IN THE SUPREME COURT OF MISSISSIPPI

COA RE

W.R. BERKLEY CORPORATIONN
UNION STANDARD INSURANCE COMPANY,
UNION STANDARD INSURANCE GROUP, AND
GREAT RIVER INSURANCE COMPANY — APPELLANT / CROSS APPELLEES

VS. — NO.: 2009-CA-01223

REA'S COUNTRY LANE CONSTRUCTION, INC. — APPELLEE / CROSS APPELLANT

REPLY BRIEF OF THE CROSS APPELLANT, REA'S COUNTRY LANE CONSTRUCTION, INC.

(ORAL ARGUMENT REQUESTED)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules of Court

Mississippi Supreme Court

A. The Trial Court's Denial Of Summary Judgment Is Not Reviewable

Great River[1] contends the Trial Court erred in failing to dismiss Rea's claims for bad faith failure to defend, both at the summary judgment stage and at trial. Obviously, the question of whether Great River had, and breached, a duty to defend Rea's in the Broom litigation is central to the claims that form the basis of Rea's Cross Appeal. Great River devotes considerable energy trying to parse out what evidence was before the Trial Court at the summary judgment stage versus what evidence was before the Court at Trial. However, the Trial Court's denial of Great River's Motion for Summary Judgment is not reviewable on appeal.

> [A]n interlocutory order denying summary judgment is not to be reviewed where final judgment adverse to the movant is rendered on the basis of a subsequent full trial on the merits. . . . Once trial began, the summary judgment motions effectively became moot. . . . [I]t is particularly difficult to understand how the ends of either justice or of orderly procedure would be furthered were we to hold that [a party] is entitled to summary judgment when the facts adduced at the full trial on the merits adequately support the findings and judgment for the [other party]. . . . By reaffirming our rule . . . that orders denying summary judgment motions will not be reviewed in such circumstances, we remain in harmony with the overwhelming majority of other circuits which have considered the issue.

Black vs. Case, 22 F.3d 568, 570-71 (5th Cir. 1994) (citations omitted). The Fifth Circuit set forth many reasons supporting the rule reaffirmed in *Black*, including "prudential" concerns such as eliminating the need for the Appellate Court to "review two sets of evidence: the 'evidence' [when the trial court denied the motion], and the evidence presented at trial." *Id.* at 571-72

This Honorable Court should likewise refuse to review the Trial Court's denial of Great River's Motion for Summary Judgment. Great River had an opportunity to present all the facts and evidence, and make all the argument it deemed relevant, during a full trial on the merits. Alternatively, should this Court elect to review the Trial Court's denial of Great River's Motion for Summary Judgment, Rea's demonstrated the existence of facts that prohibited summary

[1] For ease of reference, Rea's will refer to the Cross Appellees jointly as "Great River" unless otherwise specified or singled out.

judgment, and the Trial Court properly DENIED Great River's motion based upon an unresolved question of material fact. (See discussion, *infra*, and in Rea's *Brief of the Appellee and Cross Appellant*) Each of Rea's arguments that touch on the summary judgment issue are made out of an abundance of caution, and are submitted in the alternative to, and without waiving, Rea's position that the summary judgment denial is not reviewable on appeal.

B. Misstatements in Great River's *Brief of the Cross Appellee*

Great River's brief, which combines both the Reply Brief of the Appellant and the Brief of the Cross Appellee, makes numerous assertions that are contrary to the Record. Some have little if any substantive effect on Great River's arguments, and appear to be offered in attempt to discredit Rea's or its Counsel. Other assertions, set forth throughout the allegedly "segregated" sections of Great River's brief, have direct implications on the issues addressed in Rea's Cross Appeal – including the punitive damages issue. That this Honorable Court may consider this appeal on the facts, Great River's misstatements are illuminated:

Great River's assertion that Rea's cited Miss.R.Civ.P. 52 "as applicable to the summary judgment proceeding" (pg. 1, N2) is contrary to the Record. A simple reading of Rea's brief (bottom of page 39) reveals Rea's expressly referenced Rule 52's application to "a Trial Court conducting a bench trial."

Rea's is not asking this Court to change existing Mississippi law. Rea's is merely asking the Court to apply applicable law to the facts of this case as those facts occurred, and to enforce the policy and purpose for awarding attorneys' fees and expenses in breach of contract actions that this Court expressly stated in *Veasley* ("purpose in establishing a measure of damages for breach of contract is to put the injured party in the position where she would have been but for the breach." 610 So.2d 290, 295 (Miss.1992)

Great River's assertion that Rea's argument on Appeal regarding the "occurrence" issue is

"completely different" from the argument Rea's offered at the summary judgment stage (pg. 3) misstates the Record. Rea's made the same arguments in its Brief regarding the effect of *Alden Mills* (holding one must consider undefined "accident" from the standpoint of the injured party) on whether there was *any possibility* Broom's Complaint may lead to a covered claim that Rea's made at the summary judgment stage. (Compare pp. 25, 29, 36-37, 41, and 43 of Rea's *Brief of the Appellee / Cross Appellant*, to Rea's *Memorandum in Opposition to Summary Judgment*, and Argument at the Hearing thereon, **R 2507-10; T 56-7, 60-61**

Rea's did not "change" its position on appeal, it merely addressed in detail Great River's repeated, primary assertions to this Honorable Court that there was no coverage because all of Broom's claims *really* sounded in "breach of contract". (See, e.g., pp. 13, 15, 18, 19, 20, 22, and 27 of Great River's *Brief of the Appellant*) Great River began its *Summary of the Argument* by alleging conduct alleged in Broom's Complaint "amounted to a breach of contract", and concluded its Argument that coverage was properly denied because there was no "occurrence" by asserting "[i]n sum, the alleged underlying conduct was intentional and willful, and amounted to a breach of contract".

Great River directly misstates the Record when it asserts "at the summary judgment level, Rea's did not even discuss, much less argue, whether there was a contract." (pp. 12, 18) Rea's *Response in Opposition to [Great River's] Motion for Summary Judgment* referred to Cookston's (Great River's adjuster) conclusion that "even though [Broom] has employed negligence concepts in drafting her Complaint, it seems clear that claims arise out of and are based upon duties imposed as a result of the underlying contracts" as "strong and irrefutable evidence of bad faith" in light of the fact there was no such contract. **R 2526** Rea's *Response* highlighted the facts Cookston told Great River he had not seen any contract between Rea's and Broom, and that Great River's claims counsel admitted Great River never contacted Mr. Rea to find out whether

he had a contract – notwithstanding the fact Great River disregarded Broom's allegations of negligence and concluded all her claims against Rea's *were really* based on breach of contract. **R 2534, 2543** Rea's *Memorandum Brief in Opposition to [Great River et. Al.'s] Motion for Summary Judgment* likewise included pages of argument and citation to material facts regarding the "contract" issue. **R 2499, 2504, 2509-10, 2512, 2516**

Rea's repeatedly emphasized the fact Great River made a "quantum leap" conclusion that Broom was seeking damages *solely* for breach of contract despite the fact Great River had never seen any contract with Rea's name on it, or that obligated Rea's to Broom. Rea's argued that Great River's argument that "the chain of events leading up to Broom's alleged damages were set in motion by Rea's intentional construction work," where Great River denied Rea's claim without ever seeing a contract with Rea's name on it, was "clear and convincing evidence of bad faith." Rea's noted it was impossible for Great River to properly deny coverage based upon a policy exclusion that excluded damages sounding in contract when Great River had never seen a contract with Rea's name on it. *Id.* Similar arguments were made by Counsel for Rea's during the Hearing on Great River's Motion for Summary Judgment. **T 54-5, 69**

Ultimately, Great River advised the Trial Court that its summary judgment position turned on the question of whether there was a contract, and the Trial Court properly found there was no undisputed evidence that one existed:

> **Great River:** [W]hat you have to find is . . . [Rea's] intended to perform work pursuant to a contract and the contract was breached. There was a contract out there. That's the whole issue.
>
> **The Court:** [T]hat's a factual situation that's got to be played out. . . . I've got to, first of all, based on your arguments, got to find out that a contract existed between Broom and Rea's Country Lane. At this time I don't think I can take that step forward, therefore the Motion for Summary Judgment will be overruled.

RE 333-34 Great River's *continued* attempt at trial to argue damages alleged by Broom were the result of a breach of Rea's contractual duties and/or intentional conduct pursuant to a contract,

where the Record before the Trial Court demonstrated no contractual obligations whatsoever, highlights the Trial Court's error in refusing to access punitive damages against the Defendants.

Great River's assertion "it is undisputed that Rea's subcontractors (allegedly including W.C. Pitts) performed work at the subject property" (pg. 3) is contrary to Great River's own admission. In its September 30, 2004 *Rebuttal Brief in Further Support of Motion for Summary Judgment*, Great River affirmatively asserted (citing Mr. Pitts' Affidavit) that "W.C. Pitts never did any work for Rea's". **R 3723** In addition to being contrary to its own admission, Great River's assertion ignores contrary evidence in the Record, including but not limited to:

a. Rea's timely Answer to Broom's Complaint affirmed Rea's is not a party to, and has no obligations under any Contract with Broom. **RE 26-27; R 143-44, 155**

b. The National Union/Rea's Completion Contract required Rea's to complete specific "Bonded Contracts" and "Borrow Pit Work", however no contract related to Broom's property is a "Bonded Contract" or "Borrow Pit Work" as defined therein. **RE 31-33, 35; R 176-78, 180**

c. Rea's subcontracted with L&J Construction ("LJC") to assist it with carrying out obligations assumed under the National Union Contract. Although the Rea's/LJC Contract identified some specific borrow pits, Broom's property is not referenced. **RE 60-64; R 393-397**

d. National Union's and Talley's separate responses to Broom's Request for Admissions on March 23 each denied Rea's was hired to perform pit and dirt work on Broom's property. **Re 51, 53; R 298, 303**

e. Rea's March 20, 2001 responses to Broom's Request for Admissions expressly denied Rea's performed any work, dug any pits, hauled any dirt, or was responsible for any work on Broom's property, and asserts Rea's was not involved in any work on Broom's property. **RE 54-59; TE6**

f. Rea's March 27, 2001 Responses to Broom's Interrogatories swore Rea's did not have a contractual or any other relationship with Broom; and that Rea's never did any work on, gave or received any instructions regarding work on, and never received any compensation for work done on Broom's property. **R 384; RE 221-235; TE20**

g. Rea's never contracted with Broom, and never did, directed or supervised any work on Broom's property. **RE 341-342, 358-360; T 146-147, 183-85**

h. Broom's brother testified in his July 17, 2002 deposition that he talked with Pitts about Broom accepting some topsoil to fill in some gullies on the subject property in May, 1999, and a total of 77 loads of dirt were ultimately dumped on Broom's property by Pitts. **RE 200-03; TE13, 45-48** Broom testified during her deposition on July 15, 2002 that she did not have any

written agreement with Pitts regarding the 77 loads of dirt, did not pay anything for it, and does not believe those loads had anything to do with any signed agreement related to excavations on her property. **RE 215C; TE13, 146**

i. Broom admitted no one ever told her where in her fields pits would be dug, other than Kent's representative when she signed the Kent contract. **RE 207; TE13, 100** (As a matter of law, Rea's never assumed any duties or obligations under the Kent contract).

j. After one or more contractors entered her property to excavate dirt, Broom observed "devastation"; there were two pits dug with no slopes, trucks going every which way in every direction, and ruts everywhere. However, Broom admitted she did know who was driving all over her fields. **RE 208, 208A, TE13, 106, 110** "Exhibit 1" to Bishop's deposition (which deposition was reviewed by Cookston in evaluation of Rea's claim) is a June 5, 1999 contract between Tanner Construction (not a Defendant in the Broom litigation) and Broom, which allowed Tanner to dispose of excavation and debris removed from Tanner's job site on Broom's property, and by which Broom granted Tanner and MDOT an easement over and across any portion of Broom's property for the purpose of enabling the contractor to dispose material. **RE 216; TE13, 220** Bishop testified there were two or three truckers (from different companies) hauling materials out of Broom's pits. **RE220; TE13, 301**

k. Broom admitted she sued multiple defendants simply because "somebody must be responsible" for the damage to her property. **RE 215B; TE13, 143**

l. Cookston advised the scope of the National Union/Rea's Contract was to complete Kent's contract with MDOT, and that Rea's agreed to effect the completion of the borrow pit work and bonded contracts in accordance with the terms of the bonded contracts. Cookston admitted Kent's contract with Broom is not a bonded contract that Rea's agreed to complete. **RE 97; TE5, 64**

m. Rea's Motion for Summary Judgment, Supporting Memorandum, and Itemization of Undisputed Facts in the underlying litigation (reviewed by Cookston) demonstrated, in great detail and with citation to and incorporation of supporting evidence, that Rea's never had a contract with Broom, never had any contractual relations with or contractual obligations to Broom, never did or directed on any work on Broom's property, had no involvement with or obligations under the LJC contract with Broom, and that none of the Defendants (including Broom) had any obligations to Broom under the Kent contract (upon which Kent defaulted. **TE13, 455-586)**

n. Rea's MSJ includes excerpts from Pitts' July 19, 2002 deposition where Pitts testified he had no contract with Rea's and did not work on Broom's property on behalf of Rea's, and that Rea's never had any thing to do with Broom's property. RE 242-245; TE13, 578-80

o. Cookston admitted he never saw a contract prior to the first claim denial with Rea's name on it, and that he doesn't believe any representative of Rea's ever put a foot on Broom's property. **RE 110-11; TE9, 7-8**

p. Wayne Rea testified that Rea's did not enter into any agreements with Pitts, did not consent to any agreements being entered on Rea's behalf by Pitts, and that Pitts did not conduct

any activity with regard to Broom's property pursuant to a contract with Rea's. **RE 361; T 187**

Great River's assertion Rea's never contacted Great River in response to, and/or to express disagreement with, Great River's first denial of Rea's claim (pg 6) is contrary to the Record. When Wayne Rea received Cookston's 4/20/01 denial letter, he spoke with his Great River's insurance agent, Armstrong. Armstrong told Rea that Great River *should* defend, and that he would check to find out why it did not. **RE 346-47; T 151-52** Rea asked Armstrong why Rea's was not being defended by Great River, since each of Rea's co-defendants was being defended by its CGL carrier. Armstrong could not understand why. **RE 348; T 153** Rea asked Armstrong to have Great River get back in touch with him numerous times; yet Great River never contacted Wayne Rea. **RE 347; T 152** On August 3, 2001, Great River received a fax from Armstrong's agency asking "could you please give us a status on this claim, insured has requested." **Re 67; TE5, 1** Although Van Hook testified that she would have called the Agent, there is no documentation in Great River's claim file that Great River responded to this request. **RE 152; TE10, 65** In fact, despite Rea's repeated requests for reconsideration and further explanation of why his company was the only defendant in the Broom litigation not being defended by its CGL carrier, Great River admitted it did not perform <u>any</u> additional investigation on Rea's claim between April 20, 2001 (first denial) and July, 2002. **TE10, 64**

Great River's suggestion that Rea's somehow is responsible for Great River's denial of its claim because it allegedly never contacted Great River to dispute the facts or law expressed in Great River's denial letter (pg. 6) is folly.

> When the insured complies with the terms of the policy . . . the insurer has a duty to investigate the true facts related to any alleged exclusion from coverage.

Merchants Company vs. American Motorists Ins. Co., 794 F.Supp. 611, 617 (S.D. Miss. 1992) (*citing Marvar Shrimp and Oyster Co. vs. United States Fidelity and Guaranty Co.*, 187 So.2d 871, 875 (Miss. 1966) (emphasis added)). Great River admits Rea's did everything it was

required to do under the policy of insurance. **RE 147; TE10, 54**

Great River's assertion Rea's failed to provide the Trial Court with any "specific" facts in opposition to Great River's Motion for Summary Judgment (pp. 10-11) is completely disproved by the Record. Rea's September 13, 2004 *Response in Opposition to Motion for Summary Judgment* set forth 141 itemized paragraphs of specific facts, supported by more than 1000 pages of incorporated exhibits. **R 2520-3704** Rea's set forth voluminous, specific facts; and confirmed that the existence of these facts proved Great River breached its duty to defend Rea's, and demonstrated the breach was committed in bad faith – such that Great River's Motion for Summary Judgment must be denied. **R 2550-51**

Great River's attempt to make an issue of Rea's confirmation that the listed facts were "undisputed" is misplaced. Rea's was left to provide the Trial Court with scores of "undisputed" facts that prohibited entry of summary judgment because Great River failed to file an itemization of undisputed facts in support of its Motion for Summary Judgment, in violation of U.C.C.C.R. 4.03(2). **R 2250-2491.** Great River likewise failed to disprove those specific facts that Rea's argued prohibited summary dismissal of Rea's claims.

Great River's assertion that "absent from Rea's brief in the underlying summary judgment proceeding is *any* discussion of its conduct being accidental" (pp. 13, 18) is contrary to the Record. Rea's summary judgment argument demonstrated that the damages alleged by Broom constituted an "occurrence" whether you considered if they were "accidental" from the standpoint of Broom and/or Rea's. Rea's devoted a large portion of its *Memorandum* to this subject. **R, 2502-10**

Rea's likewise addressed why the alleged damages were "accidental" during the summary judgment Hearing. Therein, Great River's counsel confirmed Great River was arguing the alleged damages were not "accidental" because, Great River alleged,

> [Rea's] performed defective or negligent work out there. That's what [Broom's] lawsuit was about. . . . [Rea's] didn't perform. They were negligent in that they didn't do it like the contract said.
>
> . . .
>
> [Rea's] negligently dug these pits – they intended to perform the contract, negligently performed it.

T 64-65 Counsel for Rea's explained why Mississippi law, as expressed in *Alden Mills* and its progeny, demonstrated the possibility a Mississippi Court may look at "accidental" from the standpoint of Broom, thus triggering coverage. **T 53-60**

Counsel for Rea's further explained that, even were the Court to accept Great River's argument and look at "accidental" from Rea's standpoint, the alleged consequences were neither expected nor intended by Rea's. **T 69-70** Quite simply, Broom's alleged damages would have been accidental from Rea's standpoint because the evidence before the Trial Court demonstrated Rea's never expected or intended to do any work on Broom's property, much less be sued for allegedly failing to perform work in compliance with the requirements of the Kent/Broom Contract, which as a matter of indisputable law did not govern the actions of Rea's (or any other Defendant in the Broom litigation). Additionally, it was undisputed that numerous entities totally unrelated to Rea's (third parties) were doing work on and traversing Broom's property. Rea's certainly could not have expected or intended any property damage done by those entities.

Great River's assertion Rea's is asking this Court to change the law "to require insurers to always look beyond the allegations of the complaint" (Pg. 14) misrepresents the Record:

> Great River contends it had only to compare Broom's Complaint to Rea's policy to support its first claim denial. Rea's contends Crites' testimony regarding [Great River's] minimum required investigation, and Cookston's admission "we" have not seen any contract with Rea's name on it, supra, required additional investigation, including at least interviewing Wayne Rea and looking for contracts that obligated Rea's to do anything with regard to Broom's property. Even considering just the policy and Complaint, however, Great River breached its duty to defend.

Brief of the Cross Appellant, pg 35. Additionally, before Great River denied Rea's claim a

second time, Great River specifically requested, and allegedly reviewed, much evidence (including certain depositions and pleadings from the underlying litigation) beyond the Complaint and Policy. That additional evidence further confirmed Great River's duty to defend. It has long been the law in this State that the duty to defend is determined by additional facts which are known by, or become known to, the insurer – in addition to the allegations of the Complaint. *State Farm Mut. Auto. Ins. Co. v. Taylor*, 233 So. 2d 805, 808 (Miss. 1970), accord *Am. Guar. & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 610 (5th Cir. 2001).

Rea's is not asking this Court to rule that "insurers should never be permitted to rely on [a policy] exclusion when evaluating whether there is a duty to defend . . ." as alleged by Great River (pg. 17). An actual review of Rea's Brief (pp. 38-9) confirms that Rea's merely demonstrated the specific exclusions on which Great River attempted to rely were not enforceable *in this case* because Great River failed to establish facts necessary to carry its burden of proving their application.

Great River's assertion that "Rea's represents that 'Pitts was a subcontractor of Rea's and/or the other defendants'" (pg. 20) misstates the Record. The Record demonstrates Rea's did not enter into any agreements with Pitts, did not consent to any agreements being entered on Rea's behalf by Pitts, and that Pitts did not conduct any activity with regard to Broom's property pursuant to a contract with Rea's, supra. Rea's did not relinquish this position, as suggested by Great River. Rea's merely acknowledged that "[a]t best [for Great River, and considering "accidental" from the standpoint of Rea's], given the allegations in Broom's Complaint, Pitts was a subcontractor of Rea's and/or the other defendants". This statement was made in the context of demonstrating that, even if the Court were to conclude that Pitts was Rea's subcontractor, the exclusions alleged by Great River would be inapplicable pursuant to this Court's holdings in *Architex Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So.3d 1148, ¶21 (Miss., 2010).

(See *Brief of the Cross Appellant*, pp. 26, 37-38). The fact there were numerous third parties doing work on Broom's property at the same time also made it impossible for Great River to deny Rea's claim based upon an exclusion dependant on Rea's work.

Great River misstates Broom's testimony by implying Broom testified that Pitts told her "the Defendants [Rea's, et al.]" told him to construct the pits in the (allegedly dangerous) manner in which he did (pg. 20). The referenced page, **R 3518**, reveals Broom actually testified Pitts told her "the engineer" told him to do it that way, but was unable to identify who "the engineer" was (or who he worked for).

Great River's suggestion that representatives of L&J Construction ("LJC") allegedly coerced Broom to sign papers allowing LJC and/or its subcontractors to retrieve dirt from her land while acting as "subcontractors of Rea's Country Lane", and that LJC then subcontracted the work to Pitts to perform on Rea's behalf (pp. 21-22) is contrary to the Record. Although Rea's had subcontracted LJC to do certain work in connection with the highway project Rea's was working on (**R 156-60**), the contract expressly prohibited LJC from

> assign[ing] all or any part of this subcontract or sub-let[ing] all or any of the work provided for hereunder, without prior written consent of [Rea's].

R 158 The Record does not contain the requisite written consent by Rea's. The record does contain Pitt's testimony, however, he had no contract with Rea's, did not work on Broom's property on behalf of Rea's, and that Rea's never had any thing to do with Broom's property. **RE 242-245; TE13, 578-80** Rea's did not enter into any agreements with Pitts, or consent to any agreements being entered on Rea's behalf by Pitts. **RE 361; T 187** Rea's contract with LJC did address reclaiming <u>specified</u> borrow pits, but the Broom pit was not one of them. **R 156, 160**

Great River misrepresents the Record by suggesting Broom testified she was warned Pitts was going to call Larry Rea (principal of L&J Construction) <u>and</u> Wayne Rea (Rea's), and that Wayne Rea instructed Pitts how to "give the appearance [the pits] were properly sloped." (pg.

22). The referenced portions of Broom's deposition do NOT identify Wayne Rea. Rea's March 27, 2001 interrogatory responses swore Rea's did not have a contractual or any other relationship with Broom, never did any work on, gave or received any instructions regarding work on, and never received any compensation for work done on Broom's property; and that Wayne Rea only had one chance encounter with Broom, during which "nothing was said other than the customary greeting." **RE 221-235; TE20** To the extent Broom had interactions with "Rea", they were with Larry Rea, the principal of LJC.

Great River misrepresents Broom's testimony about the damage to her property, and the resulting harms to Broom by asserting the damage was repaired for "free" (pg. 23). Broom testified she was leasing her land out for pasture prior to the time dirt excavation began on her land. **RE 198; TE13, 23** After the dirt excavation, Broom testified there were "ruts all over her field", some "waist deep". **RE 205B; TE13, 58** Broom explained that her "hay field was ruined and had to be redone because of the ruts," and that the road into the property could no longer be easily navigated. She testified that Mr. Hoffman fixed the ruts *in exchange* for being able to grow hay for free. **RE 209; TE13, 117** Later in her deposition, Broom confirmed that having others repair the damages to her property without pay did cost her money. Broom testified she "would have been receiving payment for hay" [and cattle] if she had not had to have the work done. **RE 214B-215; TE13, 139-40** Lest there by any confusion on this issue, Broom testified, in response to a question about whether it cost her anything to "reconstruct" the property, "I've taken work in exchange for not having them pay me for the hay." **RE 215A; TE13, 142**

Notwithstanding Mr. Hoffman's alleged "fix" for barter, Broom also testified that her field was still a "wreck", still "full of ruts", and "not suitable for growing proper hay" as of the date of her deposition. **RE 214; TE13, 122** Great River's continued insistence on selectively choosing and quoting only snippets of Broom's testimony to support its position – where it is undisputed

the law in this State required Great River to defend Rea's if there were any *possibility* one of her claims may be covered under the Policy, is further evidence of Great River's bad faith.

Great River's attempt to reference Rea's 30(b)(6) testimony in the underlying (resolved) litigation, and/or demonstrate an inconsistency between that testimony and Wayne Rea's testimony at trial (pg. 24), is untimely, and warrants no consideration by this Court. First, it is undisputed that Great River did not consider nor rely upon Rea's deposition testimony from the underlying litigation prior to denying Rea's claim on either of the two occasions it did so – or prior to the time Rea's settled Broom's claims as a direct result of Great River's failure to defend. As this Court held in *United American Ins. Co. vs. Merrill*, 978 So.2d 613, ¶ 73 (Miss. 2007), in a case addressing the wrongful denial of an insurance claim the only "relevant records are the records upon which the denial was based."

Additionally, the facts are undisputed that Great River made no attempt to introduce Rea's 30(b)(6) deposition from the underlying litigation as an exhibit at the trial of this matter, or to attempt to "impeach" Wayne Rea when he testified as Rea's representative at trial with allegedly inconsistent testimony. "A trial judge cannot be put in error on a matter not presented to him." *Southern vs. Mississippi State Hospital*, 853 So.2d 1212, ¶ 5 (Miss. 2003) (citations omitted). While Rea's deposition from the underlying litigation was attached as one of multiple exhibits to Great River's September 30, 2004 *Rebuttal Brief in Further Support of Motion for Summary Judgment* (filed one day after the September 29, 2004 [first] Hearing on Great River's Motion for Summary Judgment), Great River did not direct the Trial Court to any of the testimony it now seeks to put before this Honorable Court in its 31 page *Rebuttal*. **R 3709-3741.** Great River did not direct the Court to any 30(b)(6) testimony from the underlying litigation in either of the two Hearings on its motion for summary judgment. **T 5-73.** The Trial Court is not required to "sift through the record" in search of evidence that might support a party's position. See, e.g. *Peters*

vs. City of Biloxi, 57 F.Supp.2d 366, 375 N17 (S.D. Miss. 1999).

If Great River wanted the Trial Judge to consider some specific point of evidence in the 450 pages of exhibits it submitted in connection with its Motion for Summary Judgment, it had a responsibility to advise the Court of its existence and alleged applicability. If Great River wanted the Trial Court to consider the underlying deposition at trial, it had a responsibility to offer it into evidence and/or use it in cross examination of Rea. Having failed to do either, Great River may not now offer the deposition as evidence of error by the Trial Court.

C. The Trial Judge Erred in Refusing to Enter a Judgment For Punitive Damages

1. Great River Admitted It Had A Duty To Defend – Then Breached It

In Mississippi, an insurance company has a duty to defend even "when a ***potential*** for coverage exists." Stated otherwise, "the insurer has a duty to defend when there is any basis for potential liability under the policy." See, e.g. *Cullop v. Sphere Drake Insurance Company*, 129 F.Supp.2d 981, 982 (S.D. Miss. 2001) (citations omitted) (emphasis added). Great River admitted that, prior to denying Rea's claims, it knew the potential for coverage of Rea's existed with regard to the Broom Complaint.

Great River admitted it understood Cookston's advice that "arguments exist" the damages alleged by Broom do not come within the risk covered by Great River's policy to suggest arguments could likewise exist to the contrary. **RE 142; TE10, 45** Great River admits Cookston advised he could not find any Mississippi cases holding damages flowing from alleged breach of contract did not constitute an "occurrence" as defined in policies such as Great River's, and that it knew it "was possible that a Mississippi judge would side with a [jurisdiction] which found such facts do create an occurrence", and that it was "equally possible that a Mississippi Court . . . would [follow] persuasive authority [to deny coverage]." **RE 149; TE10, 56** Cookston and Great River **each admitted he/it knew it was possible a Mississippi Court would find**

Broom's Complaint alleged an "occurrence" of "property damage". RE 119; TE9, 26; RE 153; TE10, 66 Cookston admits he did not tell Great River to deny the claim **(RE 109; TE9, 5).** He actually gave Great River 3 options, including defending under a reservation of rights and filing a dec action, and expressly advised Great River that one risk of denying Rea's claim "would be that a Mississippi Court would broadly construe the underlying complaint and/or policy at issue and determine that coverage exists, potentially resulting in a claim for attorney fees and other damages, including punitive damages." **RE 82, TE5, 34**

Mississippi law required Great River to defend Rea's if there were "any basis for potential" coverage of Broom's claims. Cookson expressly advised Great River of this fact. **RE 73-74; TE5, 25-26** Mississippi law further requires

> . . . where there are two or more reasonable interpretations of a clause, the court will adopt the interpretation that provides coverage. Moreover, any doubt as to the existence of a defense obligation is likewise resolved in favor of the insured.

Liberty Mutual Fir Ins. Co. vs. Canal Ins. Co., 177 F.3d 326, 331 (5th Cir. 1999) (emphasis added). This Court need not take its inquiry any further than Great River's own admissions to conclude Great River refused to defend Rea's in bad faith. If knowing, intentional refusal to defend one's insured in violation of clear Mississippi law is not conduct that provides an appropriate avenue for reversing a Trial Judge's refusal to enter a Judgment for punitive damages, what is?

2. Applicable Law Required Great River to Defend Rea's

Great River's argument that "Rea's asks this Court to disregard *Womack, Omnibank, Moulton and Architex* and to 'instead' follow *Alden Mills*" (pg. 27) misrepresents the Record. More importantly, Great River's argument demonstrates its central "misunderstanding" of applicable law, and confirms why the Trial Judge erred in not entering a judgment for punitive damages.

Rea's did not ask the Trial Court, nor is it asking this Court, to "disregard" the cases cited by Great River. Rea's is merely asking this Court to apply applicable law to the facts of this case, which law required Great River to defend Rea's in the Broom litigation if even the *potential* for coverage existed. Rea's is not contending that *Alden Mills* was the only authority that touched on Great River's duty to defend. Rather, *Alden Mills* set forth law on how trial courts should define "accident" when not defined in an insurance policy. This Court held the question of whether an injury is "accidental" must be determined from the standpoint of the person who was injured, unless the policy in question sets forth a different standard. *Georgia Casualty Co. vs. Alden Mills*, 127 So. 555, 557 (Miss. 1930).

Great River's policy defined "occurrence" as "an accident, including continuous repeated exposure to substantially the same general harmful conditions"; but was silent on from whose point of view the term "accident" must be construed. When Rea's asked for a defense in the Broom litigation, Great River was faced with, at the very least, a split of Mississippi law on the issue of what constitutes an "occurrence." Under one standing, recent interpretation at the time Rea's requested a defense, where "the policy does not define accident nor does it provide from whose viewpoint actions claimed to be accidental should be evaluated...the rules stated in the *Alden Mills* case appear to be applicable." *EEOC v. Southern Publishing Company, Inc.*, 705 F.Supp. 1213 (S.D. Miss. 1988), aff'd in part, 894 F.2d 785 (5th Cir. 1990) (decided **after** *Moulton*).[2]

Southern Publishing held "the injury to [the injured parties] was 'accidental' since the injury was the result of an external force, not of their choice or provocation." 705 F.Supp at 1217-1218. Because the injury was not of the "choice or provocation" of the injured party, the action which

[2] Accord *Zurich American Ins. Co. v. Goodwin*, 920 So.2d 427, ¶8 (Miss.,2006) ("Under Mississippi law, unless the policy specifically states that it is viewed from the perspective of the insured, ["accident"] will be viewed from the perspective of the *injured*." (emphasis in original)

gave rise to the injury constituted an "occurrence" under the subject policy of insurance. Clearly, there was no evidence that the injuries and damages complained of by Ms. Broom, such as the huge, waist deep ruts in her property, and the resulting loss of use of her property, were the result of the "choice or provocation" of Ms. Broom.

Womack v. Employers Mutual Liberty Company, 101 So.2d 107 (Miss. 1958) did not overrule *Alden Mills*, as alleged by Great River. *Womack* merely distinguished *Alden Mills* based on the facts of that case. In the course of making the distinction, this Court observed that Womack could have elected, but apparently chose not to, pay additional premiums for available coverage that would have "guaranteed the quality of his work". There was no such evidence before the Trial Court in the case at bar.

The only other case urged by Great River to have been applicable when it first denied Rea's claims in April, 2001 is *Allstate Ins. Co. v. Moulton*, 464 So.2d 507, 509 (Miss. 1985). *Moulton* is wholly distinguishable, because the policy at issue expressly defined "occurrence" as an "accident" "neither expected nor intended from the standpoint of the insured." *Moulton* at 508. This Court concluded, "by the [unequivocal] terms of the policy we are precluded from interpreting 'occurrence' or 'accident' from the standpoint of the injured party." *Id.* at 510.

United States Fidelity and Guarantee vs. Omni Bank, 812 So.2d 196 (Miss. 2002) was decided after Great River denied Rea's claims. Instead of focusing on whether the circumstance constituted an "accident" from the perspective of the injured party, as the Court did in *Alden Mills*, the *Omni Bank* Court focused on the perspective of the insured. However, *Omni Bank* did not overrule the holding of *Alden Mills* or *Southern Publishing*.

The existence of *Alden Mills* and *Southern Publishing* as standing law when Great River was considering Rea's request for a defense confirmed the *possibility* that a Mississippi Court may consider whether the property damage alleged by Broom was "accidental" from the standpoint of

Broom (the injured party), which *possibility* required Great River to defend Rea's. Great River's continued effort to argue why *Alden Mills* should not apply to *this* case merely confirms the bad faith nature of Great River's conduct. Great River had every opportunity defend Rea's under a reservation of rights, and to file a dec action (as advised by Cookston) to ask an appropriate court to find no coverage existed because, based on Great River's arguments, *Alden Mills* did not apply. Great River failed to do so, however, and it must be held accountable for the full measure of its bad faith duty to defend – including punitive damages.

3. Great River Would Have Been Required To Defend Rea's Even Absent *Alden Mills*

Even accepting Great River's position that you must consider "accident" from the standpoint of the insured to determine whether there was an "occurrence" under its policy, Broom's Complaint triggered a duty to defend. Great River's argument can be boiled down to a contention that "the chain of events leading to the injuries complained of were set in motion and followed a course consciously devised and controlled by Rea's without the unexpected intervention of any third person or extrinsic force." Such a contention fails for numerous reasons that were known to Great River one and/or both times it denied Rea's request for a defense.

As set out in detail, supra and in Rea's *Brief of the Appellee / Cross Appellant*, the evidence in the trial Record demonstrates Rea's did not have any contractual responsibilities to Broom, and Rea's did not intentionally perform any work on Broom's property. Rea's contract with LJC identified some specific borrow pits, but made no mention of Broom's property. **RE 60-64; R 393-97** Great River admits it had never seen a contract between Rea's and Broom, or even any contract with Rea's name on it, when it first denied Rea's claims, supra. Cookston admitted he did not believe that Wayne Rea, or any representatives of Rea's, had ever set foot on Broom's property. **R 2769; TE9, 8**

As to the LJC / Broom Contract, the Record demonstrates Rea's was neither party to nor

overseer of that contract. Additionally, Great River knew Broom contended the LJC contract was unenforceable, void, and "illegal". **TE13, 614-616** Clearly, Broom was not seeking damages for breach of alleged contractual duties under a contract she contended was unenforceable.

To the extent Broom was alleging property damage due to failure to comply with the requirements of the Kent / Broom contract (as argued by Great River throughout this litigation), it is clear that neither Rea's nor any of the individuals or entities working with Rea's on the highway project after Kent defaulted were bound by the terms of that contract. It is undisputed it was not one of the "bonded" contracts Rea's adopted in its contract with National Union. Even if Rea's were to be found to have intended to do some work on Broom's property, individually and/or through a subcontractor (none of which is demonstrated by the Record), Rea's could not possibly have expected to cause "damage" by failing to perform work in compliance with the Kent Contract.

It was also clear that numerous third parties, totally unrelated to Rea's, were driving across and doing work on Broom's property. It was thus impossible for Great River to reasonably conclude that "the chain of events leading to the injuries complained of were set in motion and followed a course consciously devised and controlled by Rea's without the unexpected intervention of any third person or extrinsic force." Since Broom's Complaint alleged property damage that was *potentially* "accidental" from the standpoint of Rea's, Great River had an absolute duty to defend. Great River knew it was possible a Mississippi Court would find such a duty. The Trial Court's Judgment should be reversed to the extent it refused to award punitive damages, and this matter should be remanded for the limited purpose of accessing an appropriate amount of punitive damages.

4. *Architex* Provides No Relief To Great River

Rea's fails to see how legal precedent that was not available to Great River when it chose not to defend Rea's is relevant to the question of whether Great River knew or should have known there was "any possibility" Broom's claims might give rise to coverage when it denied Rea's claim. If subsequent legal authority were to be considered in such a fashion, it seems there would *always* be a duty to defend – because the insurer would have to assume it was "possible" the Court might enunciate a new rule of law.

Even if this Court were to conclude that subsequent precedent is relevant, however, and accept Great River's argument (notwithstanding lack of supporting evidence in the Record) that Pitts worked on Broom's land as Rea's subcontractor, a duty to defend would have been triggered under *Architex*. See pp. 37-38 of Rea's *Brief of the Cross Appellant*. Again, Great River merely attempts to distinguish *Architex* (pg. 30), it fails to meet its burden of proving the application of an exclusion to coverage. Great River's continuing failure to acknowledge that the mere *possibility* of coverage triggered a duty to defend, and that any attempts to "distinguish" case law that demonstrates that possibility should be confined to a Dec Action while defending under a reservation of rights, highlights Great River's reckless disregard for Rea's rights.

5. None of the Exclusions Relied Upon By Great River Justified Denial Of A Defense

Notwithstanding Cookston's express advice, and Great River's admitted understanding that there was a basis for potential liability under the policy, Great River denied Rea's claim for a defense without conducting any outside investigation of the facts underlying Plaintiff's allegations, in direct violation of its own policies and procedures for investigating claims for coverage. (see *Brief of the Cross Appellant*, pp. 10-14). The facts are undisputed that Rea's provided Great River with proper notice of its claim, which then required Great River to

"investigate the true facts related to any alleged exclusion from coverage". See *Merchants Company*, 794 F.Supp. at 617, supra.

Commensurate with this duty to investigate is the principle that "the duty to defend is determined not only from the language of the complaint but also from independent facts of which the insurer is made aware or becomes aware which create a potential of liability." *Id.* (citations omitted). The exclusions cited by Great River all depend upon work being done by Rea's – yet Great River denied Rea's request when it had not seen any contract with Rea's name on it, and did not believe Rea's or any of its representatives had even set foot on Broom's property. Great River made no effort to investigate the facts related to the exclusions it cites. Great River's continued reliance on those exclusions at trial (and today), where the trial Record reveals no true facts to support them, highlights Great River's outrageous conduct, and the Trial Court's error in refusing to enter a judgment for punitive damages.

Cookston acknowledged in April 12, 2001 (first) opinion letter that Great River had the burden of proving the applicability of any policy exclusions as a bar to coverage. **TE7, 6** Indeed,

> Mississippi's law recognizes the general rule that provisions of an insurance contract are construed strongly against the drafter. Consistent with this principle, insuring clauses are construed broadly to effect coverage, and exclusionary clauses that restrict coverage are construed narrowly against the insurer. So, to benefit from an exclusionary provision in an insurance contract, the insurer must show that the exclusion applies and that it is not subject to any other reasonable interpretation that would afford coverage. The Court must strive to give effect to the parties' intention, as expressed by the plain language of the policy, but where there are two or more reasonable interpretations of a clause, the court will adopt the interpretation that provides coverage. Moreover, any doubt as to the existence of a defense obligation is likewise resolved in favor of the insured.

Liberty Mutual Fir Ins. Co. vs. Canal Ins. Co., 177 F.3d 326, 331 (5th Cir. 1999).

In his first letter, Cookston only addressed the possible applicability of the "contractual liability exclusion"; the "business risk exclusion"; the "your work exclusion"; and the "impaired

property exclusion". Even Cookston's "no-investigation" analysis of each of these exclusions suggested a possibility of coverage under the subject policy – thus triggering the duty to defend.

1. After analyzing the "contractual liability conclusion", Cookston advised "it appears the exclusion is **inapplicable** under the facts presented" **TE2, 6-7**

2. Discussing Section j(5) of the "business risk exclusion", Cookston advised "arguments exist that such damage arose out of 'that particular part of real property on which you or any of your contractors or subcontractors working directly or indirectly on your behalf are performing operations . . ." **TE2, 8** Cookston's acknowledgment that "arguments exist" the exclusion may apply necessarily conceded arguments also existed the exclusion would not apply, indicating the "potential for coverage" and triggering a defense. Had Great River conducted the requisite investigation of the true facts, it would have also discovered Rea's was not performing any work or operations on Broom's property; and that the damages alleged by Broom in her Complaint (which included "any costs associated with restoring and reclaiming the property") included damage for loss of use of surrounding property due to inability to harvest hay because of huge ruts in land. Exclusion j(5) would not be applicable in light of these facts.

3. Discussing Section j(6) of the "business risk exclusions", Cookston advised it "applies to exclude coverage for that particular part of your work that must be repaired due to defective workmanship." Of course, Rea's had no contract with and had done no work on Broom's property, and certainly had done no work that was defective because it did not comply with the requirements of a contract. Cookston acknowledged the policy set forth an exception to this exclusion. He advised that since Great River did not know whether Broom's alleged damages had been fixed so she could put her property to its intended use (how could it since no investigation had been performed), "to the extent Plaintiff's property has been put to its intended use, arguments exist that . . . an exception to exclusion j(6) precludes application of this

exclusion as a basis to deny coverage." **TE7, 8-9** Based on what was "known" to Great River, this exclusion formed no basis to deny coverage.

4. Discussing the "your work exclusion", Cookston acknowledged the exclusion would not apply to damage to other property (than the actual site of "your work") caused by the insured's allegedly defective work. **TE7, 9-10** Broom's prayer (in her Complaint) for damages including "any costs associated with restoring and reclaiming the property" did not specify whether she was seeking damages only to the property that was the site of the Defendant's work, or whether she was seeking compensation for damages to other parts of her property. Had Great River conducted the requisite investigation, it would have learned Broom was seeking damages for loss of use of other property than just the excavation site (ruts prevented harvest of hay); and this exclusion would have been inapplicable *even if* the pits were determined to be consequences of Rea's "work". Of course there was no evidence of that. Even without investigation, however, the allegations in Broom's Complaint indicated the possibility of coverage (since her allegations of property damage were not limited to the site of any work), thus the exclusion was not a valid basis to refuse a defense.

This exclusion, Section I(A)(2)(l), also provided it "does **not apply** if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." Great River had never seen any contract with Rea's name on it, and had no knowledge that Rea's, or any of its representatives, had even set foot on Broom's property when it denied Rea's claim. There were multiple defendants sued, some of whom may, or may not have been, Rea's subcontractors. The facts available to Great River prohibited use of this exclusion to deny a defense.

5. Discussing the "impaired property" exclusion, the last exclusion referenced by Cookston in his April 12 correspondence, Cookston advised it would "*arguably* apply under the facts at

issue." **TE7, 9-10** This conceded that it likewise "arguably" would not apply. Great River had no basis to deny coverage in reliance on this exclusion.

Cookston's September, 2002 opinion letter was more of the same. Cookston admits that at the time he wrote his September, 2002 opinion letter he had not seen a Mississippi Supreme Court case apply to CGL exclusions like Exclusions "j(5)", "j(6)" or "m" in the policy. **RE 117-18; TE9, 24-25** Cookston again advised "arguments exist" any property damage shown by Broom would be excluded by Exclusion j(5). As to Exclusion J(6), Cookston confirmed "arguments exist [one of the exceptions to the exclusion] precludes application of this exclusion as a basis to deny coverage [to Rea's]." **RE 78-79; TE5, 30-31** Cookston ultimately concluded "arguments exist" exclusion "m" may operate to preclude coverage. **RE 81; TE5, 33** Each of these conclusions confirmed the possibility of coverage (arguments likewise existed the exclusions would not apply).

More importantly, Cookston's opinions that the exclusions arguably might apply were premised on the unreasonable conclusion that Rea's had performed some work on Broom's land for which it had a duty to conform to the terms of some (admittedly unknown) contract. Cookston admitted he had no reason to believe Rea's or any of its representatives had even set foot on Broom's property, supra.

Additionally, Broom sued multiple defendants. She admitted she simply sued them all because "somebody must be responsible", and that she did not even know the identity of everyone who was driving over her land and causing ruts. Indeed, multiple entities who had no conceivable connection to Rea, including Tanner, Bishop and MDOT, were also traversing and doing work on Broom's property, supra. Broom's Complaint did not specify what damage to her property was done by each specific entity that may have been doing work there. She simply sought all damages from all Defendants. There was a clear "possibility" that the complained of

damages were caused by work done by entities who had absolutely no relation to Rea's. Such damages could not have been set in motion, expected, or intended by Rea's. Such damages could not have formed the basis for any of the exclusions cited by Great River, which each depended on work performed by Rea's.

Great River is not allowed, on appeal, to argue new facts or interpretations (other than those it considered when it denied Rea's request for a defense) in support of an exclusion to coverage. An insurer that unjustifiably breaches a duty to defend is precluded from relying on policy provisions that deny coverage. *Jones v. Southern Marine & Aviation Underwriters, Inc.*, 888 F.2d 358, 362 (5th Cir. 1989). Notwithstanding the general principal that estoppel cannot be utilized to expand coverage,

> [w]hen the alleged misconduct of the insurer concerns the duty to defend, the insurer may be held liable despite an exclusion otherwise applicable.

Twin City Fire Ins. Co. vs. City of Madison, Mississippi, 309 F.3d 901, 906 (5th Cir. 2002).

Great River was required to affirmatively prove the existence of any exclusion to coverage, not merely assert it "arguably" applied, in order to refuse Rea's request for a defense, and to resolve *any doubt* about the existence of a defense obligation in favor of a defense. *Liberty Mutual Fir Ins. Co.*, supra. It failed to do so. While Great River may have ultimately avoided indemnity for these damages after developing the facts while defending under a reservation of rights, it had an absolute duty to defend its insured against Broom's Complaint. The Trial Court committed error by failing to enter a Judgment for punitive damages in light of Great River's complete disregard for Rea's rights.

D. The Trial Court Erred in Not Awarding Rea's the Full Amount of Its Damages

Great River's response to Rea's Cross Appeal offers no new argument in response to Rea's contention that the Trial Court erred by failing to award Rea's $13,333 of undisputed expenses **(TE18)**, over and above attorneys' fees and the cost of settlement, incurred by Rea's in

responding to Broom's lawsuit. As previously noted, the *Steele* case cited by Great River is inapplicable. (*Brief of the Cross Appellant,* pg. 48). Great River's argument that these expenses are not recoverable merely because they were the result of activities requested by Great River is nonsensical. Obviously, Great River did not request Rea's to do anything (other than provide its own defense) when it denied Rea's claim. Great River cannot avoid its obligation to pay these covered expenses merely because it breached its duty to defend.

Rea's was clearly entitled to an award of attorneys' fees. Such award was necessary to put Rea's "in the position where [it] would have been but for [Great River's] breach." *Veasley,* 610 So.2d at 295 An award of attorneys' fees and expenses was also appropriate due to Great River's bad faith conduct and reckless disregard for Rea's rights. Great River *knew* there was a potential basis for coverage, yet denied Rea's defense anyway. **RE 142, 149, 119, 153; TE10, 45, 56, 66; TE9, 26** Great River was the only CGL carrier that did not defend its insured against Broom's Complaint. **RE 348; T 153** It was foreseeable to Great River that Rea's would hire counsel, and incur attorneys' fees and expenses, to enforce its contractual rights.

At trial, Rea's presented un-refuted evidence that the actual expenses owed to its attorneys' for prosecuting its claim against Great River, over and above attorneys' fees, totaled $19,817.41. **RE 306-10** Great River "acknowledged the authenticity and reasonableness of the costs and expenses submitted by [Rea's]." **RE 312-13** The Trial Court's random reduction of recoverable expenses to $10,000 under these circumstances was arbitrary and capricious. Rea's should be awarded the full amount of its incurred fees and expenses.

CONCLUSION

Rea's asks this Court to reverse and render the Trial Court on the limited issue of the amount of damages due Rea's, and mandate Rea's be awarded the full amount of un-refuted, incurred damages proven at trial, and that the Appellants / Cross Appellees pay Rea's a total judgment in

the amount of **$208,599.67** ($61,511.47 in attorneys' fees paid to Andy Kilpatrick for defending Rea's against Broom's lawsuit + $60,000 paid to settle Broom's claim + $13,333 additional expenses and loss of earnings for Wayne Rea having to participate in defense of Broom's claim + $53,937.79 in attorneys' fees [40% of damages] for having to go to trial to enforce contractual rights + $19,817.41 actual litigation expenses, over and above attorneys' fees, through trial); plus pre- and post-judgment interest from and after March 6, 2003 in the amount of 6% per annum.

Rea's further prays that this Court reverse the Trial Court's denial of punitive damages, and remand this matter to the Trial Court on the limited issue of the amount of punitive damages that should be assessed against the Appellants / Cross Appellees for their conduct in relation to their bad faith denial of Rea's request for a defense and reckless disregard for Rea's rights.

Respectfully submitted this the 24th day of January, 2013.

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CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of the Cross Appellant to the following:

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