

1 (NORMAN & GENEVIEVE BROUSSARD V. STATE FARM FIRE & CASUALTY
2 COMPANY, JANUARY 11, 2007, COURT'S RULING.)

3 * * * * UNPROOFED ROUGH DRAFT * * * * *

4 (JURY NOT PRESENT.)

5 THE COURT: THE COURT HAS BEFORE IT CROSS-MOTIONS OF
6 THE PARTIES FOR JUDGMENT AS A MATTER OF LAW. IN RULING ON
7 THESE MOTIONS, I AM GUIDED BY THE SEMINAL CASE IN THE FIFTH
8 CIRCUIT OF BOEING COMPANY VERSUS SHIPMAN, WHICH IS 411 F. 2D
9 365, A 1969 OPINION, AND A LATER DECISION OF THE UNITED STATES
10 SUPREME COURT ON RULE 50 REEVES VERSUS SANDERSON PLUMBING, THE
11 UNITED STATES SUPREME COURT JUNE 12, 2000. BOEING, AS I SAID,
12 WAS THE SEMINAL CASE IN THE FIFTH CIRCUIT, AND IT TEACHES US
13 THAT ON MOTIONS FOR DIRECTED VERDICT, NOW WE CALL IT THE
14 JUDGMENT AS A MATTER OF LAW, THE COURT SHOULD CONSIDER ALL OF
15 THE EVIDENCE, NOT JUST THAT EVIDENCE WHICH SUPPORTS THE
16 NONMOVER'S CASE, BUT IN THE LIGHT AND WITH ALL REASONABLE
17 INFERENCES MOST FAVORABLE TO THE PARTY OPPOSED TO THE MOTION.
18 IF THE FACTS AND INFERENCES POINT SO STRONGLY AND
19 OVERWHELMINGLY IN FAVOR OF ONE PARTY, THAT THE COURT BELIEVES
20 THAT REASONABLE JURORS COULD NOT ARRIVE AT A CONTRARY VERDICT,
21 GRANTING OF THE MOTION IS PROPER. ON THE OTHER HAND, IF THERE
22 IS SUBSTANTIAL EVIDENCE OPPOSED TO THE MOTION, THAT IS,
23 EVIDENCE OF SUCH QUALITY AND WEIGHT THAT REASONABLE AND FAIR
24 MINDED JURORS IN THE EXERCISE OF IMPARTIAL JUDGMENT MIGHT REACH
25 DIFFERENT CONCLUSIONS, THE MOTION SHOULD BE DENIED, THE CASE

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1 SUBMITTED TO THE JURY. AND IT REMINDS US THAT A MERE SCINTILLA
2 OF EVIDENCE IS INSUFFICIENT TO PRESENT A QUESTION FOR THE JURY.
3 AND IT ALSO REMINDS US THAT THE MOTION FOR DIRECTED VERDICT,
4 NOW THE RULE 50 MOTION, SHOULD NOT BE DECIDED BY WHICH SIDE HAS
5 THE BETTER OF THE CASE, NOR SHOULD THEY BE GRANTED ONLY WHEN
6 THERE IS A COMPLETE ABSENCE OF PROBATIVE FACTS TO SUPPORT A
7 JURY VERDICT. THERE MUST BE A CONFLICT IN SUBSTANTIAL EVIDENCE
8 TO CREATE A JURY QUESTION. THAT IS FOLLOWED BY THE UNITED
9 STATES SUPREME COURT IN THE REEVES V. SANDERSON DECISION, AND
10 THEY SAY, I BELIEVE IT IS PAGE EIGHT OF THAT OPINION, RULE 50
11 REQUIRES A COURT TO RENDER JUDGMENT AS A MATTER OF LAW. WHEN A
12 PARTY HAS BEEN FULLY HEARD ON AN ISSUE AND THERE IS NO LEGALLY
13 SUFFICIENT EVIDENTIARY BASIS FOR A REASONABLE JURY TO FIND FOR
14 THAT PARTY ON THAT ISSUE, THE STANDARD OF JUDGMENT AS A MATTER
15 OF LAW UNDER RULE 50 MIRRORS THE STANDARD FOR SUMMARY JUDGMENT
16 UNDER RULE 56. THUS THE COURT MUST REVIEW ALL OF THE EVIDENCE
17 IN THE RECORD, DRAWING ALL REASONABLE INFERENCES IN FAVOR OF
18 THE NONMOVING PARTY, BUT MAKING NO CREDIBILITY DETERMINATIONS

19 OR WEIGHING ANY EVIDENCE. GUIDED BY THESE DECISIONS, THE COURT
20 HAS NOW HEARD ALL OF THE EVIDENCE PRESENTED BY THE PARTIES. I
21 HAVE STUDIED THE TERMS OF THE INSURANCE CONTRACT IN QUESTION
22 HERE. I HAVE CAREFULLY CONSIDERED THE ISSUES FRAMED BY THE
23 PRETRIAL ORDER. I HAVE REACHED THE FOLLOWING FINDINGS OF FACT
24 AND CONCLUSIONS OF LAW: NUMBER ONE, THE PARTIES HAVE
25 STIPULATED THAT THE BROUSSARDS SUSTAINED AN ACCIDENTAL PHYSICAL

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1 LOSS OF THEIR DWELLING AS A RESULT OF HURRICANE KATRINA; TWO,
2 THE PARTIES HAVE STIPULATED THAT THE BROUSSARDS SUSTAINED A
3 LOSS OF THE CONTENTS OF THEIR DWELLING AS A RESULT OF HURRICANE
4 KATRINA, A WINDSTORM; THREE, THE PARTIES HAVE STIPULATED THAT
5 THE VALUE OF THE BROUSSARDS' DWELLING, PLUS THE EXTENSION, WAS
6 \$132,768, AND THAT THE VALUE OF THE BROUSSARDS' CONTENTS IN
7 THEIR DWELLING WAS EQUAL TO OR GREATER THAN \$90,524. UNDER THE
8 TERMS OF THIS INSURANCE POLICY, STATE FARM WOULD OWE THIS
9 ENTIRE LOSS, UNLESS IT CAN ESTABLISH THAT SOME OR ALL OF THIS
10 LOSS WAS ATTRIBUTABLE TO WATER DAMAGE, A TYPE OF LOSS EXCLUDED
11 FROM COVERAGE UNDER THIS POLICY. NOW, THIS BURDEN OF PROOF
12 SHIFTING TO STATE FARM IS CONSISTENT WITH THE MISSISSIPPI CASE
13 OF LUNDAY VERSUS LITITZ MUTUAL INSURANCE COMPANY FOUND IN 276
14 SO. 2D, 696, A 1973 MISSISSIPPI CASE WHICH IS, TO THE BEST OF
15 OUR ABILITY TO RESEARCH THE LAW, STILL THE LAW. WHERE AN
16 EXCLUSION UNDER AN ALL RISK POLICY IS SPECIFICALLY PLEADED AS
17 AN AFFIRMATIVE DEFENSE, THE BURDEN OF PROVING SUCH AFFIRMATIVE
18 DEFENSE IS UPON THE INSURER. NOW, THIS CASE WAS CITED WITH
19 FAVOR BY THE FIFTH CIRCUIT CASE OF U.S.F. & G. VERSUS PLANTERS
20 BANK & TRUST COMPANY, A 1986 DECISION FOUND IN 77 FED. 3RD,
21 863. IN THIS CASE THE COURT SAID, AS THE PLAINTIFF, U.S.F. &
22 G. BEARS THE BURDEN OF PROVING THAT EXCLUSION IS APPLICABLE.
23 WHERE AN EXCLUSION IS SPECIFICALLY PLEADED AS AN AFFIRMATIVE
24 DEFENSE, THE BURDEN OF PROVING SUCH AN AFFIRMATIVE DEFENSE IS
25 UPON THE INSURER, AGAIN CITING LUNDAY VERSUS LITITZ MUTUAL

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1 INSURANCE COMPANY, THE 1973 MISSISSIPPI CASE I JUST ALLUDED TO.
2 ALL OF STATE FARM'S EVIDENCE IN THIS CASE WAS DIRECTED TO
3 PROVING THAT ALL OF THE DAMAGE TO THE INSURED PROPERTY WAS
4 CAUSED BY RISING WATER, YET STATE FARM'S OWN EXPERT WITNESS,
5 MR. GURLEY, TESTIFIED THAT IT WAS MORE PROBABLE THAN NOT THAT
6 THE BROUSSARDS' DWELLING SUSTAINED AT LEAST SOME WIND DAMAGE TO
7 ITS ROOF. IN AN ATTEMPT TO QUANTIFY THE LIKELIHOOD OF THIS
8 WIND DAMAGE HAVING OCCURRED, MR. GURLEY ESTIMATED THAT THERE
9 WAS A 75 PERCENT PROBABILITY THAT THE DAMAGE TO THE PLAINTIFFS'
10 ROOF CONSISTED OF THE LOSS OF BETWEEN ZERO PERCENT AND
11 35 PERCENT OF THE SHINGLES ON THE ROOF OF THE DWELLING.

12 MR. GURLEY ALSO TESTIFIED THAT BASED ON THE DATA NOW AVAILABLE,
13 HE CANNOT MAKE A DETERMINATION OF THE EXTENT OF WIND DAMAGE TO
14 THE BROUSSARD DWELLING BEFORE THE STORM SURGE ARRIVED. THE
15 EVIDENCE IS OVERWHELMING THAT WHEN THE STORM SURGE REACHED THE
16 BROUSSARD PROPERTY, IT WAS SUFFICIENT IN FORCE AND DURATION TO
17 DESTROY THE DWELLING, REGARDLESS OF THE EXTENT OF THE
18 PRECEEDING WIND DAMAGE. THUS THE FORCE OF THE STORM SURGE WAS
19 SUFFICIENT TO DESTROY THE DWELLING IF IT WERE UNDAMAGED AT THE
20 TIME THE WATER REACHED IT, AND IT WAS SUFFICIENT TO REMOVE THE
21 DEBRIS OF THE PROPERTY IF THE DWELLING HAD COLLAPSED FROM THE
22 FORCE OF THE WIND BEFORE THE STORM SURGE ARRIVED. IN THESE
23 CIRCUMSTANCES, IT IS THE ALLOCATION OF THE BURDEN OF PROOF THAT
24 IS CRITICAL, FOR ONE PARTY OR THE OTHER MUST BEAR THIS ENTIRE
25 LOSS IN THE ABSENCE OF EVIDENCE BY WHICH THE TWO TYPES OF

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1 LOSSES MAY BE REASONABLY IDENTIFIED AND SEPARATED. BECAUSE THE
2 PLAINTIFFS HAVE MET THEIR BURDEN OF PROOF UNDER THE POLICY, THE
3 BURDEN OF PROOF WAS AND IS ON STATE FARM TO ESTABLISH BY A
4 PREPONDERANCE OF THE EVIDENCE THAT PORTION OF THE TOTAL LOSS
5 THAT WAS ATTRIBUTABLE TO EXCLUDED FLOODING AND RISING WATER.
6 STATE FARM IS OBLIGED UNDER ITS POLICY TO PAY ALL OF THE LOSS
7 THAT IT DOES NOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE
8 TO HAVE BEEN CAUSED BY FLOODING. NO EVIDENCE HAS BEEN
9 INTRODUCED FROM WHICH ANY FINDER OF FACT COULD REASONABLY
10 DETERMINE WHAT PART OF THE LOSS OF THE BROUSSARDS' PROPERTY IS
11 ATTRIBUTABLE TO WATER AS OPPOSED TO WIND. ACCORDINGLY, I FIND,
12 AS A MATTER OF LAW, THAT STATE FARM HAS NOT MET ITS BURDEN OF
13 PROOF AS TO THE SEGREGATION OF THIS TOTAL LOSS INTO WIND
14 DAMAGES WHICH ARE COVERED AND WATER DAMAGES WHICH ARE EXCLUDED
15 FROM COVERAGE. STATE FARM HAS ALSO FAILED TO ESTABLISH OR TO
16 OFFER EVIDENCE THAT WOULD SUPPORT A FINDING THAT THE INSURED
17 PROPERTY SUSTAINED NO WIND DAMAGE. SINCE STATE FARM OFFERED NO
18 EVIDENCE WHICH WOULD MEET ITS BURDEN OF PROOF AS TO THE DAMAGE
19 CAUSED BY WATER, I FIND THAT STATE FARM IS LIABLE TO THE
20 PLAINTIFFS FOR THE LIMITS OF COVERAGE UNDER THEIR POLICY, THE
21 SUM OF \$223,292.

22 NOW, HAVING DETERMINED THAT PLAINTIFFS ARE ENTITLED TO A
23 JUDGMENT AS A MATTER OF LAW, AND AFTER HEARING THE TESTIMONY OF
24 THE WITNESSES AND CONSIDERING THE EVIDENCE PRESENTED, I FIND
25 THAT THE DEFENDANT DID NOT HAVE A LEGITIMATE OR ARGUABLE REASON

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1 EITHER UNDER MISSISSIPPI LAW OR THE UNAMBIGUOUS TERMS OF THE
2 SUBJECT INSURANCE POLICY FOR REFUSING TO PAY THE PLAINTIFFS'
3 CLAIMS FOR INSURED PROCEEDS. TO THE EXTENT THAT THE TERMS OF
4 THE POLICY ARE AMBIGUOUS, THEY ARE INTERPRETED IN FAVOR OF THE

5 PLAINTIFFS. ALL THAT PLAINTIFFS HAD TO SHOW WAS THAT THEY
6 SUFFERED AN ACCIDENTAL DIRECT PHYSICAL LOSS TO THEIR DWELLING,
7 AND AN ACCIDENTAL DIRECT PHYSICAL LOSS TO THEIR CONTENTS CAUSED
8 BY WINDSTORM. IT IS WITHOUT DISPUTE THAT HURRICANE KATRINA WAS
9 A WINDSTORM. ONCE THIS WAS SHOWN, THE BURDEN WAS IN PLACE ON
10 THE DEFENDANT TO ESTABLISH THAT PLAINTIFFS' LOSSES WERE
11 ATTRIBUTABLE TO A CAUSE THAT WAS NOT COVERED BY THE POLICY, IN
12 OTHER WORDS, FLOOD. THE DEFENDANT ATTEMPTED IMPERMISSIBLY TO
13 PLACE THE BURDEN OF PROOF ON THE PLAINTIFFS THAT THEIR LOSSES
14 WERE CAUSED BY WIND DAMAGE, WHETHER DISCERNABLY INDEPENDENT OR
15 NOT. BECAUSE THE DEFENDANT DEVELOPED AND MAINTAINED THIS
16 UNREASONABLE POSITION WITH RESPECT TO WHAT IT REQUIRED,
17 PLAINTIFFS WERE OFFERED NO CHOICE BUT TO SEEK LEGAL REDRESS
18 THROUGH THIS COURT. DEFENDANT'S MOTION FOR PARTIAL SUMMARY
19 JUDGMENT AS TO PUNITIVE DAMAGES AND EXTRA CONTRACTUAL DAMAGES
20 IS DENIED, AS IS ITS MOTION UNDER RULE 50 OF THE FEDERAL RULES
21 OF CIVIL PROCEDURE FOR A DIRECTED VERDICT OR JUDGMENT AS A
22 MATTER OF LAW ON THESE ISSUES. PLAINTIFFS' MOTION FOR JUDGMENT
23 AS A MATTER OF LAW IS SUSTAINED AND GRANTED.

24 THIS TRIAL, THE COURT HAVING FOUND THAT THERE IS NO
25 LEGITIMATE OR ARGUABLE REASON, THIS TRIAL WILL PROCEED TO THE
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1 NEXT PHASE TO DETERMINE IF PUNITIVE AND/OR EXTRA CONTRACTUAL
2 DAMAGES ARE APPROPRIATE. HAVING ANNOUNCED THIS DECISION, THE
3 JURY IS NOT HERE YET, AND I WILL GIVE COUNSEL SOME TIME. WE
4 ARE WORKING ON SOME PUNITIVE JURY INSTRUCTIONS AND WE HAVE
5 YOURS. WE WILL TRY TO MESH THEM. WHY DON'T I GIVE YOU A FEW
6 MINUTES TO GET OVER THE SHOCK OF THE COURT TAKING THE MATTER
7 AWAY FROM THE JURY. LET'S SAY IN 15 MINUTES COUNSEL WILL COME
8 TO MY CHAMBERS AND WE WILL MAKE A RECORD THERE FOR A JURY
9 INSTRUCTION CONFERENCE ON THE PUNITIVE STAGE OF THE TRIAL.
10 COURT IS IN RECESS.

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