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By \_\_\_\_\_

CAUSE NO. 2009-63319

**JOSEPH HAYES, JR and JOANNE HAYES,**  
**Plaintiffs**

**Vs**

**UNITED SERVICES AUTOMOBILE ASSOCIATION,**  
**Defendants.**

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**IN THE DISTRICT COURT OF**  
**HARRIS COUNTY, TEXAS**  
**165TH JUDICIAL DISTRICT**

**CHARGE OF THE COURT**

**Members of the Jury:**

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.
2. Base your answers, only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence.

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. Unless otherwise instructed, the answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 or 11 jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

**DEFINITIONS:**

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

“Preponderance of the evidence” means the greater weight and degree of credible evidence admitted in the trial.

Services<sup>ar</sup>

“USAA” means the defendant United States Automobile Association.

“The insurance policy” means the Dwelling Property 3TX Special Form Ed. 01-02 issued by USAA to Joseph D. Hayes, Jr. effective 06-14-08 and admitted as Plaintiff’s Exhibit 1.

**QUESTION NO. 1A:**

Did USAA fail to comply with the insurance policy with respect to the claim by Joseph & Joanne Hayes for roof, garage door, and other exterior damage?

Answer "Yes" or "No".

Answer: YES

**QUESTION NO. 1B:**

Did USAA fail to comply with the insurance policy with respect to the claim by Joseph and Joanne Hayes for damage to the interior of the house and garage?

Answer "Yes" or "No".

Answer: NC

*If you answered "Yes" to Question No. 1B, then answer the following question. Otherwise, do not answer the following question.*

**QUESTION NO. 2:**

Did Joseph and Joanne Hayes fail to comply with the insurance policy provision stating that they give prompt notice to USAA or its agent?

A failure to comply must be material. The circumstances to consider in determining whether a failure to comply is material include:

1. the extent to which the injured party will be deprived of the benefit which he reasonably expected;
2. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
3. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
4. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances including any reasonable assurances;
5. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Answer "Yes" or "No."

Answer: \_\_\_\_\_

*If you answered "Yes" to Question No. 2, then answer the following question. Otherwise, do not answer the following question.*

**QUESTION NO. 3**

Was Joseph and Joanne Hayes's failure to comply excused?

Failure to comply by Joseph and Joanne Hayes is excused by USAA's previous failure to comply with a material obligation of the same agreement.

Additionally and alternatively, failure to comply by Joseph and Joanne Hayes is excused if compliance is waived by USAA.

Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

Answer "Yes" or "No."

Answer: \_\_\_\_\_

**QUESTION NO. 4**

Did USAA engage in any unfair or deceptive act or practice that caused damages Joseph and Joanne Hayes?

Answer "Yes" or "No" as to each subpart:

"Unfair or deceptive act or practice" means any of the following:

- A. Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of Joseph and Joanne Hayes' claim when USAA's liability had become reasonably clear;

Answer:       YES      

- B. Failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim.

Answer:       YES      

- C. Failing to affirm or deny coverage within a reasonable time;

Answer:       NO      

- D. Refusing to pay Joseph and Joanne Hayes' claim without conducting a reasonable investigation with respect to their claim(s);

Answer:       YES      

- E. Misrepresenting to Joseph and Joanne Hayes a material fact or policy provision relating to the coverage at issue.

Answer:       NO

*If you answered "Yes" to Question No. 1A, or to Question No. 1B or to any part of Question 4, then answer the following question. Otherwise, do not answer the following question.*

**QUESTION NO. 5**

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Joseph and Joanne Hayes for their damages, if any, that resulted from the failure to comply you found in response to Question Nos. 1A and/or 1B, and/or that were caused by an unfair or deceptive act that you found in response to Question No. 4.

Consider the following elements of damages, if any, and none other:

The difference, if any, between the amount paid by USAA to Joseph and Joanne Hayes for their Hurricane Ike damages and the amount that should have been paid by USAA to Joseph and Joanne Hayes under the policy.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any, for each of the following:

Damage to the roof, garage door and other exterior damage:

Answer: \$ 20,000<sup>00</sup>

Damage to the interior of the home and garage:

Answer: \$ 5,000<sup>00</sup>



**QUESTION NO. 6**

Did USAA fail to notify Joseph and Joanne Hayes in writing of the acceptance or rejection of their claims by June 10, 2009?

If the insurer rejects a claim, the written notice must state the reasons for the rejection.

Answer "Yes" or "No."

Answer:       Yes

*If you answered "Yes" to any subpart of Question No. 4, then answer the following Question No. 7. Otherwise, do not answer the following Question No. 7 and skip to Question No. 9.*

**QUESTION NO. 7**

Did USAA engage in any such conduct knowingly?

"Knowingly" means actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

In answering this question, consider only the conduct that you found resulted in damages to Joseph and Joanne Hayes.

Answer:       Yes

If you have answered "Yes" to Question No. 7, then answer the following Question No. 8. Otherwise, do not answer the following Question No. 8 and skip to Question No. 9.

**QUESTION NO. 8**

What sum of money, if any, in addition to actual damages, should be awarded to Joseph and Joanne Hayes against USAA because USAA's conduct was committed knowingly?

The factors to consider in awarding additional damages, if any, include:

- (a) The nature of the wrong;
- (b) The character of the conduct involved;
- (c) The degree of culpability of USAA;
- (d) The situation and sensibilities of the parties; and
- (e) The extent to which the conduct in question ~~offers~~ *offends* a public sense of justice and propriety

Answer in dollars and cents for damages, if any:

Answer: 30,000<sup>00</sup>

**QUESTION NO. 9**

Did USAA fail to comply with its duty of good faith and fair dealing to Joseph and Joanne Hayes?

An insurer fails to comply with its duty of good faith and fair dealing by:

Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when USAA's liability has become reasonable clear; or

Refusing to pay a claim without conducting a reasonable investigation of the claim.

Answer "Yes" or "No."

Answer:       YES

*If you answered "yes" to Question No. 9, then also answer Question No. 10. If you answered "No" to Question No. 9, then do not answer Questions No. 10 and move on to Question No. 13.*

**QUESTION NO. 10**

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Joseph and Joanne Hayes for their damages, if any, that were proximately caused by USAA's failure to comply with its duty of good faith and fair dealing?

"Proximate cause" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Consider the following elements of damages, if any, and none other:

The difference, if any, between the amount paid by USAA to Joseph and Joanne Hayes for their Hurricane Ike damages and the amount that should have been paid by USAA to Joseph and Joanne Hayes under the policy.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

Answer: \$ 2000.<sup>00</sup>

*If you unanimously answered "Yes" to Question No. 9, then answer the following question. Otherwise, do not answer the following question and move on to Question No. 13.*

*To answer "Yes" to the following question, your answer must be unanimous. You may answer "No" only upon a vote of ten or more jurors. Otherwise, you must not answer the following question.*

### **QUESTION NO. 11**

Do you find by clear and convincing evidence that the harm to Joseph and Joanne Hayes resulted from fraud by USAA?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

Fraud occurs when—

- a. party makes a material misrepresentation, and
- b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and
- c. the misrepresentation is made with the intention that it should be acted on by the other party, and
- d. the other party relies on the misrepresentation and thereby suffers injury.

"Misrepresentation" means:

- a. a false statement of fact, or
- b. a promise of future performance made with an intent, at the time the promise was made, not to perform as promised, or
- c. a statement of opinion based on a false statement of fact, or
- d. a statement of opinion that the maker knows to be false, or
- e. an expression of opinion that is false, made by one claiming or implying to have special knowledge of the subject matter of the opinion.

"Special knowledge" means knowledge or information superior to that possessed by the other party and to which the other party did not have equal access.

Answer "Yes" or "No."

Answer: ~~Yes~~ No

Answer the following Question No. 12 only if you unanimously answered "Yes" to Question No. 11. Otherwise, do not answer Question No. 12 and skip to Question No. 13.

You must unanimously agree on the amount of any award of exemplary damages.

**QUESTION NO. 12:**

What sum of money, if any, if now paid in cash, should be assessed against USAA and awarded to Joseph and Joanne Hayes as exemplary damages, if any, for the conduct you found in response to Question No. 11? 1120

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of USAA.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents, if any:

Answer: \$ 1120.00

*If you answered "Yes" to Question No. 1A, or to Question No. 1B, or to any part of Question No. 4, then answer the following Question No. 13. Otherwise, do not answer the following Question.*

**QUESTION NO. 13**

What is a reasonable fee for the necessary services of Joseph and Joanne Hayes' attorneys in this case, stated in dollars and cents?

Answer with an amount for each of the following:

A. For representation in the trial court

Answer: \$ 237,500.<sup>00</sup>

B. For representation through appeal to the court of appeals.

Answer: \$ 50,000.<sup>00</sup>

C. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: \$ 25,000.<sup>00</sup>

D. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: \$ 25,000.<sup>00</sup>



**Presiding Juror:**

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.
2. The presiding juror has these duties:
  - a. have the complete charge read aloud if it will be helpful to your deliberations;
  - b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
  - c. give written questions or comments to the bailiff who will give them to the judge;
  - d. write down the answers you agree on;
  - e. get the signatures for the verdict certificate; and
  - f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

**Instructions for Signing the Verdict Certificate:**

1. Unless otherwise instructed, you may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you cannot have one group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.

2. If 10 jurors agree on every answer, those 10 jurors sign the verdict.

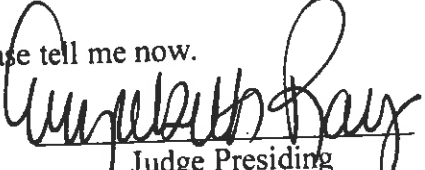
If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when you sign the verdict, only those 10 or 11 who agree on every answer will sign the verdict.

4. There are some special instructions before Questions Nos. 11 and 12 explaining how to answer those questions. Please follow the instructions. If all twelve of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

  
Judge Presiding

Verdict Certificate

Check one:

Our verdict is unanimous. All 12 of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 of us.

Signature of Presiding Juror

DAVID FORREST BARBER
Printed Name of Presiding Juror

Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

[X] Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

SIGNATURE
1. [Signature]
2. [Signature]
3. [Signature]
4. [Signature]
5. [Signature]
6. [Signature]
7. [Signature]
8. [Signature]
9. [Signature]
10. [Signature]
11. [Blank]

NAME PRINTED
Lori Jaundee
FRANKIE FOUNTAIN
R Van Arambal
OLUFEMI C. ALLEN
Philesha Cotton
Rachel Flores
Angela Buchler James
marina Garcia
TOMMY ANDREW
DAVID FORREST BARBER
[Blank]

If you have answered Question No. 12, then you must sign this certificate also.

**Additional Certificate**

I certify that the jury was unanimous in answering the following questions. All twelve of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve of us.

Question No. 9

\_\_\_\_\_  
Signature of Presiding Juror

\_\_\_\_\_  
Printed Name of Presiding Juror

Question No. 11

\_\_\_\_\_  
Signature of Presiding Juror

\_\_\_\_\_  
Printed Name of Presiding Juror

Question No. 12

\_\_\_\_\_  
Signature of Presiding Juror

\_\_\_\_\_  
Printed Name of Presiding Juror

Signed this \_\_\_\_ day of \_\_\_\_\_, 2013.

  
\_\_\_\_\_  
JUDGE ELIZABETH RAY