

2nd Civil No.
B106120

IN THE
COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

RODERICK TAYLOR and KRISTA TAYLOR,
Real Parties in Interest.

HONORABLE CHARLES W. McCOY, JR., JUDGE
SUPERIOR COURT OF LOS ANGELES COUNTY
L.A.S.C. No. BC 119992

**AMICUS CURIAE BRIEF OF THUR & O'SULLIVAN,
P.C. IN SUPPORT OF REAL PARTIES IN INTEREST
RODERICK AND KRISTA TAYLOR
[California Rules of Court, Rule 14; Application for
Permission to File Amicus Curiae Brief and Appendix of
Exhibits Filed Concurrently]**

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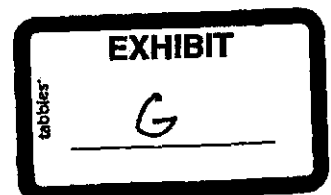


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Real Parties in Interest.

Appeal From Order of Los Angeles Superior Court,
Case No. BCI19992, Honorable Charles McCoy, Judge Presiding

THUR & O'SULLIVAN, P.C.
AMICUS CURIAE BRIEF IN SUPPORT OF
REAL PARTIES IN INTEREST RODERICK TAYLOR
AND KRISTA TAYLOR

I. INTRODUCTION.

This is a somewhat unorthodox amicus brief filed in an unusual situation. Because the factual record in this case has been sealed, Amici are not aware of the specific allegations and evidence involved in this case. What was significant to undersigned Amici, however, was the information that the dispute before this

Court involves yet another attempt in a long history of attempts by State Farm to obstruct discovery and suppress information or documents which reveal State Farm's corporate strategy and practice of depriving insureds and other legitimate claimants of policy benefits due and owing. Thur & O'Sullivan, P.C. is very familiar with State Farm's evidence suppression tactics, having litigated many insurance bad faith claims against State Farm over the past 15 years, a number of which are reflected in the Arizona appellate record. [See *Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 838 P.2d 1265 (1992); *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 758 P.2d 1313 (Ariz. 1988); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134 (1993), *Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 913 P.2d 1092 (1996).]

While this Amicus Brief can obviously not address the specific evidentiary issue in question since that information is sealed, this brief is filed in order to put the dispute, and in particular State Farm's efforts to suppress evidence in this matter, in a meaningful context. In any dispute involving discovery of evidence or privilege, our judicial system is left to rely, at least to some degree, on the good faith of the parties. Avowals, affidavits, and arguments by counsel set the stage on which the court must make hard decisions on close issues in hopes of seeing the law followed and justice served. In weighing such avowals and arguments from State Farm, it is crucial for this Court to be aware that State Farm's attempt to silence damaging evidence against the company is not an isolated event or a rare occurrence, but is instead part of a concerted, corporate strategy to avoid, at any

cost, damaging evidence against the insurer from ever seeing the light of day. It is part of a practice of State Farm and its attorneys which is, little by little, being recognized by courts throughout the nation.

State Farm has a practice of intimidating, harassing, and stonewalling policyholders and their attorneys who file actions against it. State Farm's purpose in suppressing and destroying evidence is to wear Plaintiff down and to increase the cost of litigation. Defendant's obstruction comports with its philosophy and practices taught to claims management:

And we keep plaintiffs tied up in law [and] motion for months. Now it's the old mad dog defense tactic, but it works.

(Appendix 1, Excerpt from State Farm's 1986 Division Claim Superintendent's Conference, Tape 6, "Trial Preparation Seminar.") In over a decade of bad faith litigation with State Farm and its defense counsel, Plaintiff's counsel's experience is that State Farm takes the "mad dog defense" strategy very seriously. Unfortunately, because many judges are reluctant to impose meaningful sanctions, State Farm's strategy frequently pays off.

A State Farm publication entitled Extra Contractual Damage Claims -- What They Are, And How To Handle Them - contains a section which explains a practice of using its attorneys to intimidate insureds who sue State Farm. It explains:

EXAMINATION UNDER OATH

IN THE GREAT MAJORITY OF THESE CASES, YOU WILL WANT TO EXAMINE THE INSURED UNDER OATH, . . . THIS HAS A TREMENDOUS PSYCHOLOGICAL IMPACT ON THE INSURED. THE MORE QUESTIONS YOU CAN ASK THAT

INDICATE YOU KNOW THINGS THE INSURED DOESN'T EXPECT YOU TO KNOW, THE MORE DOUBT THERE IS IN HIS MIND ABOUT JUST HOW MUCH WE DO KNOW. IF YOU CREATE ENOUGH DOUBT, IT MAY RESULT IN THE CLAIM BEING DROPPED, OR IT MAY RESULT IN A COMPROMISE SETTLEMENT; BUT IF IT DOES GO TO TRIAL, IT WILL ALMOST SURELY MAKE THE INSURED A POORER WITNESSES THAN HE OTHERWISE WOULD BE.

(Capitalization in original.) (Appendix 2, Extra Contractual Damage Claims -- What They Are, And How To Handle Them)

Some courts have recognized the litigation abuse by State Farm and its attorneys and have imposed sanctions. For example, in *Campbell v. State Farm Mut. Auto. Ins. Co.*, Third District Court of Salt Lake County, State of Utah, Cause No. 890905231, State Farm was sanctioned by a court order dated March 7, 1996, as follows:

In awarding this sanction, the court finds that the actions of Jon Kodani, James R. Robie, Stephen M. Hayes, and State Farm at the time of the deposition of Jon Kodani, were outrageous, contemptible, and with an absence of professionalism. Attorney James R. Robie repeatedly instructed the witness not to answer based on the most specious possible pretexts. The court specifically finds that the inappropriate actions of these three individuals were taken to further the interests of State Farm. At the time of the deposition, State Farm had the right to control the positions taken by said three individuals who are attorneys retained on a routine basis to represent State Farm and State Farm is responsible for their actions.

(Appendix 3, *Campbell* Court Order, March 7, 1996, at page 12-13)

(Emphasis added.)

In *Singh v. State Farm Mut. Auto. Ins. Co.*, Los Angeles Superior Court No. C743282, State Farm attorney, Jon Kodani, was held in contempt of court for removing State Farm documents from the courtroom during trial after those documents had been brought to Court pursuant to a Court Order. After removing them, he refused to return them on orders from State Farm. (Appendix 4, *Singh* Trial Transcript dated June 16, 1993, at 4209-4216, and June 21, 1993, at 4523-4525, 4564-4566.)

The question may arise as to why State Farm attorneys do the bidding of State Farm, even when it violates court rules, court orders, or subjects them to contempt of court. The answer is — MONEY. State Farm attorneys involved in these practices are paid millions of dollars each year. In the *Singh* case, for example, it was brought out that attorney Jon Kodani had been paid some \$16 Million in the previous eight years. Mr. Kodani was asked:

Q. * * * The question, sir, is, you know, did they comply with the subpoena or didn't they? Did they deep six the documents? Did they put them in the company shredder or not? And I'm just asking — starting with the easiest one first. Let's check it out.

Will you see -- bearing in mind you're the company's lawyer; you've been paid 16 Million; you have ultimately loyalty. You stipulated, I think, that you're biased; that you've got a motive to testify in their favor. Remember that?

A. Yes sir.

(Appendix 5, *Singh* Transcript, June 24, 1993, at 4991; see also at 4980)

In order to provide this Court with evidence of State Farm's tactics, and in order to put the present dispute in context, Amici will present specific instances of suppression and stonewalling by State Farm and its attorneys from several Arizona cases, (documented in the Appendix submitted herewith). This Brief will then discuss recognition by courts in other jurisdictions of State Farm's systematic pattern of misconduct and dishonesty in the suppression of damaging evidence.

II. THERE IS A PATTERN OF ABUSIVE DISCOVERY AND LITIGATION PRACTICES BY STATE FARM AND ITS ATTORNEYS.

A. *Evidence of Document Destruction and Suppression in State Farm Cases Handled By Amici.*

1. Schrader v. State Farm, Arizona Superior Court, Maricopa County, Cause No. CV 91-23590.

a) *State Farm Withheld Two Of The Most Important Documents In The Schrader Claims File*

In *Schrader v. State Farm*, a case involving the insurer's refusal to offer its injured policyholder reasonable benefits anytime before forcing the case to arbitration, State Farm intentionally removed critical documents from the claim file. In 1991, Plaintiff requested that State Farm produce various items including State Farm's claims file. State Farm responded on April 9, 1992 and objected to virtually everything, but claimed that it was producing its claims file. (Appendix 6, Exhibit A to Plaintiff's Supplemental Evidence to Plaintiff's Response filed August 9, 1996.in *Schrader v. State Farm*)

State Farm represented it was producing a complete claim file when in fact two of the most important documents had been removed. On April 30, 1992, Plaintiff's counsel wrote State Farm's attorney, Ralph Hunsaker, and advised him that documents appeared to be missing from the claims file. (Appendix 7, Plaintiff's Motion for Sanctions and to Compel Disclosure filed September 11, 1992, in *Schrader* at 4-5)

On May 7, 1992, defense counsel responded by letter claiming that "the only documents that are withheld are the billings by attorneys," and asked plaintiff's counsel to specify which other documents were missing from the production. *Id.* Plaintiff was able to identify one of the missing documents - a Progress Report with a report number missing from the sequence of other numbered reports in the file. On May 29, 1992, defense counsel provided that document, but claimed that no others existed from the claim file. *Id.*

During the deposition of State Farm claims representative Lisa O'Brien, it was discovered that she had made an evaluation of the claim and recommended to State Farm management a settlement of \$60,000 to \$75,000 (well above the \$35,000 State Farm was offering). *Id.* She said she had written a memo to her claims superintendent on the subject. That memo was not in the claim file that State Farm had produced. *Id.* Plaintiff's counsel asked Ms. O'Brien when she had last seen the memo and she replied it had been the day before the deposition while she was at State Farm's attorneys' office. Plaintiff then requested that the memo be produced, and State Farm's attorney, Ralph

Hunsaker, removed it from his file and produced it, after quickly marking off something that had been written at the bottom of the document. *Id.*

The O'Brien memo and Progress Report No. 4 are two of the most important documents in the claim file. The progress report acknowledges a value for the claim of up to \$60,000, and O'Brien's memo to Wortley recommends settlement for \$60,000 to \$75,000. *Id.* The maximum amount ever offered by State Farm to its insured on this UIM claim was \$35,000. *Id.* The insured was forced to go through arbitration where the three arbitrators awarded \$125,000, before State Farm paid the policy limits of \$100,000 to its insured.

When the suppression of evidence was called to the Court's attention in 1992, State Farm took the position that the fact that the two most important documents in the claims file just happened to be missing is "at worst simply an error by counsel, an error which has been corrected." (Appendix 8, Defendant's Response To Plaintiff's Further Briefing Per Court Order Re: Relevance Of State Farm's Intentional Document Destruction (To Contradict State Farm's Defense Of Mistaken Destruction In Present Case) filed May 13, 1996, in *Schrader* at page 5, *Ins.* 17-18) This is the same excuse of "error" and "mistake" that State Farm uses every time it has been caught concealing or suppressing key evidence.

State Farm later argued that Plaintiff's counsel must have lost the documents from the claims file after production. State Farm filed a motion seeking permission from the Court to take the deposition of plaintiff's attorney,

Calvin Thur, and his legal assistant, and stated its reason for wanting to depose them, as follows:

Plaintiff argued that State Farm withheld critical evidence from the file in an effort to cover up its claims handling practices. Judge Gottsfeld permitted Plaintiff's counsel to raise this evidence at trial.

If this type of evidence is allowed to come before the jury, State Farm submits that it is entitled to depose Mr. Thur and any member of his staff in the chain of custody of the claim file after State Farm produced it.

(Appendix 9, State Farm's Motion for Leave to Depose, dated July 17, 1996, in *Schrader*, page 5.)

Shortly thereafter, Plaintiff's counsel found in State Farm's original Response to Request for Production a production list ("list") which defense counsel actually included with its initial production of the claims file. (Appendix 10, List produced with defendant's production.) The list makes clear State Farm's attorneys never produced the documents in question and apparently never intended to.

Thereafter, Plaintiff requested that State Farm verify whether or not the discovered list was in fact defense counsel's list of claim file documents produced. Plaintiff's supplemental filing on August 9, 1996, stated:

If defense counsel acknowledges under oath that the attached list was produced along with its production of State Farm's claim file, that should put an end to defendant's contentions and accusations that it was plaintiff's counsel's office that was responsible for the documents missing from State Farm's claim file production.

(Appendix 11, Plaintiff's Motion To Require State Farm To Authenticate Its Attorneys' List Of Documents Produced Which Shows Suppression Of Evidence filed August 9, 1996 in *Schrader v. State Farm* .)

State Farm refused to even address the list. (Appendix 12, State Farm's Response, filed September 4, 1996) Only after two court hearings and the threat of continuing sanctions of \$500/per day did State Farm's attorney admit they had authored the list. (Appendix 13, State Farm's Memorandum to the Court dated January 24, 1997) State Farm has now taken the position that the list is work product and should be suppressed by the Court. (Appendix 14, Defendant's Motion *in Limine* Re Production List.)

b) State Farm Suppressed Carl Wortley's UM/UIM Case List

The trial judge in *Schrader* has ruled that State Farm will have sanctions assessed against it (and/or its attorneys) for its failure to provide, and subsequent lies about the existence of a list at State Farm of UM/UIM cases. In a minute entry dated January 26, 1996, Judge Gottsfield ordered:

The Court specifically orders that the computer list which the Court has inspected in camera consisting of nine pages and ending with the case "Gardner" be produced in its entirety to Plaintiff by February 15, 1996, as should the other material ordered by the Court this date. The Court denies relief sought striking State Farm's Answer but will assess monetary sanctions either against Defendant, its counsel, or both, which will depend on a further hearing.

(Appendix 15, Minute Entry January 26, 1996 in *Schrader*.) The sanction resulted from State Farm's persistent misrepresentations to plaintiff and the Court about the existence of such evidence.

On December 2, 1994, Plaintiff specifically requested that State Farm produce:

Each alphabetical listing and index of U and UM Appellate and Supreme Court cases available to State Farm personnel from the time such lists and indexes were started to present.

(Appendix 16, Plaintiff's Motion for Sanctions and To Compel filed in *Schrader* on November 6, 1995, at page 5)

On January 12, 1995, Defendant State Farm responded as follows:

Defendant does not maintain an alphabetical listing or index of cases. Carl Wortley maintained his own list of cases as he indicated in his PP&Rs. Defendant does not have a copy of Carl Wortley's prior alphabetical listing of Medical, U and UM Appellate and Supreme court cases.

(Id.) [Emphasis added].

Mr. Wortley was the Claim Superintendent on Mark Schrader's UIM claim, and is also the person responsible for providing the documents on requests for production in the case. Mr. Wortley is also the person at State Farm who inserted the training goals in the PP&Rs with regard to reviewing the listing and index of cases.

On January 27, 1995, Plaintiff again requested that State Farm produce Mr. Wortley's list of cases since "we knew the list and/or index of cases was

made available for training of State Farm personnel" -- reference being made to one of State Farm's own PP&Rs which identified the list. (*Id.* at page 6)

On February 3, 1995, Defendant State Farm responded as follows:

With respect to the alphabetical listing and index of UM and UIM Appellate and Supreme Court cases, as well as the case law for medical, UM and UIM cases, State Farm does not maintain these materials. They were referenced in a PP&R by Carl Wortley at some point in time. However, Mr. Wortley no longer has the listings as referenced in the PP&Rs.

(*Id.*) [Emphasis added.]

On October 26, 1995, Carl Wortley's deposition was taken. Wortley confirmed that the lists existed at State Farm:

Q. Describe for me the index that you kept for the Medical, U, and UIM cases.

A. The index related to the subject matter of the case.

* * * *

Q. And you've been handling Uninsured and Underinsured Motorist claims in your unit continuously from 1987 up to the present time?

A. Yes.

Q. Where do you keep that summary of cases at the present time?

A. I have it at my desk.

* * * *

Q. Do you have the index and the alphabetical listing in your desk also?

A. Yes.

(*Id.* at pages 6-7) [Emphasis added.]

c) *State Farm Attempted To Cover Up Mr. Wortley's Inconsistent Deposition Testimony Regarding Basic Claim Course I In Schrader*

Mr. Wortley initially stated in his deposition that he never has taken or seen State Farm's "Basic Claims Course I." (Appendix 16, Plaintiff's Motion for Sanctions and To Compel in *Schrader*, at page 11) State Farm's Basic Claims Course I states that the company's goal is to have the most profitable claims handling operation in the industry, and generally stresses to claims representatives the importance of achieving profit goals while handling claims. (Id.)

When State Farm was ordered to produce the PP&Rs of the claims personnel who worked on the Schrader claim it was discovered that Basic Claim Course I was required reading by claims representative Shelly Anderson. (Id.) Sure enough, the person who required that she review the course was Mr. Wortley himself. (Id. at 12) That apparent discrepancy was one of the reasons the Court permitted Plaintiff to again take the deposition of Mr. Wortley, a deposition that State Farm desperately tried to block with motions and a special action. When confronted with the PP&R, he now testified regarding Basic Claim Course I as follows:

Q. How was she to complete that Basic Claim Course? In other words, was that to be completed in your office, or would she have to go to corporate offices in Bloomington, or is it something she could do like on a home study program? How would she do that?

A. If I remember correctly, it was one which she completed at her desk.

Q. In other words, there was like a manual or training materials that would be made available to her?

A. Yes.

Q. And would you be the one who made that available to her?

A. Yes, I -- yes.

Q. So everybody in your unit, if you wanted them to complete Basic Claim Course I, you would give them that manual or that training material and then they would basically, when they had time available, complete the course?

A. Yes.

(*Id.* at page 12)

2. Zilisch v. State Farm, Superior Court of Arizona, Maricopa County Cause No. CV 93-05652.

State Farm has frequently engaged in gamesmanship by filing frivolous and dishonest pleadings to harass or intimidate opposing counsel: In *Zilisch v. State Farm*, State Farm filed a motion on the eve of trial to exclude numerous State Farm documents obtained from the *Singh v. State Farm* case out of California by falsely claiming that the documents were under a protective order in *Singh*. It did not attach a copy of the alleged order to its motion. (Appendix 17, State Farm's Motion in Limine Re All Documents Obtained From Singh filed January 10, 1996 in *Zilisch v. State Farm*.)

Fortunately Plaintiff's counsel was able to locate the order which was just the opposite of what State Farm had represented in its motion. Responding to the dishonest motion and providing a copy of the California court order for the court here in Arizona was time-consuming and interfered with Plaintiff's counsel's preparation for trial.

When the misrepresentation was shown by providing the court with the order which had been in State Farm's possession for over two years, Defendant withdrew its motion, but was still sanctioned. (Appendix 18, Plaintiff's Response to Defendant's Motion *in Limine* Re All Documents Obtained From Singh -And- Plaintiff's Motion for Sanctions for Defendant Knowingly Misrepresenting a Court Order From Another Court and for Unfounded Personal Attacks on Plaintiff's Counsel, filed January 16, 1996, in *Zilisch*; Appendix 19, State Farm's Withdrawal of Its Motion in *Limine* Re All Documents Obtained From Singh and State Farm's Response to Plaintiff's Motion for Sanctions, filed January 18, 1996 in *Zilisch*; Appendix 20, Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Sanctions (Re Defendant's Unsubstantiated Motion in *Limine*, False Accusations and Unfounded Attacks on Counsel, filed January 23, 1996 in *Zilisch*; and Appendix 21, Minute Entry Order of January 24, 1996 in *Zilisch*.) Once again, State Farm's attorneys argued that the misrepresentation to the Court was simply a mistake.

3. Miller v. State Farm, Superior Court of Arizona, Maricopa County Cause No. CV 93-23576.

In *Miller v. State Farm*, the trial court addressed another instance of State Farm falsely claiming that certain discovery did not exist. Judge Araneta stated on the record in *Miller v. State Farm*, as follows:

And the history of the case, among other things, involves State Farm saying that this class, as previously identified, included upwards of 40,000 or more claims. It involves State Farm saying that certain discovery didn't exist. And when I told Mr. Hunsaker to provide

an affidavit from a knowledgeable representative of State Farm to that effect, no such affidavit was presented because State Farm has in fact identified and discovered that the requested items sought by Plaintiffs did in fact exist. So we can go down that road.

(Appendix 22, Transcript of May 31, 1995 in *Miller v. State Farm* at page 10.)

The *Miller* excerpt quoted above illustrates State Farm's common practice of initially claiming that a document "does not exist," and only when faced with a court order does State Farm come forward with the document. It is difficult to argue that this is not outright suppression of evidence.

In addition, there is direct evidence in *Miller* of misuse of the claim of attorney-client privilege. On March 6, 1995, plaintiffs submitted a Request for Production for all memos from the Policy Forms Unit and, specifically, Everett Truttmann, relative to policy language changes at issue in the *Miller* lawsuit. (Appendix 23, Fourth Motion to Compel, filed August 9, 1995, in *Miller v. State Farm*.)

State Farm produced memos without objection on May 17, 1995. Based on information gleaned in an earlier deposition of Mr. Truttmann, however, it was clear to plaintiffs at least one memo was missing. Only after repeated inquiry by plaintiffs verbally and in a letter dated June 14, 1995, did State Farm's lawyers admit that at least six memos had been withheld, allegedly on the basis of attorney-client privilege. (*Id.*) Clearly, State Farm had attempted earlier to mislead plaintiffs into thinking there were no more memos since State Farm responded to the request for production without any objection or

indication that it was asserting privilege and withholding documents. Eventually, State Farm was required to produce all but one of the improperly withheld memos.

Earlier in the case, State Farm attempted to block three depositions of company personnel by asserting the attorney-client privilege on the eve of their depositions. After argument, the trial court ordered the depositions to proceed and awarded attorney's fees as a sanction against State Farm for wrongfully asserting the privilege, by painting "with much too broad a brush." (Appendix 24, Minute Entry Order of February 6, 1995, in *Miller v. State Farm*)

4. **Taylor v. State Farm, Arizona Superior Court, Maricopa County Cause No. C-550146.**

In the case of *Taylor v. State Farm*, State Farm refused to produce manuals or guidelines on excess liability. Plaintiff's counsel obtained various State Farm documents on that subject from a California attorney, including State Farm's "Excess Liability Handbook" which on its cover had the name "R.E. Aaberg, Vice President - Claims." That document contains instructions to State Farm's defense lawyers to suppress or conceal evidence which would be detrimental to State Farm in excess liability cases.

Section 5 of that handbook entitled "Attorney's File Review and Opinion" provides that as to the "contents of file review and opinion" that there should be "estimate as to the amount of verdict if plaintiff wins, (not in writing if policy limits are involved)" [[bold emphasis in original; underlining added], and that "opinion as to settlement value (not in writing if possible limits could be

involved)" [bold emphasis in original; underlining added]. (Appendix 25, General Claims Studies and Recommendations, Number 3, Excess Liability Handbook, by R. E. Aaberg, Vice President-Claims, December 1972, Attachment "Excess Liability and the Conflict of Interests Problem That Confronts the Defense Counsel, by Ross G. Hume, Senior Claim Counsel, State Farm, August 17, 1972, Part V at page 12.)

In Mr. Aaberg's deposition taken January 15, 1987 in the *Taylor* case, he disclaimed any knowledge of the handbook and even claimed to not recall ever seeing it before, although his name appeared on the cover. He even refused to agree that the book had ever been published by State Farm. (Appendix 26, Deposition of R. E. Aaberg taken January 15, 1987, in *Taylor v. State Farm*, at 10-23.)

After the 1987 deposition of Mr. Aaberg and plaintiff's use of that Excess Liability Handbook in the *Taylor* case, State Farm continued in other cases to deny the existence of the handbook. On January 14, 1991, State Farm responded to a request to produce in federal court in Tucson, Arizona in the *Trujillo v. State Farm* case as follows:

Comes now the defendant [State Farm] by and through its attorneys . . . and makes the following response to plaintiff's request for production of documents dated the 30th day of November, 1990:

[State Farm's Response] 1. The State Farm Excess Liability Handbook. Does not exist.

(Appendix 27, State Farm's Response to Production in *Trujillo v. State Farm Mut. Auto. Ins. Co.*, No. CIV-89-0663-TUC-ACM (D.Ariz.), dated January 14, 1991.)

In the *Singh* case in California, however, State Farm was requested to produce that same handbook and did produce it because State Farm knew that plaintiff's counsel in *Singh* was aware of that handbook. Thus, *Trujillo* joins *Taylor* as yet another demonstration of State Farm's willful suppression of evidence to the point of false testimony in the courts of this state.

B. STATE FARM'S PATTERN OF DESTRUCTION AND SUPPRESSION OF EVIDENCE IN OTHER CASES CONTRADICTS STATE FARM'S INNOCENT EXCUSE OF "ERROR" AND "MISTAKE"

1. *Holmgren v. State Farm*, 976 F.2d 573 (9th Cir. 1992)

In *Holmgren*, the Ninth Circuit Court of Appeals affirmed sanctions against State Farm for engaging in discovery abuses. State Farm failed to reasonably respond to simple requests to admit, choosing instead to give answers that were either false or highly misleading. The court held that "State Farm brought these sanctions upon itself by treating discovery as a game instead of a serious matter." *Id.* at 579. Furthermore, the court additionally sanctioned State Farm for bringing a "frivolous appeal." *Id.* at 581.

2. *State Farm v. Schlossberg*, 570 A.2d 328 (1990)

In this bad faith suit, Schlossberg issued a subpoena duces tecum in an attempt to get certain discoverable documents from State Farm. State Farm resisted Schlossberg's attempt at discovery by filing a protective order. At the

hearing on the protective order, the judge ordered State Farm to comply with Schlossberg's discovery requests.

State Farm did not comply with the court's order and produced only a small portion of what the discovery request called for. Schlossberg then sought sanctions against State Farm by filing a motion to compel, motion for sanctions, and motion for default. The court found a "wholesale failure to comply with discovery" in the case and conditionally granted Schlossberg's motion for default but allowed State Farm additional time to produce appropriate documents and witnesses for discovery.

State Farm produced its Vice President of Claims, Robert Mecherle, for deposition, but then instructed him not to answer over thirty questions. As a result of State Farm's obstructionist tactics, the trial judge refused to strike the default. The court of appeals held that State Farm's reprehensible conduct in discovery justified granting the default. Again, State Farm clearly attempted to abuse the discovery process and suppress the truth about State Farm practices and procedures for handling claims.

3. Campbell v. State Farm, County of Salt Lake, State of Utah, Civil No. 890905231

Campbell is a third-party bad faith case arising out of State Farm's refusal to settle a policy limits claim. State Farm's claims representative in the case testified that State Farm instructed him to alter and destroy his claims reports so that they would not contain information harmful to State Farm's position. See, *Campbell v. State Farm*, 840 P.2d 130 (Utah App. 1992).

During discovery in the bad faith case, plaintiffs asked that State Farm produce certain documents and authenticate others - all relating to State Farm claim handling practices and philosophies. When State Farm refused, plaintiffs deposed State Farm lawyer Jon Kodani from Los Angeles.

Kodani has an on-going employment relationship with State Farm in connection with the storage, bar-coding, organization, and production of State Farm internal documents:

In the past, the Law Offices of Jon A. Kodani has also been hired by State Farm Mutual Automobile Insurance Company in a few cases to assist in preparing extremely large quantities of documents for production. This preparation included barcoding and photocopying the documents. When completed with the production, the Law Offices of Jon A. Kodani boxed copies of the produced documents and placed the copies in storage.

(Appendix 28, Affidavit of Jon A. Kodani at p. 2.) Kodani apparently has bar-coded copies of internal documents the company claims it no longer possesses.

Judge Bohling aptly described the situation: "it's bizarre, they've created an industry, virtually, for people in the country to get a hold of old State Farm documents because State Farm doesn't have them." (Appendix 29, Judge Bohling, Evidentiary Hearing Transcript of March 7, 1996, Vol. 3, p. 61, lines 6-9, in *Campbell*.) Judge Bohling went on to describe State Farm's influence over Mr. Kodani's actions, and addressed Mr. Kodani's unwillingness to produce State Farm's documents (unless directed to do so by State Farm):

THE COURT: * * * I suspect somebody at State Farm has a lot of control over Kodani, and they're quite able

to, if this guy's livelihood is based on doing State Farm's bidding, which is what my understanding is, that they have a great deal that they can see [sic] to him about what he should or shouldn't do.

And I'm a little bit cynical about the way he's presented himself, because it seems like it serves State Farm's ultimate interest to have someone out there being unreasonable, and being expensive, and saying, "I'm not going to do anything," because that way State Farm doesn't, not only doesn't have any further burden to produce. And that's the concern I think anybody would have when someone like Kodani presents himself that way.

(*Id.*, at 163-164)

In *Campbell*, like other bad faith cases handled by this office, State Farm refused to authenticate its own documents. The plaintiffs in *Campbell* sought to take Mr. Kodani's deposition to discover the extent and scope of his association with State Farm, and to authenticate various bar-coded State Farm documents. State Farm's defense attorneys obstructed Mr. Kodani's deposition and instructed him not to answer legitimate questions and to refuse to authenticate any bar-coded State Farm documents. Judge Bohling's Order of May 28, 1996, describes the events:

21. As part of plaintiffs' efforts to obtain discovery of documentary evidence, plaintiffs attempted to take the deposition of Jon Kodani, a resident of the State of California. Mr. Kodani's affidavit has been filed in this case indicating that he has over three million pages of State Farm documents. Mr. Kodani is an attorney that does legal work and document processing for State Farm.

22. The court has reviewed the deposition transcript of the Kodani deposition. In spite of what appeared to the court to be good faith efforts by plaintiffs' counsel

to pursue legitimate discovery, Mr. Kodani failed to produce a single document or to make a good faith effort to authenticate any of the documents which plaintiffs had obtained through other sources.

23. The court has therefore determined discovery abuse on the part of State Farm in connection with the Kodani deposition and has sanctioned State Farm accordingly.

(Appendix 30, *Campbell* Order dated May 28, 1996.)

There was substantial evidence presented to the court in *Campbell* regarding State Farm's efforts to suppress and destroy documents sought by plaintiffs in bad faith cases. State Farm's intentional suppression and destruction of its own documents was described in Judge Bohling's Order of May 28, 1996:

11. By its own evidence, State Farm has confirmed in open court in hearings conducted in this case how successful their evidence destruction efforts have been. A State Farm employee, Paul Short (who was State Farm's designated representative for the first trial in this case), spent many hours going to the claims offices in the state confirming that the requested documents had been destroyed.

12. State Farm, through representations of counsel, through responses to discovery requests, and through numerous witnesses both by way of deposition and hearings conducted before this court, has consistently represented that much of the potential documentary evidence that plaintiffs have sought to discover in this case has been destroyed through State Farm's own efforts.

13. A designated spokesperson for State Farm at evidentiary discovery hearings conducted in this case, Karen Ortiz, admitted that claims manuals and claims materials are routinely requested in every bad faith case filed against State Farm. She also admitted that

there are always bad faith cases pending against State Farm.

14. Accordingly, there is evidence in the record suggesting that while State Farm was instructing that documents be destroyed, not only was this case pending, but there were cases pending against State Farm around the country where such documents had been requested or were at issue. There is also evidence that State Farm knew or reasonably should have known that the evidence which was being destroyed at its instance would be relevant to and would be requested in discovery in future cases.

18. Several former State Farm employees have testified that destroying, altering and concealing evidence is common practice at State Farm.

19. At an evidentiary discovery hearing conducted before this court over a three-day period in March of 1996, evidence was presented of destruction of documents, efforts by State Farm to conceal evidence and misrepresentation by State Farm of the existence of evidence.

(*Id.* at 4-6)

The *Campbell* case also revealed other facts about State farm's efforts to suppress evidence. Bruce Davis, a former State Farm employee, worked for State Farm for approximately seven years in the State of Colorado handling mostly property damage claims, but occasionally handling other types of claims. He testified at the *Campbell* trial. Mr. Davis testified, among other things, about State Farm's suppression and destruction of evidence.

In his deposition, Mr. Davis testified that "purging files was a common practice" and he was instructed "to remove anything that you think could be derogatory to the company and/or our policies and procedures." (Appendix

35, Davis Deposition in *Campbell*, April 29, 1996, at 264-65) In his deposition,

Mr. Davis explained specifically how it was taught and where it was done:

A And they outlined the reason for that was in the event that the file - it becomes part of the discovery stage of a lawsuit, that line right there could be very damaging to the company, but they wanted that line in the file. They said put it on a buck slip. And I remember thinking why the buck slip? And finally Fred Hartwell or somebody took me aside and said - first time I had a file that went to litigation, there were a couple, but sometimes it was the B.I. stuff and I'd done the P.D., and they'd say this file has been subpoenaed, suit is filed and it's in discovery stage. They're asking for it. Take a day with this file and purge the file. And I'd say what? And they'd try to explain it. I remember being young, a little wet behind the ears, and they'd say yeah. We're not going to hand this over to plaintiff's counsel. Purge the file. When you're done, make sure the B.I. person does the same. And then they'd say, "And, by the way, this comment in the middle of your claims log has got to go. And would you please start making these comments in the file but put them on a buck slip." And I said, "Why a buck slip?" And they said, "Because, idiot, when the file is going to be handed over to plaintiff's counsel, we go through and pull all the buck slips."

Q And who was saying all these things to you, Mr. Davis?

A Hartwell and Dave Peterson. And I'd have maybe 20 entries on a claim activity log. I think they still use them at State Farm. He'd make me rewrite the entire log and leave out that entry, put it on a buck slip, and then he would purge the buck slip.

Q You saw him purge the buck slips?

A Yes, sir, I did, right out of my file standing at my desk. And I saw him do the same in the B.I. unit. . . .

Id., pp. 262-63 (Emphasis added.)

Q So that wasn't something that was taught at the bad faith school?

A What was taught there is to take entries that were critical to the performance of the file that may be derogatory to, you know, mother State Farm in the event of litigation. I was to put it on a buck slip so that it could be eliminated from the file, if necessary, at the point of any subsequent litigation.

Q That was said in a bad faith school?

A Oh, yes.

Q That you put it on a buck slip so that it can be removed from the file?

A In the event – yes, absolutely.

Q Okay.

A That was discussed. And then it was reiterated locally

Id., p. 269 (Emphasis added.)

A Dave Peterson, Fred Hartwell. And a couple times when I made those comments in the body of the claims log they made me rewrite the entire claims log eliminating those couple lines.

Q And this again is Hartwell and Peterson?

A Peterson, and then Bill Beenck made it very clear that that's what he wanted because he was the end of the line. Once Beenck said okay, it's antiseptic enough, let's hand it to plaintiff's counsel, then it went to plaintiff's counsel was what I was told.

Id., p. 271 (Emphasis added.)

C. *State Farm's Internal Documents Reflect The Company's Attempt To Suppress Evidence.*

1. Utah Staff Meeting Minutes

State Farm claim office staff meeting minutes from Utah instruct claim representatives to destroy evidence and "the reasoning behind this [instruction]

is that we do not keep discoverable information that could be asked for in 'bad faith' suits." (Appendix 31, Message dated 04/11/90 Subject: Staff Meeting Minutes - April 5, 1990 meeting in State Farm's Utah Offices.)

State Farm claims the instruction was aimed only at "old junk." The minutes make clear, however, "it was emphasized that we purge information that is older than 6 months." Thus, at issue is all evidence of claims handling materials that are older than 6 months.

Accordingly, State Farm's staff meeting minutes are an admission that it seeks to destroy claims handling evidence that might be discoverable in bad faith suits. State Farm attempts to sanitize its past by concealment of evidence of its claims handling practices and procedures.

A claim superintendent's summary memo about the Utah meeting describes State Farm's corporate motive and intent in destroying "old" (i.e., older than 6 months) documents that might be discoverable in bad faith lawsuits:

I guess corporate is not even going to keep old CPG guides, old claim manuals, etc. we will only have what is currently in effect. That way if they subpoena our claim manual for U claims for 1987, for example, we will say we don't have it. This should be easier than trying to produce it or having to defend it.

So, look through all your old stuff and dump it. You won't ever miss it.

(Appendix 32, Message dated 04/05/90, Subject: Purging Old Files.)

2. California Memo to Divisional Claim Superintendent

This memo indicates that not only is State Farm not maintaining "any records and publications" on advice of counsel, but "we are somewhat reluctant to put too much in writing." (Appendix 33, Memo from George Vivlamore to Ken Goodnight, General Claims Consultant at Corporate Headquarters, September 16, 1985) By not maintaining records and not putting claims information in writing, State Farm suppresses evidence of its claims handling practices and procedures.

3. July 10, 1995 Letter From State Farm to Arizona Law Firm of O'Connor Cavanagh

This letter from State Farm's "Records Administrator" instructs defense counsel to destroy "manuals, reports, and correspondence." (Appendix 34, Letter to O'Connor Cavanagh dated July 10, 1995.) State Farm contends that this memo is directed at copies of these documents, but that State Farm maintains the originals. The truth, however, is that State Farm destroys evidence of its claims handling manuals and materials (if older than 6 months) to avoid them from being discovered in bad faith suits. (See Appendices 31 and 32.)

Thus, if State Farm no longer has the originals because they are destroyed, then its defense firms are the only ones that still have copies of the materials. Once State Farm instructs its defense firms to destroy their copies, then there is no copy of the document available for production. Then, when

faced with a request to produce these materials, State Farm simply responds that the item "does not exist."

III. CONCLUSION.

The pattern that has emerged in State Farm litigation, both in the personal experiences of Amicus Thur & O'Sullivan, P.C. described above, and in the reported case law is consistent. It demonstrates a corporate effort nationwide to withhold, suppress, destroy or bury internal documents, testimony or any other evidence revealing of State Farm's philosophy, motive, plan and practices. It also demonstrates multiple instances of misrepresentation by the company and its attorneys in order to accomplish those goals.

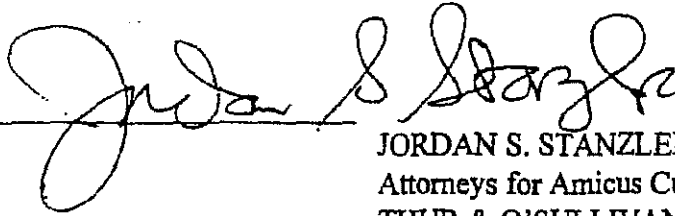
Occasional sanctions from the courts has apparently had little effect in altering State Farm's "mad dog" litigation tactics. The result is that the company has been successful in making any serious litigation efforts aimed at its practices extremely costly and time-consuming for plaintiffs and their attorneys.

This Brief is submitted in the hope that this Court will be aware of that factual background in addressing State Farm's arguments and attempts to suppress evidence in the present case.

DATED: February __, 1997

Respectfully submitted,
ANDERSON, KILL & OLICK, P.C.
Jordan S. Stanzler, Esq.

By: _____

A handwritten signature in black ink, appearing to read "Jordan S. Stanzler", written over a horizontal line.

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IN THE COUNTY COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA

JEAN F. LAMY,
Plaintiff,

v.

Case No: MC-95-6933-RJ

STATE FARM FIRE &
CASUALTY COMPANY,
Defendant.

THERESE ALEXANDRE
Plaintiff,

v.

Case No: MC-95-6932-RJ
(Consolidated)

STATE FARM FIRE &
CASUALTY COMPANY
Defendant.

Affidavit of Gary T. Fye

Re: State Farm Document Destruction Practices

GARY T. FYE COMPANY
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