

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

**NORMAN J. BROUSSARD and  
GENEVIEVE BROUSSARD**

**PLAINTIFFS**

**VERSUS**

**1:06cv6-LTS-RHW**

**STATE FARM FIRE AND CASUALTY COMPANY**

**DEFENDANT**

**MEMORANDUM OF LAW IN SUPPORT OF STATE FARM FIRE AND CASUALTY  
COMPANY'S MOTION FOR PARTIAL JUDGMENT AS A MATTER OF LAW AND FOR  
NEW TRIAL**

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State Farm Fire and Casualty Company ("State Farm") respectfully submits this memorandum of law in support of its motion for partial judgment as a matter of law and for new trial.

## ARGUMENT

### **I. PLAINTIFFS FAILED TO MAKE OUT A PRIMA FACIE CASE FOR RECOVERY OF DAMAGE TO THEIR PERSONAL PROPERTY, AND STATE FARM IS THEREFORE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THIS CLAIM**

After Plaintiffs rested their case in chief, and again at the close of evidence, State Farm moved for judgment as a matter of law ("JMOL") on Plaintiffs' claim for recovery of damage to their personal property. Transcript of Jury Trial ("Tr.") 332:9-333:9.<sup>1</sup> The basis of this motion was that Plaintiffs had failed to meet their burden of proving that the damage to their personal property was caused by a covered peril and thus had failed to establish a prima facie right to recovery under the insurance contract. The Court denied the initial motion without prejudice and without comment. Tr. 338:22-25. As to the renewed request, the Court not only denied State Farm's motion but entered JMOL in favor of Plaintiffs. Tr. 493:2-497:22; *see also* Opinion on Rule 50 Motions for Judgment as a Matter of Law [106] ("Opinion" or "Op."). In so ruling, the Court appears to have misunderstood both the state of the evidence and the showing Plaintiffs were required to make under the language of their policy. Accordingly, State Farm now respectfully renews its motion for JMOL as to Plaintiffs' claim for damage to their personal property.

Plaintiffs' policy provides coverage for personal property (or contents) on a "named" or "specified" peril basis.<sup>2</sup> Thus, to make out a prima facie case for coverage, Plaintiffs had the burden of proving that their personal property was damaged by one of the perils specifically enumerated in the

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<sup>1</sup> Copies of the cited transcript pages are attached as Exhibit A to State Farm's Motion.

<sup>2</sup> Named peril policies provide coverage only for the specific risks enumerated in the policy. By contrast, "open peril" policies (formerly called "all risk" policies) provide coverage for a broad range of risks – in this case, "accidental direct physical loss" – subject to the policies' specific exclusions, conditions and limitations. See *Lunday v. Litz Mut. Ins. Co.*, 276 So. 2d 696, 698-99 (Miss. 1973) (noting distinction).

policy – in this case, "windstorm," including rain entering the dwelling through an opening caused by the direct force of wind. To satisfy this burden, Plaintiffs were required to prove both that wind caused the damage to their property *and* the amount of damage caused by wind. *See Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696, 699 (Miss. 1973) (noting that under specified peril policy insuring against "direct loss by windstorm," plaintiffs had burden "to prove that the damages sustained were covered by the peril insured against, that is, by direct action of the wind"). Because Plaintiffs did neither, State Farm is entitled to JMOL on this claim.

Although the Court appears to have recognized that Plaintiffs had the burden of proof with respect to their contents claim, Tr. 518:22-25, it found that Plaintiffs' burden was satisfied simply by the parties' purported stipulation that Plaintiffs' loss was caused by Hurricane Katrina, which the Court characterized as a "windstorm":

All that Plaintiffs had to show was that they suffered . . . an accidental direct physical loss to their contents caused by windstorm. [¶] It is without dispute that Hurricane Katrina was a windstorm. Once this was shown, the burden was in place on the Defendant to establish that Plaintiffs' losses were attributable to a cause that was not covered by the policy, in other words, flood.

Tr. 498:6-14. In fact, according to the Court, the parties had stipulated to every fact necessary to satisfy Plaintiffs' burden:

2. The parties have stipulated that the plaintiffs sustained a loss of the contents of their dwelling *as a result of* Hurricane Katrina, *a windstorm*.

3. The parties *have stipulated . . . that the value of the plaintiffs' contents* in their dwelling *was equal to or greater than \$90,542*. [This] figure[] represent[s] the policy limits for the plaintiffs' . . . contents under the State Farm homeowners policy. . . .

10. Because the *plaintiffs have met their burden of proof under the policy, via the stipulations* in the pre-trial order, the burden of proof was and is on State Farm to establish . . . that portion of the total loss that was attributable to excluded flooding and rising water.

Op., pp. 2-3 (emphasis added).

There are two fatal flaws in the Court's analysis. First, the Court grossly misstated the parties'

stipulation, which said only: "The Plaintiffs['] home was destroyed *during* Hurricane Katrina leaving only a slab." See Pretrial Order [88], p. 5 (emphasis added). In other words, the parties *never* stipulated that Hurricane Katrina "was a windstorm" or that Plaintiffs' personal property was damaged "as a result" of windstorm.<sup>3</sup>

Second, it is clear that Plaintiffs did not satisfy their burden regardless of whether the parties stipulated that the contents of Plaintiffs' house were destroyed "during Hurricane Katrina" or "as a result of Hurricane Katrina." Mississippi hurricane cases clearly view hurricanes as comprised of both wind and water forces; thus, where a specified peril policy insures against "windstorm," the burden under Mississippi law is clearly on the insured to prove that his property was damaged by windstorm as defined by the Mississippi courts. See *Lunday*, 276 So. 2d at 699; see also, e.g., *Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765, 767 (Miss. 1971) (to establish "windstorm damage," it is "sufficient to show that *wind* was the proximate or efficient cause of loss or damage") (emphasis added); *Kemp v. Am. Universal Ins. Co.*, 391 F.2d 533, 535 (5th Cir. 1968) (defining "windstorm" as "that force of natural air

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<sup>3</sup> The Court's apparent misunderstanding on this key point was actively encouraged by the Court's law clerks, who repeatedly sought to inject "windstorm" into the analysis:

Mr. Banahan: With regard to the contents coverage under the policy, it was our understanding back from the pretrial, I thought we were all on the same page, that it is Plaintiffs' burden to prove the damage to their contents was caused by a covered loss, in this case wind.

Law Clerk: And Katrina was a windstorm. . . .

Mr. Banahan: It said windstorm in the pretrial [order]? . . .

Law Clerk: It says windstorm in the policy.

Tr. 504:22-505:11 (emphasis added).

Mr. Banahan: . . . I think the burden of proof is on the Plaintiffs to prove that the contents were damaged. The causative mechanism for the damage to the contents I still believe is the Plaintiffs' burden of proof. We can stipulate that they had enough contents coverage that they would get their policy limits if it was damaged by a covered loss in this case, which is wind. . . .

Law Clerk: Again, it was direct accidental physical loss caused by windstorm, and *you stipulated that Hurricane Katrina was a windstorm.*

Tr. 519:7-520:19 (emphasis added).

which is . . . 'capable of damaging the insured property either by its own unaided action or by projecting some object against it'" and "any wind that is of such extraordinary force and violence as to thereby injuriously disturb the ordinary condition of things insured") (citations omitted). Thus, in *Lunday*, a case addressing Hurricane Camille damage under "specified peril" policy language very similar to State Farm's here,<sup>4</sup> it was not enough for the plaintiff to show that the damage to his rooming house occurred "*as a result of the hurricane*. Rather, he was required to prove that his losses *were caused by wind*. As the Court stated, "the burden of proof was on the plaintiff to prove that the damages sustained were covered by the peril insured against, that is, by direct action of the wind," thus, "negativ[ing] the proposition that the damages were caused by tidal or surface water." *Lunday*, 276 So. 2d at 699. State Farm knows of no case in Mississippi (or any other jurisdiction) that even suggests an insured can meet his burden simply by establishing that his loss was caused by a hurricane and therefore *ipso facto* by windstorm. In so reasoning here, the Court improperly relieved Plaintiffs of their burden under specified peril coverage of proving that the hurricane damage to their property was caused by the hurricane's *wind forces* rather than the hurricane's *water forces*.

In any case, as pointed out above, the parties stipulated merely that Plaintiffs' house and its contents were destroyed *during* Hurricane Katrina, not *by* Hurricane Katrina. Accordingly, characterizing Hurricane Katrina as a "windstorm" does not answer the question whether the damage to Plaintiffs' personal property was *caused by* windstorm. In other words, even if Plaintiffs' personal property was damaged *during* Hurricane Katrina, that damage could have been caused by storm surge, wind, or a combination of both. As the Court noted, "the key issue is how much damage had occurred as a result of wind before the storm surge arrived." *Op.*, p. 3, ¶ 8. As to that issue, Plaintiffs clearly

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<sup>4</sup> The policy in *Lunday* provided specified peril coverage for "Direct Loss by Windstorm." *Lunday*, 276 So. 2d at 697. State Farm's policy provides specified peril coverage for personal property for "accidental direct physical loss . . . caused by . . . Windstorm."

bore – and failed to satisfy – the burden of proof.<sup>5</sup>

For all these reasons, State Farm respectfully submits that it is entitled to JMOL on Plaintiffs' claim for damage to their personal property. At a minimum, and in the alternative, the claim should have gone to the jury for a determination whether Plaintiffs met their burden of showing whether and to what extent their personal property was damaged by wind.

**II. THE CONFLICTING EVIDENCE AS TO THE CAUSE OF DAMAGE TO PLAINTIFFS' DWELLING RAISED A TRIABLE ISSUE OF FACT, AND STATE FARM IS THEREFORE ENTITLED TO A NEW TRIAL**

In entering JMOL for Plaintiffs, the Court stated that "it is the allocation of the burden of proof that is critical, for one party or the other must bear this total loss in the absence of evidence by which the two types of losses [i.e., wind and water] may be reasonably identified and separated." *Op.*, p. 3, ¶ 9. The Court then concluded that "the burden was and is on State Farm to establish, by a preponderance of the evidence, that portion of the total loss that was attributable to excluded flooding and rising water" and held that "State Farm is obliged under its policy to pay all of the loss that it does not establish . . . to have been caused by flooding." *Id.*, ¶ 10. Since, in the Court's view, State Farm "offered no evidence which would allow the finder of fact to make a reasonable determination of the amount of the total loss that is attributable exclusively to water damage," *id.*, ¶ 13, it failed to meet this burden and was therefore liable to Plaintiffs as a matter of law for the full policy limits.

With respect, the Court misapprehended both the law and the facts. As will be demonstrated, it was Plaintiffs, not State Farm, who bore the burden of establishing the extent to which Plaintiffs' house was damaged by wind and of segregating covered from noncovered damage under both their dwelling coverage and their personal property coverage. That is because, under any form of coverage – open

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<sup>5</sup> The testimony of Plaintiffs' purported expert James Slider was incompetent and inadmissible and thus did not satisfy Plaintiffs' burden to show that wind destroyed the contents of their house. *See* Point III *infra*. Nor did Plaintiffs' own assertions that they believed their house was destroyed by a tomado satisfy their burden, because Plaintiffs were not eyewitnesses to the event.

peril or named peril – Plaintiffs must prove *the extent of their claimed loss* as part of their burden of proving their entitlement to contract damages. And, as will be demonstrated below, even if the burden was on State Farm, as the Court ruled, State Farm presented more than sufficient evidence to create a question for the jury's resolution. The Court therefore erred in taking this question away from the jury and must now order a new trial with respect to Plaintiffs' claim for damage to their dwelling.

**A. Plaintiffs Had the Burden of Proving the Amount of Their Covered Loss**

Plaintiffs' homeowners policy covers Plaintiffs' dwelling on an "open peril" basis. Under such a policy, if the insured meets his threshold burden of proving an accidental direct physical loss, the burden shifts to the insurer to prove the applicability of any exclusion asserted as an affirmative defense. *See Lunday*, 276 So. 2d at 696.<sup>6</sup> However, as many courts have held (but the Court here overlooked), once the insurer adduces evidence that the insured's loss was caused by an excluded peril, the burden shifts back to the insured to show that the claim does not fall within the exclusion or to segregate covered losses from noncovered losses. *See, e.g., Royal Surplus Lines Ins. Co. v. Brownsville Indep. Sch. Dist.*, 404 F. Supp. 2d 942, 949 n.7 (S.D. Tex. 2005) (citing *Britt v. Cambridge Mut. Fire Ins. Co.*, 717 S.W.2d 476, 482 (Tex. App. 1986)). This "shifting back" of the burden of proof is in accord with the established principles of Mississippi law that "a plaintiff has the burden of proving a right to recover under the insurance policy sued on" and "[t]hat basic burden never shifts from the plaintiff."<sup>7</sup> *Britt v. Travelers Ins. Co.*, 566 F.2d 1020, 1022 (5th Cir. 1978) (Mississippi law); *see also Coahoma County Bank & Trust Co. v. Feinberg*, 128 So. 2d 562, 565 (Miss. 1961) (reiterating rule that burden of proving entitlement to insurance policy proceeds rests on person seeking proceeds).

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<sup>6</sup> State Farm indisputably met its burden to show the applicability of the water damage exclusion through the testimony of its experts Dr. Gurley and Dr. Dean. Tr. 347:15-16; 384:5-7; 389:18-20; 450:14-16; 471:25-472:1.

<sup>7</sup> Thus, for example, in *Brown v. PFL Life Insurance Co.*, 312 F. Supp. 2d 863, 868 (N.D. Miss.), *aff'd*, 111 F. App'x 258 (5th Cir. 2004), after the insurer satisfied its burden of proving the applicability of the exclusion at issue, the court shifted the burden back to the plaintiff to rebut that showing. Because the plaintiff "offered no evidence, whatsoever, to contradict the [insurer's] findings," the court upheld the insurer's determination of noncoverage. *Brown*, 312 F. Supp. 2d at 869.

The rule imposing on the insured the burden of proving the amount of loss attributable to a covered peril, or of segregating covered damage from excluded damage, flows from "the basic principle that insureds are entitled to recover only that which is covered under their policy; that for which they paid premiums." *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex. App. 1999). *See also Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 319 (Tex. 1965) (under policy covering hurricane but excluding water damage, it was "essential that the insured produce evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy"); *Harbor House Condo. Ass'n v. Massachusetts Bay Ins. Co.*, 915 F.2d 316, 318 (7th Cir. 1990) (under all risk policy, "[i]t is not enough to show that a loss may have occurred. *Plaintiffs must prove the nature, extent or amount of their loss to a reasonable degree of certainty* before any award of damages can be made under the policy.") (emphasis added)). As stated in one leading insurance treatise:

Where the harm sustained by the insured is the result of two or more causes or risks, some of which are not covered, it is of course manifest that the insurer is only liable for so much of the total harm as was caused by the risk covered by the policy. . . . It is the insured's burden to produce evidence that would afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by the covered peril and that by the excluded peril.

12 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 175:9 (3d ed. 1997) (emphasis added); *see* 17A *Couch on Insurance* § 254:75 ("insureds whose losses are only partially reimbursable by the insurer" have been deemed to have the burden of "[s]egregating damages to the insured building from a covered peril from those caused by a noncovered peril"). *See also Fiess v. State Farm Lloyds*, 392 F.3d 802, 807 (5th Cir. 2004) ("Because the insured may only recover for damage caused by covered perils, *the insured bears the burden of presenting evidence that will allow the trier of fact to segregate covered losses from non-covered losses.*" (emphasis added)).

The rule also accords with the basic tenet of Mississippi law that a plaintiff must prove "not only

the fact of his injury, but the extent of the injury in order to support an award of monetary damages," *Savage v. LaGrange*, 815 So. 2d 485, 491 (Miss. Ct. App. 2002) – a tenet that applies equally in the insurance context. *See Home Ins. Co. v. Greene*, 229 So. 2d 576, 579 (Miss. 1969) (noting that "[a]n insured seeking recovery on a policy insuring against fire has the burden of proving the loss and its extent"). Indeed, because allocation is central to the coverage claim, the insured's "failure to segregate covered and noncovered perils is fatal to recovery." *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App. 2003) (liability policy); *accord Patrick Schaumburg Autos., Inc. v. Hanover Ins. Co.*, 452 F. Supp. 2d 857, 863, 869, 872-73 (N.D. Ill. 2006) (denying insured's motion for summary judgment even though it was "undisputed that [the insured] suffered some covered loss," because insured failed to satisfy its "burden of proving the amount of the covered loss").

As these authorities demonstrate, Plaintiffs had the burden of proving the amount of their covered damages.<sup>8</sup> The Court's contrary ruling – and its grant of JMOL in favor of Plaintiffs – were error, necessitating a new trial.

**B. Even If State Farm Had the Burden of Segregating Wind and Water Damage, It Introduced Sufficient Evidence to Go to the Jury on This Issue**

Even assuming the Court were correct in relieving Plaintiffs of their burden of negating the applicability of the exclusion or of segregating covered from noncovered losses, State Farm introduced sufficient evidence to allow the issue to go to the jury. The Court, however, found that "no evidence has been introduced from which any finder of fact could reasonably determine what part of the loss of the Broussards' property is attributable to water as opposed to wind." *Op.*, p. 3, ¶¶ 11-12. This ruling was

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<sup>8</sup> The requirement that damages be segregated assumes, of course, that Plaintiffs' loss is not excluded in its entirety. In making this argument, State Farm does not intend to waive its right to argue that because Plaintiffs' total loss would not have occurred in the absence of excluded water damage, there was no coverage for Plaintiffs' loss by virtue of the valid and enforceable anti-concurrent cause language in State Farm's policy. *See Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067, 1069-70 (Miss. Ct. App. 2004) (State Farm's anti-concurrent cause lead-in language is "clear" and "[u]nambiguous language of exclusion"); *Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp. 2d 907, 911-13 (S.D. Miss. 1998) (Mississippi law), *aff'd*, 200 F.3d 815 (5th Cir. 1999); *Wallace v. City of Jackson*, No. 251-05-941 CIV, slip op. at 3 (Hinds County Cir. Ct. Miss. Sept. 15, 2006) (State Farm's lead-in language has been "judicially determined to be clear and unambiguous").

erroneous in two separate respects.

First, Plaintiffs' claim was at all times for the *total* loss of their house. As to this claim, State Farm's expert Kurtis Gurley testified unequivocally that the destruction of the structure (as opposed to potential damage to the roof covering) was "due to water inundation from surge and wave action" and that "the estimated peak wind speeds experienced at the Broussard residence were not of a magnitude large enough to cause the total destruction of the home." Tr. 389:16-25. State Farm's expert Robert Dean went even further, opining that "the structural damage was clearly induced by surge and waves" and that wind could not have caused structural damage. Tr. 471:23- 472:3.<sup>9</sup> By contrast, Plaintiffs' expert, James Slider, testified that the total destruction of the house was due to wind. Tr. 228:18-19. This conflict in the evidence (assuming for these purposes Mr. Slider's testimony was competent and admissible) was sufficient to create a triable issue for the jury as to what caused the total destruction of the house.

Second, even if the issue to be decided could properly be characterized as the relative effects of wind and water, the Court erred in ruling that State Farm did not adduce sufficiently precise evidence to go to the jury on this issue. In so ruling, the Court evidently believed that expert Kurtis Gurley's "attempt to quantify" the amount of wind damage was insufficiently certain because Dr. Gurley could testify only to an estimate of the probable damage – specifically, "a 75% probability that the damage to the plaintiffs' roof consisted of the loss of between 0 percent and 35 percent of the shingles on the roof of the dwelling." Op., pp. 2-3, ¶ 7. The Court then stated, erroneously, that "based on the data now available," Dr. Gurley "cannot make a determination of the extent of the wind damage to the Broussard dwelling before the storm surge arrived." *Id.* In fact, Dr. Gurley *had* made such a determination, albeit an estimate, and testified, consistent with this estimate, that neither he, nor any other wind engineer,

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<sup>9</sup> Dr. Dean further testified that he "do[es] not include shingles as being in the realm of structural damage." Tr. 472:6-7.

could definitively state that any wind damage had in fact occurred<sup>10</sup> or quantify the probable extent of the wind damage with any greater degree of specificity.<sup>11</sup>

The Court's apparent assumption that the evidence of the amount of covered wind damage was legally insufficient unless it was proven with complete precision misapprehends Mississippi law. For example, in *Wall v. Swilley*, 562 So. 2d 1252, 1256-58 (Miss. 1990), an action by a home buyer alleging that the seller had misrepresented the condition of the house, the trial court granted a directed verdict for the seller on the grounds that the buyer's evidence of damages was speculative and insufficiently

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<sup>10</sup> On direct examination, Dr. Gurley testified:

Q. And I will ask you this rather pointed question. Did you determine that in fact there was [wind] damage to the Broussard property?

A. No, I could not make that determination.

Q. Do you know any way that an individual in your field, the wind engineering, could make that determination with the information that was available following Hurricane Katrina?

A. No. Based on the information that I have available to this date, I cannot make that determination.

Tr. 348:3-11. Notably, contrary to the Court's finding, neither Dr. Gurley's testimony, nor the parties' stipulations, nor any other evidence "established, conclusively, that the plaintiffs' dwelling sustained wind damage." Op. p. 2, ¶ 5.

<sup>11</sup> According to Dr. Gurley:

Q. Based on the science that is available to you in your field, is there any way that you can give this jury a more specific tool as far as where the damage occurred and exactly how much damage occurred to the Broussard's roof in order for them to factor that in?

A. Based on the information I had, including the aerial imagery, that is the best I can do. There is no way I can say the home experienced 20 percent or five percent. I can't put a number on it. I can give you statistical likelihood of it falling into various categories.

Tr. 385:13-22.

Q. Was there any way you could put a finer point on it, Dr. Gurley, or to your knowledge is there any way from a scientific standpoint as a wind engineer to put a finer point on it to provide State Farm or the jury with a more specific number or what would be appropriate as far as possible or probable wind damage that may have occurred before the storm surge took the house down?

A. This is my best attempt with the information that is available today. This is the closest I can get to putting a fine point on what happened to the roof.

Tr. 438:11-20.

precise.<sup>12</sup> The Mississippi Supreme Court reversed, holding that the buyer's evidence of damages, although somewhat speculative, was nonetheless "adequate such that a hypothetical reasonable juror could have found damages for [plaintiffs] at some amount above nominal damages." *See also State Farm Mut. Auto. Ins. Co. v. Commercial Union Ins. Co.*, 394 So. 2d 890, 894 (Miss. 1981) (rejecting primary liability insurer's argument that a coinsurer did not introduce adequate evidence to allocate attorney fees and expenses incurred in defending two underlying actions, only one of which was covered, where attorney for secondary insurer was asked "How much of the bill was due directly to Cause No. 3421?" and answered "I can't tell you that either. I can say if there had been only one lawsuit you would still be looking at probably at least 75 percent of the bill.").

Courts in Mississippi and elsewhere afford even greater latitude in cases such as this, where certainty as to the amount of damages is virtually impossible from a scientific standpoint. As the Mississippi Supreme Court has explained:

[W]here it is reasonably certain that damage has resulted, *mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages*. This view has been sustained where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof. Under such circumstances, all that can be required is that the evidence – with such certainty as the nature of the particular case may permit – lay a foundation which will enable the trier of facts to make a fair and reasonable estimate of the amount of damage.

*Cain v. Mid-South Pump Co.*, 458 So. 2d 1048, 1050 (Miss. 1984) (emphasis added). *See also Progressive Cas. Ins. Co. v. All Care, Inc.*, 914 So. 2d 214, 221 (Miss. Ct. App. 2005) (upholding jury verdict for plaintiff because evidence allowed jury to make "a fair and approximate" calculation of damages despite fact that "any attempt to quantify [plaintiff's] losses . . . can only be accomplished based on a fair degree of speculation" and that "there is no gauge by which we or the jury can attempt to

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<sup>12</sup> Among other problems, the plaintiff buyer presented no evidence of fair market value at the time of the sale seven years earlier, and presented three different estimates of the cost of repair, ranging from \$19,000 to \$52,000. *Wall*, 562 So. 2d at 1256-58.

calculate any reasonably exact amount of loss . . ."); *Computer Sys. Eng'g v. Qantal Corp.*, 572 F. Supp. 1365, 1377-78 (D. Mass. 1983) (even though plaintiff's experts gave three different figures, proof of damages was not too speculative because "a fact finder may arrive at any figure within a reasonable range supported by evidence and inferences drawn from the evidence"), *aff'd*, 740 F.2d 59 (1st Cir. 1984).

In this case, Plaintiffs' expert, James Slider, testified that it was "most likely" that wind destroyed Plaintiffs' house before the storm surge arrived.<sup>13</sup> Tr. 228:18-19. Dr. Gurley's conflicting expert opinion – that the wind damage (if any) was most likely "superficial," consisting in all probability of at most the loss of 35 percent of the roof's shingles – was sufficiently precise under the circumstances to enable the jury to make a "fair and approximate" estimation of the covered damage if they chose to accept Dr. Gurley's opinion rather than Mr. Slider's. At a minimum, Dr. Gurley's testimony, while not establishing that wind damage occurred or the specific amount of wind damage if it did occur, certainly established a ceiling on any damage that the jury could have credited. In any event, the conflict created a classic fact question that should have been submitted to the jury for resolution.

Mississippi courts have consistently held that where there is conflicting evidence as to whether the destruction of a home during a hurricane was caused by wind alone or was "contributed to or aggravated by" tidal water, resolution of the causation question is a question of fact for the jury – even in cases in which the insurer adduced far less definitive and certain evidence than in this case. For example, in *Grace v. Lititz Mutual Insurance Co.*, 257 So. 2d 217 (Miss. 1972), a Hurricane Camille case, the question of causation went to the jury (resulting in a verdict in favor of the insured) where the insurer's only counter to the insureds' evidence that wind completely destroyed the house before the water arrived was that the loss was at least "contributed to or aggravated by" flood, without further

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<sup>13</sup> As discussed in Point III below, Mr. Slider should not have been allowed to testify at all.

quantification. Confirming that this evidence was sufficient to raise a triable jury issue, the court rejected the insureds' demand for prejudgment interest, ruling that there was "*a bona fide dispute as to the amount of damages* as well as the responsibility for the liability therefor." *Id.* at 225 (emphasis added). This was so, the court held, even though "[n]owhere during the trial of the case did the [insurer] ever contest the amount of the loss or the fact that all of the property owned by [the insureds] was totally destroyed . . . ." *See also id.* (noting that insurer had not offered "any evidence at any time during the trial of what value or of what part [of] the [insured's] property was destroyed by water prior to its destruction by wind"). Likewise, in *Home Insurance Co. v. Sherrill*, 174 F.2d 945, 945-46 (5th Cir. 1949), the Fifth Circuit held that the question of causation was one for the jury where the insurer introduced evidence that "high water was at least a contributing cause" of the destruction of the insured building – even though it proffered "no evidence as to how much of the damage was due to the water" – while the insured's evidence tended to show that the building was destroyed by wind "before the water was high enough and rough enough to contribute thereto." *See also Liberty Universal Ins. Co. v. Hall*, 289 So. 2d 683, 684 (Miss. 1974) (in Hurricane Camille case, "evidence as a whole . . . created a question for the jury" where insured's evidence "tended to show that the damage was caused by the wind before the water ever reached [the insured] property," whereas witnesses for insurer "admitted that there was some wind damage" but testified that "the greater portion of the damage was caused by water").

"Under Rule 50, a court may not render judgment as a matter of law unless a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Ellis v. Weasler Eng'g Inc.*, 258 F.3d 326, 37 (5th Cir. 2001). Here, the question of whether and to what extent Plaintiffs' house was damaged by wind, if at all, was the subject of conflicting evidence, and State Farm presented competent evidence of the greatest amount of damage that could have been caused by wind. As the foregoing authorities establish, the issue should have been put before the jury. State Farm is therefore entitled to a new trial on Plaintiffs' claim for damage to their

dwelling.<sup>14</sup>

### **III. THE COURT'S ERROR IN ALLOWING PLAINTIFFS' UNQUALIFIED EXPERT TO TESTIFY WARRANTS A NEW TRIAL**

Prior to and again during trial, State Farm sought unsuccessfully to exclude the testimony of Plaintiffs' purported expert, James T. Slider, P.E., on the ground that his opinions and conclusions failed to meet the standards of reliability set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 592 (1993), and its progeny.<sup>15</sup> At trial, Mr. Slider rendered opinions and conclusions that, like his Rule 26 report and deposition testimony, lacked any meaningful scientific basis.

#### **A. Mr. Slider Lacked the Necessary Expertise to Offer Opinions on Causation**

Mr. Slider is a structural engineer. Tr. 224:21-22. He is neither a coastal engineer, i.e., a practitioner of the branch of civil engineering involving the study of the action of the seas on shorelines and the design of structures to protect against this action, Tr. 276:9-12, nor an expert in the field of wind engineering, a multi-disciplinary field that involves the study of both the physical nature of wind and its impact on structures and systems. In fact, when asked whether he knew what a wind engineer does, Mr. Slider responded, "I wouldn't have a clue." Tr. 220:1-4, 276:13-16. Notably, Mr. Slider did not know whether the "technique" he employed for determining the alleged cause of the damage to Plaintiffs' residence had ever been used to reach conclusions about the cause of damage to structures during hurricanes, Tr. 220:5-13, and, to his knowledge, this "technique" had never received peer review in the field of civil engineering. Tr. 221:22-25. In short, Mr. Slider had no education, training or experience

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<sup>14</sup> Moreover, the amount of the judgment is incorrect as it relates to damage to Plaintiffs' dwelling. In its original oral ruling on Plaintiffs' motion for JMOL, the Court stated that State Farm was liable to Plaintiffs in the amount of \$223,292.00, representing "the limits of coverage under [Plaintiffs'] policy." Tr. 497:21-22. Later, the Court acknowledged that this amount erroneously included the policy limits for Plaintiffs' dwelling extension coverage (stipulated in the Pretrial Order [88] to be \$12,070), and the Court subtracted this amount before entering the final judgment amount of \$211,222.00. The Court failed, however, to subtract the applicable Hurricane Deductible – here, 2% of Plaintiffs' policy, or an additional \$2,362.00. See Ex. D-1, Declarations Page. At a minimum, the judgment must be corrected to reflect this deductible.

<sup>15</sup> The Court refused to hold a *Daubert* hearing on the relevance and reliability of Mr. Slider's testimony. See State Farm's Motion to Reconsider at 2 [97]; Order dated 2/6/0 [97].

in the issues that were at the center of this case, particularly including the relative effect of hurricane wind and storm surge in damaging Plaintiffs' house.

**B. Mr. Slider's Opinions Were Not Based on Sufficient Facts or Data**

Mr. Slider's opinions were based in significant measure on ASCE 7, the American Society of Civil Engineers' "Minimum Design Loads for Buildings and Other Structures," which details the requirements for general structural design, including means for determining dead, live, soil, flood, wind, snow, rain, atmospheric ice, and earthquake loads. *See, e.g.*, Tr. 225:1-22. But Mr. Slider only considered wind load calculations from ASCE 7 and ignored other relevant information such as water loads (the destructive force caused when a wave is on top of the water) and the potential for damage caused by floating debris. Tr. 233:21-234:14.

In addition, Mr. Slider based his opinions in part on interviews with six or seven "eyewitnesses" – only one of whom was even in Biloxi at the time of the storm, but nowhere near Plaintiffs' property. Tr. 237:13-240:9. Mr. Slider did not inspect neighboring properties that were left standing after the hurricane for whatever light they might shed on the likely cause of Plaintiffs' damage.<sup>16</sup> *See* Tr. 250:7-23, 251:12-15, 261:25-262:4. He made no effort to determine the wind speeds of earlier hurricanes in Biloxi in which Plaintiffs' house sustained relatively little or no damage, Tr. 253:19-254:2, and he did not consider the historical record as to the extent of damage to other residential structures from previous storms with wind speeds similar to Katrina's.

**C. Mr. Slider's Principles and Methods Are Unreliable**

Where, as here, an expert's testimony goes to the issue of causation, a necessary ingredient of expert analysis is the exclusion of alternative causes. *Michaels v. Avitech, Inc.*, 202 F.3d 746, 753 (5th

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<sup>16</sup> As State Farm's expert Dr. Gurley testified, "Any basic forensic investigation of why things fail necessarily considers what happened to the immediate surroundings, in particular for a hurricane event, which is a big large physical event, and in particular in a case where there is nothing left of a physical structure . . . ." Tr. 394:10-14.

Cir. 2000) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 757, 759 n.27 (3d Cir. 1994)); *see also Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 448 (Tex. App. 1997) (causation expert should analyze and exclude other possible causes). Nonetheless, Mr. Slider completely ignored storm surge as a possible cause of Plaintiffs' loss, even while noting that not a single house beyond the debris line was devastated or destroyed like Plaintiffs' home.<sup>17</sup> Tr. 263:23-264:1. He made no effort to determine the timing of the various potentially destructive surge levels on Plaintiffs' home, Tr. 246:7-247:5; did not consider FEMA suggestions for designing structures to withstand water current, Tr. 247:18-20; and was unaware of the conclusions reached by the ASCE Damage Assessment Team regarding the storm surge or the destruction it caused. Tr. 275:14-19. Compounding these problems, Mr. Slider failed to properly analyze the wind speed at Plaintiffs' home during the hurricane. For all these reasons, among others, Mr. Slider should not have been allowed to testify, and the erroneous and prejudicial admission of his testimony warrants a new trial.<sup>18</sup>

#### **IV. AS A MATTER OF LAW, THE PUNITIVE DAMAGES AWARDED AGAINST STATE FARM WERE IMPROPER AND UNSUPPORTED BY THE EVIDENCE**

##### **A. Mississippi Law Does Not Permit Punitive Damages in this Case**

Before punitive damages can be imposed for the bad faith denial of an insurance claim, Mississippi law places on the plaintiff the heavy burden of establishing by clear and convincing evidence that the defendant insurer denied the claim "(1) without an arguable or legitimate basis, either

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<sup>17</sup> A "debris line" is the "[l]ine left . . . on the ground by the deposition of debris. A debris line often indicates the . . . inland extent reached by flood waters." NOAA Coastal Services Center, Risk and Vulnerability Assessment Tool, Glossary, "Debris Line," available at <http://www.csc.noaa.gov/rvat/glossary.html#d>. It therefore serves as a marker for the outside boundary of the storm surge. Plaintiffs' residence was located "slightly south" of the debris line. Tr. 478:16-17. In addition to Mr. Slider's testimony that he did not see a single house north of the debris line that was "knocked down" or totally "destroyed," State Farm's expert testified that no house south of the debris line remained standing after Katrina. Tr. 452:2-4.

<sup>18</sup> In granting Plaintiffs' motion for JMOL, the Court expressly stated that it had relied upon "all of the evidence," necessarily including Mr. Slider's testimony. *Op.*, p. 1; Tr. 493:11-12. Because the Court erred in admitting Mr. Slider's testimony, and because that incompetent testimony more probably than not affected the ultimate result, State Farm is entitled to a new trial. *See Mukhtar v. Calif. State Univ., Hayward*, 299 F.3d 1053, 1066-67 (9th Cir. 2002) ("If we are unable to say that the probabilities favor the same result and are unsure whether the error was harmless, a new trial is required."); *accord United States v. Mitchell*, 173 F.3d 1104, 1111 (9th Cir. 1999).

in fact or law, and (2) with malice or gross negligence in disregard of the insured's rights." *United States Fid. & Guar. Co. v. Wigginton*, 964 F.2d 487, 492 (5th Cir. 1992); *see also Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888, 896 (Miss. 2006) (punitive damages claim in insurance context requires "actual malice [or] gross negligence evidencing a willful, wanton, or reckless disregard" for the rights of others or "actual fraud"). Based on the evidence at trial, neither of these requirements was met, and State Farm is therefore entitled to judgment as a matter of law on Plaintiffs' claim for punitive damages.

Under Mississippi law, to recover punitive damages for the bad faith denial of an insurance claim, a plaintiff must first establish by clear and convincing evidence "that there was no reasonably arguable basis for the insurance carrier to deny the claim." *Blue Cross & Blue Shield v. Campbell*, 466 So. 2d 833, 844 (Miss. 1984). An arguable factual basis is "one in support of which there is some credible evidence. There may well be evidence to the contrary." *Tipton v. Nationwide Mut. Fire Ins. Co.*, 381 F. Supp. 2d 572, 579 (S.D. Miss. 2004) (emphasis added; citations omitted). Even though an insurer's denial of benefits may later be determined to be erroneous, the denial is not in bad faith and will not support an award of punitive damages if the denial had an arguable basis or "arguable merit." *Sobley v. S. Natural Gas Co.*, 302 F.3d 325, 342 (5th Cir. 2002). Moreover, as the Mississippi Supreme Court explained in *Liberty Mutual Insurance Co. v. McKneely*, 862 So. 2d 530 (Miss. 2003):

The defendants are not required to disprove all possible allegations made by a claimant. They are simply required to perform a prompt and adequate investigation and make a reasonable, good faith decision based on that investigation.

*Id.* at 535. A merely negligent investigation does not support bad faith; rather, the insurer's "level of negligence in conducting the investigation must be such that a proper investigation by the insurer 'would easily adduce evidence showing its defenses to be without merit.'" *Id.* at 534 (citation omitted).

Furthermore, under Mississippi law an insurer is "entitled to have a court resolve [an] undecided question of law to determine its liability without being punished for referring the question to a court." *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 874 (5th Cir. 1991). Accordingly, "[f]or requiring

the resolution of the legal issue [an insurer] cannot be liable under Mississippi law for punitive damages, even if it does not prevail on the underlying legal issue." *Id.* Thus, in *Gulf Guaranty Life Insurance Co. v. Kelley*, 389 So. 2d 920 (Miss. 1980), the Mississippi Supreme Court held that a clause in a life insurance policy permitting the insurer to cancel the policy within 90 days of issuance was void as against public policy where the insurer exercised that right to cancel the policy of an insured who had fallen ill and died within the 90-day window. *Id.* at 922. Nonetheless, the Court reversed the punitive damages award, explaining:

Defendant had the right to interpose its defense, and although we have decided defendant was liable on its policy, we conclude there was an arguable reason for failing to pay the claim; therefore, the question of punitive damages should not have been submitted to the jury.

*Id.* at 923.

In upholding the sanction of punitive damages in this case, the Court relied primarily on a log entry by a State Farm adjuster that stated in part that it appeared Plaintiffs' home "'was more damaged by flood than wind'"; on its erroneous characterization of State Farm's wind/water claim handling protocol; and on the fact that State Farm decided to defend this case in court. *See* Order dated Jan. 31, 2007 ("1/31/07 Order") [108], at 2; *see also* Op. at 14. The law and the evidence compel a different result.

First, as shown in Point II above, State Farm had an arguable and reasonable basis for concluding that Plaintiffs' house was swept away by storm surge, leaving only a slab. This Court's emphasis on a single phrase from the adjuster's evaluation of the damage to Plaintiffs' house ("more damaged by flood than wind") disregards the overall context of that evaluation and ignores the fact that the adjuster's ultimate conclusion was precisely the same as that of State Farm's experts: that the house was standing and structurally intact when it was destroyed by flood. Moreover, contrary to this Court's statement, the evidence is clear that State Farm did not "use[] the debris line as its sole investigative guide." 1/31/07 Order at 2. Indeed, the adjuster's initial evaluation, quoted in part by the Court, makes clear that the

adjuster not only looked at the debris line (which was two house lots north of Plaintiffs' lot), but also inspected the area and examined the condition of the trees near Plaintiffs' residence. The adjuster's notes state not only that the "House and shed are completely gone," but also that

[a]lthough there is some damage to some tree tops in the area, the damage to the trees right next to the house is minimal except for the areas below the apparent waterline, where it appears floating debris scraped the side of the trees. This damage is uniform in that it is at the same height on each tree. There does not appear to be any random damage to the area generally associated with tornadic activity.

Ex. D-113.

In any case, as State Farm's experts testified, the debris line was in fact a significant line of demarcation: houses within the debris line were totally destroyed or sustained severe structural damage, while those beyond the debris line sustained either no damage or minor damage to roof shingles. Moreover, as State Farm employee Terry Blalock testified, there was nothing left of Plaintiffs' house or shed so as to permit further investigation into whether any shingles had in fact blown off or, if so, how many. Tr. 302:17-18, 23-25. Mr. Blalock testified that, in cases such as this, where storm surge left only a slab, if a portion of the roof could be located, State Farm would examine it to see whether there was wind damage for which it could pay. Tr. 302:9-15. Because, in Plaintiffs' case, there was no identifiable wind damage and because physical evidence "supported that the surge is what took that dwelling," State Farm made no payment. Tr. 303-04. This testimony and other evidence demonstrate that State Farm's investigation of Plaintiffs' claim was more than reasonable and adequate under Mississippi law. *See McKneely*, 862 So. 2d at 534-35.

Second, this Court erroneously found a basis for punitive damages in State Farm's wind/water claim handling protocol, which the Court opined "emphasized the exclusion but is at odds with other express terms of the insurance contract," "attempted impermissibly to place the burden of proof on the Plaintiffs to establish that their losses were caused by wind," and "in slab cases, . . . assigned 100% of

the loss to flooding unless the policyholder could show 'independent windstorm damage' or produce an eyewitness to the destruction." 1/31/2007 Order at 2.<sup>19</sup> In fact, the wind/water claim handling protocol reasonably interpreted the anti-concurrent cause language of the policy, which excludes damage that "would not have occurred in the absence of" water damage, as limiting coverage in storm surge cases to "independent windstorm damage." Ex. P-13 at 2. The fact that this Court later invalidated State Farm's anti-concurrent cause language as "ambiguous" (despite the fact that the language had been upheld and applied by Mississippi state and federal courts) does not transform State Farm's attempt to implement that language and the water damage exclusion itself into a basis for punitive damages. Moreover, contrary to the Court's conclusion, the protocol nowhere instructed adjusters to "assign 100% of the loss to flooding unless the policyholder could show 'independent windstorm damage' or produce an eyewitness to the destruction." 1/31/2007 Order at 2. Rather, it instructed adjusters to handle each claim "on its merits"; to conduct a "causation investigation" documenting and considering "[e]vidence gathered at the on site inspection," including "physical evidence such as water lines, an examination of the debris, and an analysis of physical damage to the structure," as well as "evidence gathered at neighboring locations," "[d]ata obtained from reports describing damage to the area," and "information from witnesses and policyholders"; and to "calculate separate damage attributable to wind and water and handle the adjustment accordingly." Ex. P-13 at 1-2.

In addition, the burdens of proof that are criticized by the Court as improper (namely, requiring policyholders in these circumstances to quantify the amount of separate and independent wind damage to their property) are in accordance with the burdens of proof adopted by numerous courts, including the

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<sup>19</sup> In its discussion of the wind/water claims handling protocol, the Court also incorrectly implied that State Farm adopted the protocol specifically to provide justification for State Farm's denial of the Broussards' claim. *See* 1/31/2007 Order at 2 ("To justify this decision [to deny Plaintiffs' claim], Defendant adopted a wind/water claim handling protocol that emphasized the exclusion but is at odds with other express terms of the insurance contract."). In fact, the claim handling protocol was adopted shortly after Hurricane Katrina to provide guidance to the numerous claims adjusters State Farm retained to handle the enormous volume of Katrina insurance claims. Ex. P-13 at 1. There is no evidence whatever that State Farm adopted the protocol with an improper intent to deny claims for covered damage.

Fifth Circuit. As discussed above, these courts hold that, once an insurer has shown that an exclusion applies, the burden shifts back to the insured to establish that the exclusion does not apply or to segregate wind and water damage.<sup>20</sup> Given the substantial authority placing the burden on policyholders to establish the existence and amount of separate wind damage in circumstances such as these, State Farm certainly acted in good faith in adopting and applying its wind/water claim handling protocol. Moreover, under Mississippi law, State Farm cannot be subject to punitive damages for litigating the question of law as to the applicable burden of proof. *See Dunn*, 927 F.2d at 874 ("For requiring the resolution of the legal issue [an insurer] cannot be liable under Mississippi law for punitive damages, even if it does not prevail on the underlying legal issue."); *see also Strickland v. Motors Ins. Corp.*, 970 F.2d 132, 137-38 (5th Cir. 1992) (punitive damages properly denied where insurer acted in reliance on interpretation of statutory language that was "less than clear"); *S. United Life Ins. Co. v. Caves*, 481 So. 2d 764, 769 (Miss. 1985) (rejecting punitive damages if an insurer's denial of a claim was based on a misunderstanding of the law).

Third, even assuming *arguendo* that the facts and law would allow a finding of bad faith against State Farm, that bad faith could be found to exist only with regard to the shingle damage that State Farm's experts stated might have been caused by wind before the storm surge reached the house – a minor portion of Plaintiffs' claim. Nothing in the evidence supports the proposition that State Farm acted in bad faith in denying the claim for the total destruction of the residence on the basis of the water damage exclusion. Moreover, Dr. Gurley's opinion that there might have been limited wind damage before the storm surge hit was based on statistical probabilities; he never determined "that in fact there

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<sup>20</sup> This Court has recognized that there is substantial ground for difference of opinion regarding its interpretation of State Farm's homeowners policy, including "the water damage exclusion; . . . the anti-concurrent cause clause; and *the respective burdens to be carried by the parties.*" *Tuepker v. State Farm Fire & Cas. Co.*, No. 1:05CV559-LTS-RHW, 2006 WL 2794773, at \*1 (S.D. Miss. Sept. 27, 2006) (emphasis added).

was [wind] damage to the Broussard property."<sup>21</sup> See note 7 *supra*. Thus, given that there was indisputable evidence of storm surge – and no evidence that could definitively establish *any* actual wind damage – State Farm also had an arguable basis for not tendering payment for shingle damage.

In any case, in contesting State Farm's denial of their claim, Plaintiffs did not claim separate payable shingle damage. Rather, Plaintiffs "made the claim that the house was totally destroyed by wind, that the tornado totally blew the house away" before the storm surge hit. Tr. 305:17-19. Thus, although this Court relied in its punitive damage analysis on its view that State Farm "took the extraordinarily troubling position, even with expert reports in hand . . . that it would rely on the jury to make the determination of the amount to pay the Plaintiffs for their covered losses" (1/31/07 Order at 3), the expert reports State Farm had in hand did not support payment of policy limits as Plaintiffs sought. Rather, those reports indicated that there *might have been* some wind damage to the shingles on Plaintiffs' roof or that there *might have been no wind damage at all*. Contrary to this Court's statement, payment of even the maximum amount of shingle damage that State Farm's expert opined might have occurred would not have avoided this litigation and trial.

Given the expert reports, the conclusions of its own adjusters based upon their inspection of Plaintiffs' property and the surrounding area, and the substantial legal authority placing the burden of

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<sup>21</sup> In deciding whether to pay for separate wind damage, State Farm looked for specific evidence of wind damage with respect to the particular property at issue. Dr. Gurley's testimony as to the probability of shingle damage to the Broussards' home was based on a statistical survey of shingle damage to still-standing homes in the neighborhood. The Fifth Circuit has recognized the problems of using statistical evidence to establish causation in an individual case. See *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 302 (5th Cir. 1998). Moreover, even though State Farm's expert's testimony regarding the extent of possible wind damage was sufficient to satisfy State Farm's purported burden of segregating wind from water damage, see Point II above, this does not mean that State Farm acted in bad faith by concluding that Plaintiffs' house had sustained *no* compensable damage. The evidence supporting that conclusion included, *inter alia*, the fact that the trees surrounding Plaintiffs' home sustained extremely minimal wind damage, that power lines and poles near Plaintiffs' home remained standing, that the shingled roof of a nearby apartment complex was intact, and that many homes within a mile of the Broussards' lot, but beyond the debris line, suffered "virtually no damage." Tr. 382, 396:6-12, 398:18-399, 406:5-9. This evidence constituted more than "some credible evidence" in support of State Farm's denial of Plaintiffs' claim, rendering punitive damages impermissible under Mississippi law. See *Campbell*, 466 So. 2d at 844 ("some credible evidence" in support of insurer's denial of a claim is enough to establish a reasonably arguable basis, such that punitive damages may not be awarded, even though there is "evidence to the contrary").

proof on Plaintiffs to segregate any covered wind damage from excluded water damage, State Farm's decision to go to trial cannot be a basis for punitive damages. Indeed, in similar circumstances the Mississippi Supreme Court has found that plaintiffs were not entitled to prejudgment interest because there was a "bona fide dispute as to the amount of damages as well as the responsibility for the liability therefor." *Grace*, 257 So. 2d at 225.

In this case, two experts testified on behalf of State Farm that wind did not cause structural damage to Plaintiffs' house or breach the envelope of the house. One of those experts, Dr. Gurley, testified that before the storm surge swept the house away, wind could have damaged from 0 to 35 percent of the shingles on the roof. *Op.*, pp. 2-3, ¶ 7. In other words, in the worst case, wind might have caused relatively minor damage to Plaintiffs' roof – and might have caused no damage at all. Dr. Gurley also testified that no houses north of the debris line were completely destroyed. Rather such houses were "structurally intact with varying levels of either none or some amount of roof cover loss." *Tr.* 381:11-12. Dr. Gurley's estimate as to possible wind damage to Plaintiffs' roof was based upon his examination of the levels of roof damage sustained by houses north of the surge area, which, according to him, experienced more sustained and higher peak winds than did Plaintiffs' residence. State Farm's other expert, Dr. Robert Dean, testified as to the massive destructive force of the storm surge and accompanying waves that inundated Plaintiffs' residence and swept it away.

As this Court found, State Farm presented "overwhelming" evidence that "the force of the storm surge was sufficient to destroy the [Plaintiffs'] dwelling." *See Op.*, p. 3, ¶ 8. State Farm also presented overwhelming evidence that storm surge did in fact destroy Plaintiffs' dwelling and that Plaintiffs' dwelling was not destroyed by wind or a tornado before the storm surge reached it. This evidence included the fact, based on aerial photographs of the surrounding area, that none of the houses outside of the storm surge area was destroyed or sustained structural damage, while houses hit by the storm surge were completely flattened or severely damaged. *Tr.* 380:21-24, 451, 382, 215. Thus, any reliance by

State Farm upon the "debris line" reflected the reality of the damage caused by the storm surge.

In light of the case law on burden of proof and the testimony and evidence in this case, State Farm had more than a reasonably arguable basis for denying Plaintiffs' claim. Likewise, there is no evidence to support a finding that State Farm acted with gross negligence or in reckless disregard of Plaintiffs' rights. Accordingly, the award of punitive damages must be vacated, and State Farm should be granted JMOL on Plaintiffs' claim for punitive damages.

**B. Alternatively, Further Remittitur Is Required Because the Punitive Damages Award Is Grossly Excessive as a Matter of Mississippi Law and Federal Constitutional Law**

Both Mississippi law and federal due process set limits on the propriety and amount of punitive damage awards. Under these standards, the punitive award, already remitted by this Court to \$1 million, should be further substantially reduced. Under federal constitutional law, the propriety of a punitive award is assessed based upon three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). Mississippi law requires consideration of similar factors in determining whether an award is excessive. *See* Miss. Code Ann. § 11-1-65(1)(f)(ii).

The first guidepost of reprehensibility weighs in favor of reducing the punitive damages award. State Farm's conduct, as shown by the evidence in this case, cannot be considered reprehensible. As shown above, State Farm acted reasonably toward Plaintiffs in its handling and investigation of their insurance claim. Moreover, in denying Plaintiffs' claim, State Farm reasonably and in good faith relied on its policy language as being consistent with and permissible under Mississippi law. Indeed, Plaintiffs made no showing that the reprehensibility factors identified by the Court in *Campbell* were met. *See Campbell*, 538 U.S. at 419.

Under the second guidepost mandated by the *Campbell* excessiveness analysis, the United States Supreme Court has made clear that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. The \$211,222.00 compensatory award is clearly "substantial." At a ratio of nearly 5 to 1, the remitted punitive award of \$1 million is still beyond the range of what is constitutionally permissible in this case. Even when a defendant's conduct is highly reprehensible, which State Farm's was not, courts applying *Campbell* have reduced punitive damage awards to 1:1 ratios or less to comport with due process requirements where (as here) compensatory damages are substantial. *See, e.g., Ceimo v. Gen. Am. Life. Ins. Co.*, No. CV-00-1386-PHX-JFM, 2003 U.S. Dist. LEXIS 26699, at \*5-7 (D. Ariz. Sept. 16, 2003) (reducing punitive damages award from a 11.79:1 ratio to a 1:1 ratio), *aff'd*, 137 Fed. Appx. 968 (9th Cir. 2005).<sup>22</sup>

Moreover, for purposes of ratio, the entire amount of compensatory damages (\$211,222.00) drastically overstates the purported harm caused by State Farm's alleged bad faith denial of Plaintiffs' claims. As shown above, assuming there was a bad faith denial, the bad faith would be limited to the denial of a fraction of the compensatory damages awarded by this Court. There could have been no bad faith as to the damages claimed for the contents of Plaintiffs' house.<sup>23</sup> *See Point I supra*. Likewise, there could be no bad faith with respect to damages to Plaintiffs' dwelling other than the limited amount of shingle damage, if any, to which State Farm's expert testified. Plainly, the punitive award, even as remitted, bears no reasonable relationship to the possible shingle damage in this case.

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<sup>22</sup> *See also Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing punitive damages award from a 3.7:1 ratio to 1:1); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 793, 798-99 (8th Cir. 2004) (reducing punitive award from 10.1:1 ratio to 1:1); *Hines v. Grand Casino*, 358 F. Supp. 2d 533, 552-53 (W.D. La. 2005) (reducing punitive award from 10:1 ratio to 1.5:1); *Casumpang v. Int'l Longshore & Warehouse Union, Local 142*, 411 F. Supp. 2d 1201, 1221-22 (D. Haw. 2005) (reducing punitive award from 4:1 ratio to 1:1); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 450, 468-70 (3d Cir. 1999) (remitting 1:1 punitive award to 1/48 of compensatory damages).

<sup>23</sup> Moreover, if any portion of the compensatory damage award is set aside, the punitive damage award must be vacated as well. *See Savage v. LaGrange*, 815 So. 2d 485, 494 (Miss. Ct. App. 2002)

The third punitive damages guidepost is a comparison of the award with the most relevant civil sanction for conduct comparable to the alleged conduct at issue. *See Campbell*, 538 U.S. at 428. In this case, the closest comparable penalty is the penalty of up to \$1,000 per violation that the insurance commissioner may levy for "any insurance unfair trade practice or fraud." Miss. Code Ann. § 83-17-71(1)(g), (h); *see also id.* § 83-9-19. The gross disparity between the punitive award and the comparable civil penalty requires a further significant reduction of the punitive award.

Finally, the consideration of State Farm's wealth for purposes of assessing punitive damages is unconstitutional. *See Campbell*, 538 U.S. at 427 ("[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," as it "bear[s] no relation to the award's reasonableness or proportionality to the harm").<sup>24</sup> Allowing consideration of corporate wealth improperly "creates the potential that juries will use their verdicts to express biases against big businesses," *id.* at 417 (citation omitted), and contravenes a defendant's due process right to fair notice of the severity of the penalty that may be imposed for its conduct. *See Gore*, 517 U.S. at 574, 585.

In sum, federal constitutional principles and Mississippi law require that, if the punitive damages award is maintained, it must be further substantially reduced to a ratio much lower than 1 to 1.

## **V. STATE FARM IS ENTITLED TO A NEW TRIAL BECAUSE ITS CONSTITUTIONAL RIGHT TO AN IMPARTIAL FACT-FINDER WAS VIOLATED**

### **A. A Transfer of Venue Was Required to Protect State Farm's Right to an Impartial Fact-Finder**

State Farm is entitled under the Seventh Amendment and the due process clauses of the Fifth and

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<sup>24</sup> The Court erroneously rejected State Farm's proposed jury instruction D-19, which would have precluded the jury's consideration of State Farm's "size, financial condition, net worth, wealth, or overall profits, income, assets, or revenues." This error allowed the jury to inflate the punitive damages to a grossly disproportionate amount. The Court also erred in failing to give State Farm's proposed instruction D-17, which would have instructed the jury that the amount of punitive damages must be reasonable and proportionate to both the amount of harm to the plaintiffs and the amount of compensatory damages awarded. *See Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558, 564-65 (3d Cir. 1989) (ordering new trial where requested charge on reasonable relationship not given). This Court should also have instructed the jury as to the definitions of "actual malice," "gross negligence," "willful," "wanton," and "reckless disregard," as requested by State Farm's proposed instruction D-9.

Fourteenth Amendments of the United States Constitution to “an impartial jury free from outside influences.” *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); see *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (“One touchstone of a fair trial is an impartial trier of fact . . . .”); *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 514-15 & n.2 (10th Cir. 1998) (Seventh Amendment impartial jury guarantee includes civil proceedings and “the denial of trial by an impartial jury is also the denial of due process”). As State Farm established in pretrial proceedings<sup>25</sup> and during voir dire, the entire venire was subjected to pervasive and extreme adverse publicity surrounding Katrina insurance issues.<sup>26</sup> Moreover, members of the venire (and the jurors actually impaneled) all had their lives impacted by the hurricane and its aftermath and had experience with or knowledge of insurance claims, insurance lawsuits and insurance controversies stemming from Hurricane Katrina. These combined circumstances so tainted the venire that this case should never have been tried in the Southern District of Mississippi.

**1. State Farm's Experts Established That State Farm Could Not Secure a Fair, Impartial Jury in the Southern District of Mississippi**

State Farm's expert Dr. Kent Tedin conducted a survey of potential jurors in the Southern District that substantiated the negative effect on potential jurors of both the adverse publicity against insurance companies and the natural tendency to support community members in the face of tragedy, particularly when the defendant is a “distant corporation.” Tedin Aff., ¶ 40. Of the people polled by Dr. Tedin, 49 percent agreed with Congressman Taylor’s much publicized statement equating insurance executives with child molesters. Tedin Aff., ¶ 37. Dr. Tedin's poll demonstrated that a person's perception of insurance companies as “fair” or “unfair” is affected in an identifiable and negative way by

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<sup>25</sup> State Farm incorporates by reference the arguments set out in State Farm's Motion to Change Venue [29] and Memorandum of Law in Support [34], filed 9/1/2006; the Tedin Affidavit [30], filed 9/1/2006; State Farm's Rebuttal Memo in Support of the Motion to Change Venue [55], filed 9/22/2006; and the Bronson Affidavit [61], filed 10/3/2006.

<sup>26</sup> State Farm's request for an evidentiary on its motion to change venue, Tr. 8:19, was not granted by the Court.

the psychological stress following Katrina and by directly or indirectly experiencing flood damage and insurance claim issues. *Id.*, ¶¶ 40-68. Dr. Tedin also demonstrated that voir dire is ineffective in detecting bias among potential jurors under such circumstances. *Id.*, ¶¶ 73-90. His survey demonstrated that a fair trial would be impossible in the Southern District of Mississippi.

State Farm's expert Dr. Edward Bronson also concluded that State Farm could not get a fair jury trial in this District. Dr. Bronson conducted an in-depth review of media coverage in the *Sun Herald*, WLOX-TV newscasts and other programs, as well as other media outlets. His analysis demonstrated that the pervasive negative publicity had a clear detrimental effect on the venire. Bronson Aff., ¶ 3. Dr. Bronson's analysis included the extent and nature of the publicity (*id.*, ¶¶ 30-101); Plaintiffs' status (*id.*, ¶¶ 102-14); the perception of State Farm in the community as a "distant, unappealing and unsympathetic" defendant (*id.*, ¶¶ 115-35); population size (*id.*, ¶¶ 136-51); the political overtones of this case (*id.*, ¶¶ 152-63), as well as the inadequacy of voir dire in determining juror bias in these circumstances (*id.*, ¶¶ 168-82); and the impossibility of overcoming juror bias with judicial instructions. *Id.*, ¶¶ 183-86. In his supplemental affidavit, attached to State Farm's motion as Exhibit B, Dr. Bronson has analyzed the prejudicial news coverage that continued to occur up to the eve of and during the trial in this case (*see* Bronson Supp. Aff., Ex. B, ¶¶ 5-14), as well as the coverage of both the trial itself and the verdict. *See id.*, ¶¶ 15-25. *See* Exhibit A attached hereto (Appendix of Media Source Publications (table describing prejudicial media coverage from September 15, 2006 through the last day of trial, January 11, 2007)).

## **2. Voir Dire Revealed That the Venire Was Irrevocably Tainted**

Voir dire confirmed the conclusions of Drs. Tedin and Bronson and showed that an unbiased venire is virtually unattainable in this venue:

- Of the original 130 persons summoned, 50 were eliminated outright because they (or a family member) were a party to a Katrina lawsuit. Tr. 11:7-8, 14:8-19; *see Bass v. State Farm Fire & Casualty Co.*, Case No. 1:06-CV-00034 (Order

Overruling Defendant's Motion Requesting Implementation of Certain Procedures Regarding Jury Selection at p.1 [113]) ("members of the venire [in *Broussard* and *Tejedor*] were excused if they responded in the affirmative as to whether they or any members of their family were a plaintiff in any lawsuit resulting from property damage due to Katrina").

- Of the remaining 80 potential jurors, only nine suffered no damage from Katrina. Tr. 25:18-28:25.
- Only 20-21 prospective jurors were from a non-coastal county within the six-county Southern Division. Tr. 11:14-19.
- A "good number" of the prospective jurors stayed in their homes during Katrina, Tr. 67:4-9, experiencing firsthand the worst hurricane to hit this continent.<sup>27</sup>
- After excusing 23 candidates (*see* Tr. 19-109), voir dire revealed that 41 of 57 potential jurors (71%) were exposed to the media coverage on Katrina insurance disputes and/or discussed with others whether Katrina claims had been properly paid. Tr. 109-45.

Regarding the jurors actually impaneled, voir dire disclosed that:

- *Every* juror sustained some type of damage from Katrina. Tr. 25:18.
- Two jurors lived in an area that had damage from wind and storm surge and experienced storm surge/flood damage to their homes. Tr. 37-41.
- One juror, Mr. McPeek, had his claim denied by Allstate. Tr. 38:9-14.
- All but one juror knew of the media coverage on Katrina insurance disputes. Tr. 103:17-21.
- Two jurors had discussions with others regarding whether their Katrina claims were paid properly. Tr. 109:10-22.

### **3. News Coverage on the Eve of Trial Further Tainted the Venire**

Seventy-one percent of the venire acknowledged being aware of news coverage on Katrina and State Farm's insurance issues. On the weekend before the trial, the *Sun Herald* reported both that State Farm had moved for a change of venue because it believed it would not get a fair trial on the Coast and

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<sup>27</sup> Though this is an area that could have a significant impact on a person's ability to impartially determine the issues arising in this case, the Court prohibited defense counsel from exploring this important issue. Tr. 67-68.

that State Farm had "offered the Broussards \$20,000 . . . to settle the case." Anita Lee, "Jury selection critical in Katrina slab case - Can Coastians be fair and impartial?," *Sun Herald* (Biloxi, Miss.), Jan. 7, 2007, at A2, *available at* 2007 WLNR 300652 (Westlaw). Both statements gave the venire information this Court had previously ruled should not be presented to the jury. Other articles in that weekend's *Sun Herald* contained equally prejudicial material. These included Representative Gene Taylor's call for "insurance horror stories"; a photograph of a tattered United States flag with a sign: "I know my flag is tattered, in need of loving care, but I can't take it down until State Farm pays its share"; and an article reminding readers:

Your attorney general, Jim Hood, has launched a criminal probe [against insurers]. Congressman Taylor, who is leading insurance reform efforts, colorfully likened insurers to child molesters . . . .

*See* Tr. 6-7, Exs. A-D. This relentless negative publicity continued up to the eve of trial (and beyond). In his supplemental affidavit addressing this continuing publicity and the jury selection process, Dr. Bronson concludes that the voir dire as carried out "gave no assurance that the jury selected . . . was, after all, the fair and impartial one sought." Bronson Supp. Aff., ¶ 113.

#### **B. Application of 28 U.S.C. § 1404 Mandates Transfer**

Pursuant to 28 U.S.C. § 1404, in civil cases involving pretrial publicity, federal courts "consider such evidentiary support as would demonstrate the propriety of a transfer based upon prospective veniremen bias." *N. Ind. Pub. Serv. Co. v. Envirotech Corp.*, 566 F. Supp. 362, 365 (N.D. Ind. 1983) (recognizing that statistical evidence and opinion polls are often used to support a pre-voir dire request for transfer because of prospective juror prejudice). In this case, State Farm provided ample evidence before trial to support a change of venue, while Plaintiffs offered *no proof* to rebut that evidence. But the Court denied a transfer, ruling that (a) the "convenience of the parties greatly outweighs against the defendant" based on the cost to plaintiffs if the trial were moved to Oxford, Mississippi; and (b) the "interest of justice" would be met based on the Court's belief that a "fair and impartial" jury could be

impaneled. Tr. 122-24; *see* Venue Opinion [109] ("Venue Op.") at 2.

The record, however, contains no evidence of what the "costs" of holding the projected three-day trial in Oxford would have been. *See* PTO, ¶ 18 [88]. More importantly, in cases involving inflammatory and prejudicial pretrial publicity, the "interest of justice" factor under section 1404(a) must not be treated merely as one more factor in the analysis. Rather, "[i]n potential jury bias cases based on presumed prejudice, the basic principle to be upheld [in deciding venue] is the fundamental fairness of the trial." *Haworth, Inc. v. Herman Miller, Inc.*, 821 F. Supp. 1476, 1480 (N.D. Ga. 1992). "When the trial judge becomes aware through massive news coverage that a fair trial cannot be had in the place where the action was filed, the judge has a duty to protect the defendant's rights to a fair trial." *Wash. Pub. Utils. Group v. U.S. Dist. Ct.*, 843 F.2d 319, 327 (9th Cir. 1988) (upholding transfer of venue). Contrary to the Court's ruling, 28 U.S.C. § 1404 mandates transfer to another venue.

### C. Due Process Mandates Transfer

In light of Katrina's catastrophic effect on the venire and the extensive, inflammatory publicity, a change of venue was required under *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980):

[W]here a [defendant] adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, "[jury] prejudice is presumed and there is no further duty to establish bias."

*Id.* at 997 (quoting *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979)).<sup>28</sup> Despite the evidence of massive negative publicity and the effects of Katrina on the venire, the Court did not address, let alone apply, the *Mayola* standard for triggering the "presumption of bias."

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<sup>28</sup> *See United States v. Harrelson*, 754 F.2d 1153, 1159 (5th Cir. 1985) (Defendant "can demonstrate that prejudicial, inflammatory publicity about his case so saturated the community from which his jury was drawn as to render it virtually impossible to obtain an impartial jury. Proof of such poisonous publicity raises a presumption that appellant's jury was prejudiced, relieving him of the obligation to establish actual prejudice . . ." (citations omitted)); *United States v. Stratton*, 649 F.2d 1066, 1082 (5th Cir. 1981) ("[a]dverse pretrial publicity may prejudice a jury panel to such an extent that a fair trial before that panel is impossible"). In this case, the excessive punitive damages awarded by the jury, which the Court felt compelled to reduce by 60%, indicates actual bias and prejudice against State Farm.

In *United States v. McVeigh*, 918 F. Supp. 1467, 1473 (W.D. Okla. 1996), the court recognized the futility of voir dire in light of the venire's personal "identification with those directly affected" and "identification with a community point of view [such] that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience." As State Farm showed, these same factors are present here, thereby warranting a change of venue. See *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 52 (Miss. 2004) ("[W]hen faced with a case which has been heavily reported in the news media, our trial courts must be prepared to readily grant a change of venue.") (reversing and remanding case based in part on improper venue); *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446, 450 (Miss. 1997) (affirming venue transfer based on futility of voir dire to detect juror bias from pre-trial publicity).<sup>29</sup>

Even if voir dire could have assured a fair trial in this case, the voir dire that took place was insufficient to protect State Farm's right to a fair and impartial jury. More is required than simply asking the venire (as happened here) whether "anyone had been so affected by pretrial publicity that he or she could not be completely fair and impartial." *United States v. Beckner*, 69 F.3d 1290, 1293 (5th Cir. 1995). Where, as here, prospective jurors have been "exposed to potentially prejudicial pretrial publicity . . . [t]he juror is poorly placed to make a determination as to his own impartiality." *United States v. Davis*, 583 F.2d 190, 197 (5th Cir. 1978). Accordingly, the district court must "determine[] for itself whether any juror's impartiality [has] been destroyed" by making an independent inquiry as to "what in particular each juror had heard or read and how it affected his attitude toward the trial." *Id.* at

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<sup>29</sup> See also *N. Ind. Pub. Serv. v. Envirotech Corp.*, 566 F. Supp. 362, 366 (N.D. Ind. 1983). Empirical studies show that voir dire is not effective for discovering and combating the effects of prejudicial pretrial publicity. See, e.g., Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll & James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 Am. U. L. Rev. 665 (1991); James Gobert, *Jury Selection: The Law, Art and Science of Selecting a Jury* § 2:11 (2d ed. 1990); see *Bronson Aff.*, ¶¶ 168-82.

196.<sup>30</sup> *See also* Bronson Supp. Aff., ¶¶ 94-113. Instead of making the required independent inquiry, the Court stopped defense counsel from making a more thorough examination on pretrial publicity, stating: "I don't think we are going to be able to take that much time to do individuals." Tr. 117:9-10. Merely asking prospective jurors as a group whether pretrial publicity affected their opinion of the defendant did not satisfy the Court's obligation to ensure impartiality. *See Davis*, 583 F.2d at 196 (trial court's conclusory group questioning as to whether any juror felt publicity had impaired his impartiality was not sufficient); *Beckner*, 69 F.3d at 1294 (same); *Waldorf*, 3 F.3d at 710-12 (same). Failure to make an independent evaluation of impartiality was error and warrants a new trial.

#### **D. Failure to Declare a Mistrial Was Error and Requires a New Trial**

##### **1. The Court Did Not Instruct the *Broussard* Jurors to Avoid Media Coverage**

Before releasing the *Broussard* jurors at the end of the first day and before opening statements, the Court *did not* instruct the jurors to avoid exposure to any news coverage on the case. Tr. 145 (only instruction was to "remain above and avoid all conversation regarding this case"). In comparison, the Court strictly admonished the jury in *Tejedor v. State Farm Fire and Casualty Company*, 1:05cv679-LTS-RHW, to avoid all media coverage, ordering them not to look, read or listen to media accounts of the trial. Tr. 155:20-156:1. Clearly, the Court mistakenly believed that it had instructed the *Broussard* jurors similarly on the first day.<sup>31</sup> The failure to do so was especially harmful because during the voir dire process the Court had told the venire: "No one expects you not to read the newspaper or listen to a radio or a television account of post-Katrina matters that have gone on now for several months, a year or more . . . ." Tr. 13:20-25. Likewise, that afternoon the Court corrected defense counsel in front of the

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<sup>30</sup> Though the Fifth Circuit has only had the opportunity to address the adequacy of voir dire in the face of pretrial publicity in the criminal context, other federal courts apply the same principles in civil proceedings. *See Waldorf v. Shuta*, 3 F.3d 705, 712 n.7 (3d Cir. 1993); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 497, 509 (C.D. Cal. 1981).

<sup>31</sup> The media coverage instruction given on Day 2 reveals that the Court believed he had given a similar instruction the day before: "As I told you yesterday, you absolutely must not read, look, or listen to any media account of [issues relating to this case]." Tr. 174:11-24 (emphasis added); *see also* Tr. 160:22-23.

venire: "Now, counsel, don't imply they should not have even read the paper because they received a jury summons. I told them earlier there is nothing wrong with pursuing their media interest." Tr. 117:18-19.<sup>32</sup> The Court's lack of clear instructions to the impaneled jury to avoid the media was error. *See United States v. Williams*, 635 F.2d 744, 745-46 (8th Cir. 1980) (new trial warranted where court failed to issue cautionary instruction prior to dismissal for evening); *United States v. Aragon*, 962 F.2d 439, 445 (5th Cir. 1992) (quick, casual instruction to "avoid reading about or listening to media reports" was inadequate).

Moreover, the inflammatory coverage continued on the evening news the day the jury was impaneled and in the following morning's newspaper. Tr. 159-161. Accordingly, State Farm's motion for a mistrial based on news coverage on the evening of the first day of trial should have been granted. Tr. 160. Alternatively, State Farm asked that the Court voir dire the jury daily to ask in detail what press coverage they had been exposed to or if they discussed the trial with anyone, particularly about issues that were subject to the Court's orders in limine. Tr. 160:12-16. In response, the Court stated: "[The news coverage] is beginning to bother me. I will put it that way. I realize the local media has the right to print the news, . . . but, boy, they are making it tough, you know? They are making it tough. There is nothing I can do about it." Tr. 160:24-161:4. The Court, however, believed it had properly instructed the jurors the day before: "[W]ell, what troubles me is. . . that *I instructed the jury they should not read anything about this case*, and here we come with [State Farm's motion for mistrial based on new media coverage]." Tr. 160:22-23 (emphasis added). The Court denied State Farm's motion for a mistrial, and although the Court conducted voir dire of the jury (Tr. 163:18-164:6), this voir dire was wholly inadequate, as detailed below.

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<sup>32</sup> The Court continued, "What is wrong is if it influences them and they cannot be a fair and impartial juror." Tr. 117:19-20. As addressed above, however, a juror may be unable to judge his or her own impartiality and even with a sufficient voir dire, bias may remain undetected.

The Court erred in failing to grant a mistrial when it did not allow particularized questioning of the jury, and did not instruct the jurors to avoid media coverage. A new trial is warranted under these circumstances.

**2. The Court Conducted an Insufficient Voir Dire on Days 2, 3 and 4 of Trial**

State Farm's motions for mistrial on the second, third and fourth days of the trial should also have been granted. The Court's voir dire of the jury on subsequent trial days was clearly insufficient. On Day 2 of the trial, the jurors were merely asked by the Court if they were influenced by what they read about the insurance industry in the morning newspapers. Although the panel unanimously said they were not (Tr. 174:25-175:1-3), the Court's voir dire was insufficient to ensure the requisite "independent determination of the impartiality of each juror." *Beckner*, 69 F.3d at 1294. This Court did not make the particularized inquiry requested by defense counsel (Tr. 160:12-16) as is required under *Davis, supra*. On the third and fourth days of trial, State Farm again moved for mistrial based on inflammatory publicity (Tr. 329:18-21. 330:5-17, Exs. A and B to 1-10-07 motion for mistrial); 505:21-25; 506:1-12, Ex. A (to 1-11-07 motion for mistrial), and its motions were again overruled. Tr. 506:13. The Court's repeated error in failing to change venue, strike the venire, or allow a mistrial mandate a new trial.

**CONCLUSION**

For all the foregoing reasons, State Farm respectfully requests that its motion for partial

judgment as a matter of law and for new trial be granted.

THIS, the 9th day of March, 2007.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, JOHN A. BANAHAN, one of the attorneys for the Defendant, STATE FARM FIRE & CASUALTY COMPANY, do hereby certify that on March 9, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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