

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

EDWARD E. GEMMILL

PLAINTIFFS

VERSUS

1:05CV692 LG-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

**STATE FARM FIRE AND CASUALTY COMPANY'S
TRIAL BRIEF**

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STATE FARM FIRE AND CASUALTY COMPANY'S TRIAL BRIEF

State Farm Fire and Casualty Company ("State Farm") respectfully submits this trial brief to address certain issues raised at the pretrial conference and other important issues that may arise during the trial of this case.

I. State Farm's "Wind/Water Claim Handling Protocol" Is Relevant and Admissible (If at All) Only in the Second Phase of the Trial

A. The Wind/Water Claim Handling Protocol Is Not Admissible in Phase I of the Trial

State Farm's wind/water claim handling protocol ("the protocol") should not be admitted in Phase I of the trial, which will determine whether Plaintiff is entitled to payment of his insurance claim under his State Farm homeowners policy. The protocol has no relevance to the question whether Plaintiff's loss is covered and if so, the extent of covered damages. Rather, as a claim handling guideline, the protocol is relevant, if at all, only to the manner in which State Farm made its decision to deny Plaintiff's insurance claim. Accordingly, it may be admitted (if at all) only if the trial proceeds to Phase II. *See Bridges v. Enter. Prods. Co.*, No. 3:05cv786-WHB-LRA, 2007 WL 571074, at *3 (S.D. Miss. Feb. 20, 2007) (excluding evidence relevant only to punitive damages from liability and compensatory damages portion of trial); *Beck v. Koppers, Inc.*, Nos. 3:03CV60-P-D, 3:04CV160-P-D, 2006 WL 2228876, at *1 (N.D. Miss. Apr. 3, 2006) (noting that "the court will not admit evidence during the first stage of the trial that is only relevant to punitive damages"); *Bradfield v. Schwartz*, 936 So. 2d 931, 938 (Miss. 2006) ("If punitive damages are indeed to be awarded within the limitations prescribed by [the punitive damages] statute, then evidence which does not pertain to compensating the plaintiff but only pertains

to proof that a punitive damage award is appropriate, should not be heard until liability has been determined.").

The protocol was provided to some State Farm claims adjusters in Mississippi and other areas affected by Hurricane Katrina "as a guide for handling various wind and/or water claims." Ex. A at 1. The purpose of the protocol was to describe the process to be used in determining whether certain claims were or were not payable. Among other directives, the protocol instructs adjusters that "[e]ach claim should be handled on its merits," that a "causation investigation should be conducted" in each case and that the adjuster should document evidence of wind and/or water damage. *Id.* It states that adjusters are to consider "any available information" in making a coverage determination, including evidence gathered at the on-site inspection; documentation of physical evidence such as water lines, an examination of the debris, and an analysis of the physical damage to the structure; evidence gathered at neighboring locations; data obtained from reports describing damage to the area; information from witnesses and policyholders; and input from any experts retained to provide guidance. *Id.*

The protocol sets forth the following categories of damage and gives instructions for each: (i) damage to the property caused by wind (covered); (ii) damage to separate portions of the property that can be attributed to either wind or excluded water; (iii) damage to the property caused by excluded water, with no available coverage; and (iv) damage to the property caused by floodwaters and covered by an available flood policy. *Id.*

With respect to damage to separate portions of the property that can attributed to wind or water, the protocol indicates that "[e]ach type of damage should be documented in the claim file" and that the "claim representative should calculate the separate damage

attributable to each peril and handle the adjustment accordingly." *Id.* at 2. However, "[w]hen the investigation indicates that the damage was caused by excluded water and the claim investigation does not reveal independent windstorm damage to separate portions of the property, there is no coverage available under the homeowners policy." *Id.* The protocol indicates that the relevant policy language supporting this instruction, which is quoted, is the water damage exclusion and the anti-concurrent cause lead-in to that exclusion. *Id.*

As the above description of the wind/water claim handling protocol makes clear, it has no relevance to establishing the actual facts and circumstances of the damage to Plaintiff's home and whether and to what extent that damage is covered under Plaintiff's policy. Accordingly, it should be excluded from Phase I of the trial in this case.

B. The Wind/Water Claim Handling Protocol Is Not Evidence of Bad Faith or Other Culpable Conduct Meriting Punitive Damages

In *Broussard v. State Farm Fire & Casualty Co.*, No. 1:06cv6-LTS-RHW, the Court erroneously found a basis for punitive damages in the protocol, which, in the Court's view, "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 "[i]n slab cases, . . . assigned 100% of the loss to flooding unless the policyholder could show 'independent windstorm damage' or produce an eyewitness to the destruction." See *Broussard*, Order dated Jan. 31, 2007 [*Broussard* 108], p. 2. In fact, the protocol reasonably interpreted the anti-concurrent cause language of State Farm's policy, which excludes damage that "would not have occurred in the absence of" excluded water damage, as limiting coverage in storm surge cases to

"independent windstorm damage." Ex. A at 2. The fact that the Court later invalidated this language (which had been upheld and applied by Mississippi state and federal courts¹) does not transform State Farm's attempt to give effect to that contractual language in applying its water damage exclusion into a basis for punitive damages. Moreover, contrary to the Court's conclusion in *Broussard*, the protocol nowhere instructs adjusters to "assign[] 100% of the loss to flooding unless the policyholder could show 'independent windstorm damage' or produce an eyewitness to the destruction." Order at 2. Rather, as shown above, it instructs 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. A at 1-2.

Moreover, to the extent the protocol speaks to the issue, the burdens of proof criticized by the Court in *Broussard* -- namely, requiring policyholders in these circumstances to provide evidence that separate and independent wind damage occurred before the storm surge completely destroyed the residence -- are in accordance with the burdens of proof adopted by numerous courts, including the Fifth Circuit. See Point II.A

¹ 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").

infra. Given the substantial authority placing the burden on the insured to establish the existence and amount of separate wind damage in circumstances such as these, State Farm certainly acted in good faith in adopting its wind/water claim handling protocol, which it believed to reflect accurately the terms of its insurance contracts as well as the applicable laws governing those contracts.

II. Apportionment of the Burden of Proof

As this Court recognized in *Broussard*, in cases involving the total destruction of a dwelling, "it is the allocation of the burden of proof that is critical" *Broussard*, Opinion on Rule 50 Motions for Judgment as a Matter of Law [*Broussard* 106], p. 3, 6.

As will be demonstrated below, it is Plaintiff, not State Farm, who bears the burden of segregating covered from noncovered damage under both his dwelling coverage and his personal property coverage². That is because, under any form of coverage open peril or named peril³ a plaintiff must prove the extent of his claimed loss as part of his burden of proving his entitlement to contract damages.

A. To Recover for Wind Damage to His Dwelling, Plaintiff Must Prove the Amount of Independent Damage Attributable to Wind

Under an "open peril" policy such as that covering Plaintiff's dwelling, if the insured meets his threshold burden of proving an accidental direct physical loss, the burden shifts

² Under Mississippi law, the two coverages constitute separate and independent insuring contracts. See *Travelers Indem. Co. v. Wetherbee*, 368 So. 2d 829, 835 (Miss. 1979) (Mississippi law "unequivocally establish[es] the divisibility of policy coverages so they may be considered as separate contracts even though the premiums are paid in the entirety").

³ "Open peril" policies (formerly called "all risk" policies) provide coverage for a broad range of risks, subject only to the policies' specific exclusions, conditions and limitations. Named peril policies, by contrast, provide coverage only for the specific risks enumerated in the policy. See *Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696, 698-99 (Miss. 1973) (noting distinction).

to the insurer to prove the applicability of any exclusion asserted as an affirmative defense. See *Commercial Union Ins. Co. v. Byrne*, 248 So. 2d 777, 782 (Miss. 1971). However, as many courts have held, 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) ("Once the insurer demonstrates that an exclusion arguably applies, the burden then shifts back to the insured to show that the claim does not fall within the exclusion or that it comes within an exception to the exclusion.") (citing *Britt v. Cambridge Mut. Fire Ins. Co.*, 717 S.W.2d 476, 482 (Tex. App. 1986)).⁴ This "shifting back" of the burden of proof is in accord with controlling Mississippi jurisprudence that "a plaintiff has the burden of proving a right to recover under the insurance policy sued on" and that "[t]hat basic burden never shifts from the plaintiff."⁵ *Britt v. Travelers Ins. Co.*, 566 F.2d 1020, 1022 (5th Cir. 1978) (Mississippi law); see also *Coahoma County Bank & Trust Co.*

⁴ The burden shifting rule applied in *Royal Surplus* is routinely applied in cases dealing with exceptions to exclusions. See, e.g., *U.S. Fid. & Guar. Co. v. B&B Oil Well Serv., Inc.*, 910 F. Supp. 1172, 1181 (S.D. Miss. 1995) (recognizing that "most courts have held that the burden is on the insured to prove" the applicability of an exception to an exclusion); *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1020 (6th Cir. 1995) (similar). Among the rationales offered for the rule are that the insured has the burden of proving its entitlement to coverage and that placing the burden on the insured "absolves the insurer from bearing the difficult burden of proving the negative." *Highlands Ins. Co. v. Aerovox Inc.*, 676 N.E.2d 801, 805 (Mass. 1997). Both of these rationales apply equally here.

⁵ 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; and because the plaintiff had "offered no evidence, whatsoever, to contradict the [insurer's] findings," the court upheld the insurer's determination of noncoverage. *Id.* at 869.

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).

The rule imposing on the insured the burden of proving the amount of loss attributable to a covered peril, or of segregating the covered damage from the 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) (property policy covering hurricane but excluding water damage) ("It is 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) (all risk policy) ("It 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." (Second emphasis added)). As noted 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 rule 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"); *Coastal Plains Feeders, Inc. v. Hartford Fire Ins. Co.*, 545 F.2d 448, 453 (5th Cir. 1977) (Alabama law) (noting general rule that insured "of course, bore the burden of proving the amount of its damages; the jury could not be left free to speculate as to this amount"). 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").

Accordingly, in order to prove his right to recover for alleged wind damage to his dwelling, Plaintiff must prove, in addition to the other issues on which he bears the burden

of proof, the extent of his covered loss *i.e.*, the amount of damage that was caused by wind, independent of the action of excluded water. As to the latter, even "the admitted *fact* of damage is insufficient" to sustain Plaintiff's burden, because he must also prove "the *amount* of damages." *Harbor House*, 915 F.2d at 319 (emphasis added). And while Plaintiff "need not prove [his] damages to a mathematical certainty, neither can [he] rely on mere speculation or conjecture" to satisfy his burden on this issue. *Id.*; accord *Savage*, 815 So. 2d at 491 (reversing damage award for personal injuries based on plaintiffs' failure to present sufficient evidence of nature or extent of alleged injuries). In short, Plaintiff may recover for damage to his dwelling only if and to the extent *he* not State Farm is able to apportion the covered wind damage, if any, from the excluded flood damage.

B. To Recover for Damage to His Personal Property, Plaintiff Must Prove the Cause of His Loss

In contrast to the coverage provided for Plaintiff's dwelling, Plaintiff's policy provides coverage for personal property on a named peril basis. See note 3, *supra*. Thus, to make out a *prima facie* case for coverage, Plaintiff has the burden of proving, as a threshold matter, that his personal property was damaged by one of the perils specifically enumerated in the policy in this case, "windstorm," including rain entering the dwelling through an opening caused by the direct force of wind. See *Lunday*, 276 So. 2d at 699 (under specified peril policy insuring against "direct loss by windstorm" it was plaintiffs' burden "to prove that the damages sustained were covered by the peril insured against, that is, by direct action of the wind").⁶ To satisfy this burden, Plaintiff must prove both that

⁶ The language in the policy in *Lunday* providing specified peril coverage for "Direct Loss by Windstorm," 276 So. 2d at 697, is substantially similar to the language in the State Farm policy in this case, which provides specified peril coverage for personal property for "accidental direct physical loss . . . caused by . . . Windstorm."

his property was damaged as a result of wind *and* the amount of damage caused by wind. Should he fail in either particular, his contents coverage claim necessarily fails, and judgment must be entered for State Farm.

Moreover, under the Mississippi Supreme Court's decision in *Lunday*, Plaintiff's burden cannot be satisfied simply by a showing that the contents of Plaintiff's house were destroyed as a result of Hurricane Katrina. Rather, as the Court's interpretation of the relevant insurance policy language in *Lunday* makes clear, Plaintiff has the burden of showing that his personal property 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." *Id.* at 699 (emphasis added); 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) (citation omitted); *Kemp v. Am. Universal Ins. Co.*, 391 F.2d 533, 535 (5th Cir. 1968) ("windstorm" in insurance policy means "that force of natural air which is . . . 'capable of damaging the insured property either by its own unaided action or by projecting some object against it'" or "'any wind that is of such extraordinary force and violence as to thereby injuriously disturb the ordinary condition of things insured . . . is deemed to be a windstorm'") (citations omitted)).

III. Plaintiff Should Be Judicially Estopped from Asserting that Wind Damage Caused the Loss of His Dwelling

In an attempt to avoid the "water damage" exclusion in his homeowners policy, Plaintiff contends that his home was destroyed by wind, not flood or storm surge. As

explained below, however, Plaintiff previously accepted a policy limits payment under his flood insurance policy, which specifically covers only "direct physical loss by or from flood."⁷ See 44 C.F.R. Pt. 61, App. A(1). Because Plaintiff's receipt of flood insurance benefits is directly contrary to, and irreconcilable with, his current contention that wind was the cause of his loss, he must be judicially estopped from suing to recover under his homeowners policy.

Plaintiff's expert, James T. Slider, has stated that Plaintiff's residence "was completely destroyed by the wind, leaving only a clean slab" and that "the Gemmill residence was destroyed by the winds of Katrina prior to the advent of the storm surge." Report of Opinion of Cause of Damage to the Residence of Edward and Lisa Gemmill prepared by Slider & Associates, dated April 27, 2006 [27, Att. 1], pp. 4, 5; see *also* Slider Deposition, 117:24-118:1 [27, Att. 3] ("In my opinion, there is a much greater likelihood that the wind would have destroyed [Plaintiff's residence] than the water."). Previously, however, on September 2, 2005, Plaintiff filed a claim with State Farm to recover benefits under his flood insurance policy. Thereafter, on October 1, 2005, State Farm paid Plaintiff full policy limits under the flood policy, in the amount of \$128,100.00.

As this Court has previously recognized, "[w]here one insurer, in this instance, the flood insurer, has settled an insured's claim by paying policy limits, the insured may be

⁷ The Standard Flood Insurance Policy provides coverage for "direct physical loss by or from flood to your

insured property" 44 C.F.R. Pt. 61, App. A(1). It excludes, among other things, loss caused "directly or indirectly by . . . [t]heft, fire, explosion, wind, or *windstorm*." *Id.* at V., Exclusions, (D)(8) (emphasis added). All SFIP policyholders are charged by law with constructive knowledge of the policy's contents and requirements. See 44 C.F.R. Pt. 61, App. A (1), Art. VII.J; *Richmond Printing LLC v. Dir. Fed. Emergency Mgmt. Agency*, 72 Fed. App'x 92, 97-98 (5th Cir. 2003) (unpublished) (because SFIP is both an insurance policy and a federal regulation, policyholder charged with duty to read and understand terms of SFIP); see *also Heckler v. Community. Health Svcs. of Crawford County, Inc.*, 467 U.S. 51, 63-64 (1984); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947).

estopped from recharacterizing, as wind damage, losses for which he has accepted flood insurance compensation." *SIMA/Signature Lake, L.P. v. Certain Underwriters at Lloyds London*, 1:06cv186-LTS-RHW, Mem. Opinion [34], p. 3. That is precisely what Plaintiff seeks to do here and precisely what the doctrine of judicial estoppel is designed to avoid.

Judicial estoppel "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003).⁸ Its purpose "is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest." *In Re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004). Notably, the "earlier proceeding" need not have been a formal legal proceeding; for example, as courts in the Fifth Circuit and elsewhere have held, the doctrine applies in the insurance context to preclude a plaintiff from pursuing a legal claim that is fundamentally inconsistent with representations he made in an earlier application for insurance benefits.

In *McClaren v. Morrison Management Specialists, Inc.*, 420 F.3d 457 (5th Cir. 2005), for example, a plaintiff stated in his claim for Social Security disability benefits that he was "unable to work" because of illness. Based on this representation, he was later estopped from pursuing an action for age discrimination in which he sought to allege that he would have been able to perform the job for which he was not selected. *Id.* at 462. In analyzing the situation before it, the *McClaren* court relied on the United States Supreme Court's decision in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), which

⁸ The federal law of judicial estoppel applies to federal diversity actions because in such a case "it is the federal court that is subject to manipulation and in need of protection." *Hall*, 327 F.3d at 395.

involved a similar question in the context of a claim under the Americans with Disabilities Act:

In [*Cleveland*], the Supreme Court addressed whether a plaintiff who claims to be both "totally disabled" for purposes of receiving SSDI benefits and "qualified" for employment under the ADA is judicially estopped from bringing his ADA claim. . . . [T]o survive summary judgment for the employer, a plaintiff must address the apparent inconsistency between "qualified" for employment under the ADA and "disabled" for SSDI benefits. . . . If a plaintiff fails to explain the inconsistency . . . or if the explanation is insufficient, then his ADA claim is judicially estopped by his earlier statements regarding disability.

McClaren, 420 F.3d at 462-63. The Fifth Circuit granted the employer's motion, holding that the plaintiff's attempt to reconcile the inconsistent statements was "not a sufficient explanation of the inconsistency he must reconcile, but rather is simply a disavowal of his averment to the SSA."⁹ *Id.* at 466. See also *Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477, 480 (5th Cir. 2000) (plaintiff judicially estopped where she made "specific factual statements" in prior sworn application for disability benefits and her attempted explanation did not "resolve any of the contradictions inherent in these simple factual claims").

Notably here, the courts have specifically recognized the inherent irreconcilability of a plaintiff's receipt of benefits under a flood insurance policy with a later action to recover benefits under a homeowners policy based on the allegation that the loss was caused by wind. See *Mayton v. Auto-Owners Ins. Co.*, 2006 WL 1214831, at *3 (E.D. Va. May 2, 2006). In *Mayton*, the plaintiffs sued their homeowners insurer, alleging that winds from

⁹ Judicial estoppel will not apply if the two statements can plausibly be reconciled, such as when the original claim does not contain specific factual contentions that are incompatible with the plaintiff's explanation that he could perform the job so long as he was provided "reasonable accommodation." See *McClaren*, 420 F.3d at 466. Here, however, Plaintiff's contradictory assertions as to the cause of his home's destruction simply cannot be reconciled.

Hurricane Isabel had totally destroyed their home and that the insurer's reliance on the "water damage" exclusion in its policy was therefore improper. *Id.* at *1-2. The plaintiffs moved *in limine* to prevent the insurer from introducing evidence that they had received flood insurance benefits for a structure on adjacent property. The court denied the motion, finding the evidence relevant and admissible. *Id.* at *3. "Further," the court said, "this evidence constitutes an admission against interest by the Plaintiffs. The insurance claim [on the adjacent property] was made under oath, and therefore [is] admissible for impeachment purposes to attack Plaintiffs' credibility." *Id.* Or, as succinctly stated in *Feldman v. American Memorial Life Insurance Co.*, "[w]e cannot permit litigants to adopt an alternate story each time it advantages them to change the facts." 196 F.3d 783, 791 (7th Cir. 1999) (plaintiff judicially estopped from pursuing ADA action by earlier statements of total disability in application for SSDI benefits).

In sum, Plaintiff's claim for and acceptance of flood insurance proceeds under a policy that covers "direct physical loss by or from flood" and specifically excludes loss caused "directly or indirectly" by wind -- is totally irreconcilable with Plaintiff's current assertion, bolstered by the opinion of his expert, that his property was damaged solely or primarily by wind and that he is therefore entitled to recover under a policy that expressly excludes loss that would not have occurred in the absence of flood. Accordingly, under the controlling authority in this Circuit, Plaintiff must be judicially estopped from asserting that claim in this litigation.

IV. Plaintiff Is Not Entitled to Punitive Damages

Punitive damages are not favored under Mississippi law; they are considered an extraordinary remedy and are allowed only with great caution and within narrow limits.

Sobley v. S. Natural Gas Co., 302 F.3d 325, 338 (5th Cir. 2002); *Standard Life Ins. Co. of Ind. v. Veal*, 354 So. 2d 239, 247 (Miss. 1977). Before punitive damages can be imposed for a 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 in fact or law, and (2) with malice or gross negligence in disregard of the insured's rights." *U.S. 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"). Plaintiff cannot meet either of these requirements.

A. Plaintiff Cannot Show That State Farm Did Not Have an Arguable Basis for Denying His Claim

Under Mississippi law, to recover punitive damages based upon a purported 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).¹⁰ An arguable factual basis for the denial of an insured's claim is "one in support of which there is some credible evidence," even though "[t]here may well be evidence to the contrary." *Tipton v. Nationwide Mut. Fire Ins. Co.*, 381 F. Supp. 2d 572, 579 (S.D. Miss. 2004) (citations omitted). If an insurer had a "legitimate or arguable reason for denying a claim,"

¹⁰ Similarly, extracontractual damages, which include "reasonable attorney fees, court costs and other economic losses," may be awarded only if the insurer had no arguable basis for denying policy benefits. *Windmon v. Marshall*, 926 So. 2d 867, 874-75 & n.2 (Miss. 2006).

then there is no need for the Court to contemplate the purported willfulness or gross negligence of the insurer's actions, as that legitimate or arguable reason would "utterly preclude the submission of the issue of punitive damages to the jury." *Pioneer Life Ins. Co. of Ill. v. Moss*, 513 So. 2d 927, 930 (Miss. 1987); *Reece v. State Farm Fire & Cas. Co.*, 684 F. Supp. 140, 145-46 (N.D. Miss. 1987) (granting partial summary judgment to insurer on punitive damages where insurer had arguable basis for denying policy benefits).

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*, 302 F.3d at 342. "Mississippi law is well-settled . . . that a 'plaintiff has a "heavy burden" when seeking punitive damages based on a bad faith insurance claim.'" *Id.* at 338 (citations omitted). 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. Thus, an investigation that is merely negligent does not support bad faith. See *id.* at 534. 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.* (citations 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.

d. at 923.

The evidence at trial will show that State Farm had an arguable reason for denying Plaintiff's claim and punitive damages are thus not warranted. *See Hans Constr. Co. v. Phoenix Assurance Co. of N.Y.*, 995 F.2d 53, 55 (5th Cir. 1993) (affirming grant of partial summary judgment on punitive damages under Mississippi law where insurer invoked exclusion for damage caused by overloading of insured equipment: "[B]ecause [the insurer] hired independent experts to determine the cause of the crane failure, it had, at the very least, an arguable basis for denying the claim."); *Sansone v. Liberty Mut. Ins. Co.*, No. Civ. A. 3:04CV-886BN, 2006 WL 286779, at *5 (S.D. Miss. Feb. 3, 2006) ("An insurer's reliance on a physician's opinion in denying a [worker's compensation] claim has generally been a sufficient ground, in and of itself, to constitute an arguable or legitimate reason for denial of coverage.") (citations omitted); *U.S. Fid. & Guar. Co. v. King Enters., Inc.*, 982 F. Supp.

415, 417 (N.D. Miss. 1997) (Senter, J.) (insurer "based its denial on an independent investigation and, therefore, had an arguable reason for denying the claim"); *Reece*, 684 F. Supp. at 145-46 (insurer denied first-party claim based on expert's conclusion that fire loss was caused by accelerant; court granted partial summary judgment to carrier on punitive damages because insurer "had an arguable reason for denying payment on this claim due to the various facts suggesting" arson); *Liberty Mut.*, 862 So. 2d at 534 (insurer had arguable basis for discontinuing disability benefits based on expert's investigation).

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 where insurer's denial of claim was based on misunderstanding of law).

B. Plaintiff Cannot Make the Additional Required Showing By Clear and Convincing Evidence That State Farm Acted with Actual Malice or Gross Negligence or Committed Actual Fraud in Denying Plaintiff's Claim

To prevail on his claim for punitive damages, in addition to showing State Farm had no "arguable reason" for denying Plaintiff's claim, Plaintiff must prove by clear and convincing evidence that State Farm "acted with malice [or] with gross negligence or reckless disregard for the rights of others." *Hartford Underwriters*, 936 So. 2d at 895. *See*

a/so Miss. Code Ann. 11-1-65(1)(a) ("Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant . . . acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.").¹¹

Plaintiff cannot make any showing at trial -- much less meet the required clear and convincing standard -- that State Farm engaged in any conduct of the kind that would justify an award of punitive damages. Accordingly, the issue of punitive damages may not be submitted to the jury.

V. State Farm Should Be Permitted to Use Its Demonstrative Exhibits at Trial

During its expert witnesses' testimony, State Farm intends to use certain exhibits as demonstrative aids to assist the jury in better understanding the experts' conclusions. These exhibits, in the form of PowerPoint slides, were incorporated into supplemental reports of the experts and given to Plaintiff before the February 22, 2007 Pretrial Conference. These exhibits have also been listed as Defendant's exhibits in the Pretrial Order.¹² See Pretrial Order, 12. State Farm intends to use these exhibits as demonstrative aids during its experts' testimony.

¹¹ Miss. Code Ann. 11-1-65 also mandates a bifurcated procedure that "insulate[s] [the jury] from both the issue and the evidence regarding punitive damages until after it has heard evidence concerning the basic issue of the culpability of the defendant, and rendered its verdict on the culpability issue. Then, and only if the jury has determined that compensatory damages are appropriate, may the jury hear the evidence concerning the issue of punitive damages." *Hartford Underwriters*, 93 So. 2d at 897.

¹² The Pretrial Order also lists these exhibits for potential use as demonstrative exhibits during opening statements and closing arguments. See Pretrial Order, 13.

State Farm has fully complied with the requirements of Federal Rules of Civil Procedure 26(a)(2)(C)¹³ and 26(e)(1)¹⁴ regarding the disclosure of its experts, their reports and the supplementation of their reports in a timely fashion.

Moreover, these PowerPoint slides are demonstrative in nature and serve to illustrate State Farm's experts' conclusions. Accordingly, even assuming *arguendo* that the Court determines that these exhibits are not supplements to the expert reports, they are nonetheless admissible and may be utilized as pedagogical aids during trial.

Demonstrative exhibits are generally admissible regardless of whether they are part of an expert's report. According to *Weinstein's Evidence Manual*, "[u]sually these pedagogical devices are introduced through an expert, such as an accountant or FBI agent. When used by an expert in explaining his or her opinion, they should be considered part of the expert's testimony pursuant to [Fed. R. Evid.] Rules 702 and 703, and they may then be exhibited to the jury if the relevant testimony is read to the jury during its deliberations." 1-9 *Weinstein's Evidence Manual* 9.05[4][b] (2006) (explaining admissibility of demonstrative evidence); see also *Robinson v. Missouri-Pacific R.R. Co.*, 16 F.3d 1083,

¹³ Fed. R. Civ. Proc. R. 26(a)(2)(C) states in pertinent part:

These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

¹⁴ Fed. R. Civ. Proc. 26(e)(1) states in pertinent part: "With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due." *Id.*

1087 (10th Cir. 1994) (affirming the trial court's admission of a video animation of the accident as "illustrative of the expert's testimonial theory of the accident.").

The Fifth Circuit also has upheld the use of such demonstrative exhibits at trial. See, e.g., *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985) ("A trial court also has the discretion to permit the parties to show to the jury charts and other visual aids that summarize or organize testimony or documents that have already been admitted in evidence."); *United States v. Buck*, 324 F.3d 786, 790-91 (5th Cir. 2003) (allowing use of a diagram depicting the connection between the defendant and misapplied payments because "[i]t was proper for the diagram to be shown to the jury, to assist in its understanding of testimony and documents that had been produced"). Therefore, State Farm should be able to use the PowerPoint slides at trial, as supplemental exhibits to the experts' reports and as demonstrative or pedagogical exhibits to assist the jury in understanding the experts' testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, **SCOTT CORLEW**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that on March 8, 2007, I electronically filed the foregoing Trial Brief, with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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