 28. And in doing so, they flippantly state in regards to his Spring 2006 conversation with the Attorney General's office "The Attorney General's Office does not conduct investigations, make calls . . . , and request meeting with [members of the public] in order to address common circumstances of finding two copies of the same report." State Farm Brief at p. 20. It is ironic at least for State Farm to make this argument about investigations regarding two copies of the same report because that is what two State Farm lawyers told Mr. McIntosh that had occurred after 20/20 questioned another State Farm lawyer about the existence of two reports. In other words, they think that an individual has to know that there are two different engineering reports when an Attorney General's Office comes calling but it is also fair for them to not think there are two reports when 20/20 actually presents one of their lawyers with the two reports.

As to damages from State Farm's fraud cover up, clearly there are since in addition to continuing to not pay contractual benefits, State Farm induced Mr. McIntosh to sign a notice that purported to prevent the national news media from revealing State Farm's own fraud. See First

Complaint Exh. E, D.E. 1-3 at 22-23. That document explicitly relies on the misrepresentation that there is only one engineering report, and essentially made Mr. McIntosh an accomplice in covering up the very fraud that had been perpetrated against him. Moreover, Mr. McIntosh relied upon these misrepresentations by declining to cooperate with the media investigations, declining to cooperate with governmental investigations, and declining to file suit against State Farm. He did all of this only after learning the truth almost one year after the original fraud occurred.

State Farm also attempts to argue that Mr. McIntosh cannot show any **injury** that resulted from State Farm's lies, and State Farm thinks this lack of injury is because State Farm had already denied the McIntosh claim ten months previously. However, the date of denial is strictly irrelevant, given that State Farm's duties to pay a legitimate claim continue to this day. Indeed, in Hurricane Katrina litigation, this very Court has held that "an insurer's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for nonpayment. Put more bluntly, if you owe a debt the duty to pay does not end when you are sued for nonpayment of it." *Odom v. Armed Forces Ins.*, Not Reported in F.Supp.2d, 2006 WL 2541599 (S.D.Miss. 2006), quoting *Gregory v. Continental Insurance Co.*, 575 So.2d 534, 541 (Miss. 1991). Even State Farm has admitted as much in other litigation. *Sobley v. Southern Natural Gas Co.*, 302 F.3d 325 (5th. Cir. (Miss.), 2002) ("Evidence of post-denial conduct by the insurer is relevant under Mississippi law to establish a claim for bad faith denial of insurance coverage, as State Farm's counsel admitted at oral argument.") Indeed, this particular conduct is quite relevant to the punitive damages that the McIntoshes are likely to receive when this case is tried. *Eichenseer v. Reserve Life Ins. Co.*, 682 F.Supp. 1355, 1372 (N.D.Miss.1988) ("An insurance company is under a continuing duty to reevaluate its position when it chooses to deny a claim. This is

because an insurer may be subject to punitive damages for initially denying a claim without an arguable reason, even if it later decides to pay.”), aff’d, 881 F.2d 1355 (5th Cir.1989), vacated on other grounds, 499 U.S. 914, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991). To state this as clearly and as simply as possible – Mr. McIntosh was injured by State Farm’s misrepresentations because it was part and parcel of their bad faith denial of his claim. (Indeed, the fact that State Farm felt the need to repeatedly misrepresent its original basis for denying the claim is itself evidence that the claim was denied in bad faith.)

In addition, Mr. McIntosh was injured because State Farm made a public fool of him, using these misrepresentations to induce him to sign a document that further concealed State Farm’s misconduct. As if that was not enough, State Farm then posted this same statement on its corporate website, to publicize the fact that it was using Mr. McIntosh. These outrageous abuses, beyond that inherent in State Farm’s bad faith denial, caused Mr. McIntosh additional anxiety and emotional suffering, and State Farm should have foreseen as much.

In cases in which there is evidence of willful ... or intentional wrongs, and where mental or emotional stress is a foreseeable result of the conduct of the defendant, a court can assess damages for mental and emotional distress. The plaintiff does not have to present further proof of injury. The nature of the act itself, rather than the seriousness of the consequences, can justify an award for compensatory damages.

Gamble v. Dollar General Corp. 852 So.2d 5 (Miss., 2003) (internal citations omitted).

CONCLUSION

For all of the foregoing reasons, Plaintiffs urge the Court to deny the motion for partial summary judgment filed herein by State Farm.

Respectfully submitted, this the 10th day of December 2007.

THOMAS C. and PAMELA McINTOSH, PLAINTIFFS

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