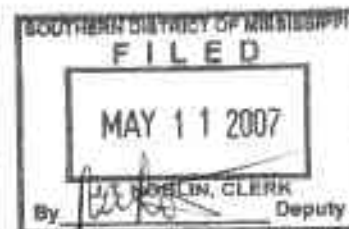


IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION



MICHAEL McCOY

PLAINTIFF

v.

CIVIL ACTION NO. 1:06-cv-00004-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANTS

PRETRIAL ORDER

1. Choose [by a  mark] one of the following paragraphs, as is appropriate to the action:

A pretrial conference was held

Date: 5/16/07 Time: 10:30 AM

United States Courthouse at: The Dan M. Russell, Jr. Federal Building,  
2012 15th Street, Courtroom 506  
Gulfport, Mississippi

before the following judicial officer: Senior U. S. District Judge L. T. Senter, Jr.

2. The following counsel appeared:

- a. For the Plaintiff:

Name	Address	Telephone
Jack L. Denton, Esq.	Morgan Square 955 Howard Avenue Post Office Box 1204 Biloxi, MS 39533	(228) 374-8722
William C. Walker, Jr., Esq.	299 South 9 <sup>th</sup> Street	(662) 234-8074

Suite 100  
Post Office Box 1115  
Oxford, MS 38655

**b. For the Defendant:**

Name	Address	Telephone
H. Benjamin Mullen, Esq. John A. Banahan, Esq.	Post Office Drawer 1529 Pascagoula, MS 39568-1529	(228) 762-6631

3. The pleadings are amended to conform with this pretrial order.
4. The following claims, including claims stated in the complaint, have been filed:  
Plaintiff's claim against Defendant for breach of insurance contract and bad faith.
5. The basis for the court's jurisdiction is: 28 U.S.C. § 1332(a) (diversity of citizenship between the parties and an amount in controversy in excess of \$75,000.00 exclusive of interest and costs).
6. There is the following jurisdictional question:  
NONE.
7. The following motions remain pending:  
Motion to Change Venue  
Remainder of Motion for Partial Summary Judgment  
Various Motions In Limine
8. The parties submit the following concise summaries of the ultimate facts as claimed by:  
By Plaintiff:
  1. On August 29, 2005, Hurricane Katrina completely destroyed the McCoy home and personal property located at 112 Wenmar Avenue, Pass Christian, Mississippi, leaving only a slab.

2. The McCoy home and personal property were insured for certain losses under a homeowner's insurance policy issued by State Farm Fire and Casualty.
3. The amount of the homeowner's dwelling coverage was \$108,230.00 and the amount of the contents coverage was \$81,172.00.
4. The homeowner's dwelling value and the contents value equaled or exceeded the respective coverage amounts.
5. McCoy made an insurance claim for the full dwelling and contents coverage under the State Farm homeowner's policy.
6. State Farm denied all of McCoy's homeowner's claim.
7. The State Farm homeowner's insurance policy covered accidental direct physical loss to the dwelling, unless excluded, and covered wind storm damage to the personal property, unless excluded.
8. Hurricane Katrina, a windstorm, caused direct physical loss to the dwelling and contents.
9. State Farm denied all of the homeowner's claim because State Farm said it had determined all the damage was caused by flood, which was excluded.
10. The damage was caused by the wind.
11. State Farm's denial of the homeowner's claim was clearly contrary to the insurance policy.
12. State Farm set up and used a procedure which resulted in the denial of all homeowner's claims if there was evidence of surge unless there was, remaining on the slab, independent windstorm damage to separate

portions of the property.

13. State Farm's procedure resulted in no payment under homeowner's coverage in any slab case.
14. State Farm continued to May 2, 2007 to refuse to pay any of the homeowner's claim even though State Farm has hired an engineer who admits that at least some of the damage was not caused by flood, State Farm taking the position that it can put the burden of proof as to the separation of water from wind on the insured in spite of the burden being placed upon State Farm to prove the water damage exclusion entitled it to refrain from paying any sum under the homeowner's claim.
15. State Farm, on May 2, 2007, sent a check for \$8,354.28.
16. McCoy is entitled to recover, in addition to the full amount of his claim (\$189,402.00), punitive damages up to \$5,000,000.00.

By Defendant:

The instant action was filed by the Plaintiff, Michael McCoy, on November 23, 2005. The Complaint alleges that Hurricane Katrina caused damages to the Plaintiff's home and contents; that the Plaintiff performed all of his duties under the policy; that State Farm's denial is contrary to the facts, policy, and Mississippi Law and made in bad faith; that State Farm's denial was in bad faith and damaged the Plaintiff, and entitles him to damages in the amount of the face value of the homeowners policy, \$50,000.00 in emotional damages, and \$5,000,000.00 in punitive damages.

The Plaintiff did not have a flood insurance policy on his residence. The Defendant has tendered payment to the Plaintiff for speculative wind damage to the structure in the amount of \$8,354.28. The Plaintiff's homeowners policy with State Farm

Fire & Casualty Company provided dwelling limits of \$108,230.00, dwelling extension limits of \$10,823.00, and contents limits of \$81,172.00.

The Defendant's adjustor, Tudi Edwards, inspected the property owned by the Plaintiff. Her inspection revealed that the Plaintiff's home was destroyed by flood/storm surge. Therefore, State Farm denied the Plaintiff's claim under his homeowners policy. State Farm has since sent its experts, Dr. Kurt Gurley and Dr. Bob Weisberg, to the property. They both opine that the Plaintiff's house was totally destroyed by flood/storm surge/wave action. However, Dr. Gurley is of the opinion that there is a 60% probability that the McCoy residence experienced minor roof cover (shingle) loss on the order of 1 - 20% of shingles damaged or lost prior to destruction of the home by water. This new information is what prompted the tender of \$8,354.28 referenced above. Beyond this, however, it is the Defendant's position that the Plaintiff's house and contents were entirely destroyed by excluded water/storm surge.

The Plaintiff contends that wind was the sole cause of the destruction of his home. This is the primary issue for the jury in this case.

9. The following facts are established by the pleadings, by stipulation, or by admission:

1. On August 29, 2005, the McCoy home and personal property located at 112 Wenmar Avenue, Pass Christian, Mississippi, were destroyed during Hurricane Katrina, leaving only a slab.
2. The McCoy home and personal property were insured for certain losses under a homeowner's insurance policy issued by State Farm Fire and Casualty.
3. The amount of the homeowner's dwelling coverage was \$108,230.00 and

the amount of the contents coverage was \$81,172.00.

4. McCoy made an insurance claim for the full dwelling and contents coverage under the State Farm homeowner's policy.
  5. State Farm initially denied all of McCoy's homeowner's claim.
  6. The State Farm homeowner's insurance policy covered accidental direct physical loss to the dwelling, unless excluded, and covered wind storm damage as a named peril to the personal property, unless excluded.
  7. Hurricane Katrina caused damage to the dwelling and contents.
  8. State Farm, on May 2, 2007, sent a check for \$8,354.28 representing the cost of replacing shingles on the roof of the home less McCoy's deductible.
10. The following facts are contested:
- By Plaintiff:
- a. Whether and, if so, the amount of actual and punitive damages Plaintiff is entitled to recover.
  - b. Whether the damage was caused by the wind.
  - c. The damage was caused by the wind.
  - d. State Farm's denial of the homeowner's claim was clearly contrary to the insurance policy.
  - e. State Farm set up and used a procedure which resulted in the denial of all homeowner's claims if there was evidence of surge unless there was, remaining on the slab, independent windstorm damage to separate portions of the property.
  - f. State Farm's procedure resulted in no payment under homeowner's

coverage in any slab case.

- g.** State Farm continued to May 2, 2007 to refuse to pay any of the homeowner's claim even though State Farm has hired an engineer who admits that at least some of the damage was not caused by flood, State Farm taking the position that it can put the burden of proof as to the separation of water from wind on the insured in spite of the burden being placed upon State Farm to prove the water damage exclusion entitled it to refrain from paying any sum under the homeowner's claim.

McCoy is entitled to recover, in addition to the full amount of his claim (\$189,402.00), punitive damages up to \$5,000,000.00.

- h.** McCoy is entitled to recover, in addition to the full amount of his claim (\$189,402.00), punitive damages up to \$5,000,000.00.

- i.** All issues of fact not stipulated to above.

**By Defendant:**

- a.** Whether the Plaintiff's home was completely destroyed by wind as claimed by Plaintiff or water as claimed by the Defendant.
- b.** The extent to which, if any, wind damaged the Plaintiff's house prior to destruction by water.
- c.** Whether any of the Plaintiff's contents were destroyed by a wind storm, a named peril.
- d.** The value of the Plaintiff's contents loss destroyed by a named peril.

- 11.** The contested issues of law are as follows:

**By Plaintiff:** None.

**By Defendant:**

- a.** Whether the Plaintiff has the burden under the terms of the policy of insurance of proving that any contents damaged during Hurricane Katrina were damaged as a result of a named peril, namely wind.
- b.** Whether the Plaintiff has the duty under the terms and conditions of the policy of insurance to establish the extent of damages claimed under the policy.
- c.** Whether each element of Plaintiff's claim for punitive, exemplary or non-punitive extra contractual damages, including the amount of such damages, must be proven by clear and convincing evidence as required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and by Article III, Section 14 of the Constitution of the State of Mississippi.
- d.** Whether any award of punitive exemplary or non-punitive extra contractual damages assessed against State Farm must have a pre-determined upper limit, either as a maximum multiple of compensatory damages or an absolute maximum amount, to protect State Farm's due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution and by Article III, Section 14 of the Constitution of the State of Mississippi.
- e.** Whether any award of punitive, exemplary or non-punitive extra contractual damages assessed against State Farm must have a pre-determined upper limit, either as a maximum multiple of compensatory damages or an absolute maximum amount, to protect State Farm from an excessive award

in violation of the excessive fines clause of the Eighth Amendment to the United States Constitution and Article III, Section 28 of the Constitution of the State of Mississippi.

- f.** Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm without the jury being first clearly and uniformly instructed as to the elements required and the amount of verdict appropriate so as to protect State Farm's due process and equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article III, Section 14, of the Constitution of the State of Mississippi.
- g.** Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm without the jury being first instructed regarding the applicable principles of deterrence and punishment and the necessary relationship between the Plaintiff's actual damages and punitive damages so as to protect State Farm's due process and equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article III, Section 14 of the Constitution of the State of Mississippi.
- h.** Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm without first prohibiting the jury from awarding any such damages in whole or in part on the basis of individually discriminatory characteristic, including State Farm's corporate status so as to protect State Farm's due process and equal protection rights as guaranteed by the Fourteenth Amendment to the United States

Constitution and by Article III, Section 14 of the Constitution of the State of Mississippi.

- i. Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm because the standards for determining liability for such damages as well as the amount of such damages are vague, imprecise, inconsistent and arbitrary and are not defined with sufficient clarity to give advance notice to State Farm or any other potential defendant of the prohibited conduct or mental state making an award of punitive damages possible.
- j. Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm without there being trial and appellate court review on the basis of uniform and objective standards so as to protect State Farm's due process and equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article III, Section 14 of the Constitution of the State of Mississippi.
- k. Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm without affording State Farm protections similar to those afforded to criminal defendants including, but not limited to, the protection against unreasonable searches and seizures, double jeopardy, or impermissible multiple punishments and compelled self-incrimination, the right to confront adverse witnesses, the right to compulsory process for favorable witnesses, the right to the effective assistance of counsel and to a unanimous verdict of a twelve-

person jury on every element of an award of punitive damages so as to protect State Farm's due process and equal protection rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and provided by Article 3, Sections 14, 22, 23, 26 and 31 of the Mississippi Constitution.

- l.** Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm without requiring a bifurcated trial as to all punitive damages issues so as protect State Farm's due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 3, Section 14 of the Constitution of the State of Mississippi.
- m.** Whether any award of punitive, exemplary or non-punitive extra contractual damages which is based in whole or in part on State Farm's net worth, wealth, or value of assets would deny State Farm's right to equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article 3 Section 14 of the Mississippi Constitution.
- n.** Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm which is not rationally proportional to the Plaintiff's actual compensatory damages as well as criminal sanctions that could be imposed for comparable misconduct.
- o.** Whether any award of punitive, exemplary or non-punitive extra contractual damages may be assessed against State Farm because State Farm clearly had, at a minimum, legitimate and arguable reasons for its conduct and decisions in this case.

- p. Whether the Plaintiff may recover any extra-contractual or punitive damages without establishing their right to such damages by clear and convincing evidence.
  - q. Whether the Plaintiff may recover any extra contractual or punitive damages without establishing their right to such damages beyond a reasonable doubt.
  - r. Whether each element of Plaintiff's claim for punitive, exemplary or non-punitive extra-contractual damages must be shown beyond a reasonable doubt as required under the Fourteenth Amendment to the United States Constitution and under Article III, Section 14 of the Constitution of the State of Mississippi.
  - s. Whether the Plaintiff is entitled to punitive, exemplary, or extra-contractual damages pursuant to Miss. Code Ann. §11-1-65.
  - t. Whether there are any liens for SBA or MDA or any other liens on the Plaintiff's property which must be protected by the Defendant.
- 12.** The following is a list and brief description of all exhibits (except exhibits to be used for impeachment purposes only) to be offered in evidence by the parties. Each exhibit has been marked for identification and examined by counsel.
- A.** To be Offered by the Plaintiff:
    - P-1 The Insurance Policy and Declaration Page
    - P-2 The Denial Letters of November 3 and November 14
    - P-3 The Claim File
    - P-4 Contents List
    - P-5 James T. Slider Report with Exhibits

- P-6 Slider Resume
- P-7 The Wind/Water Protocol
- P-8 First Four Pages of Annual Statement
- P-9 Correspondence dated May 2, 2007, and check for \$8,354.28

Plaintiff reserves the right to introduce into evidence any exhibits listed by Defendant.

The authenticity and admissibility in evidence of the preceding exhibits are stipulated. If the authenticity and/or admissibility of any of the preceding exhibits is objected to, the exhibit must be identified below, together with a statement of the specific ground(s) for the objection(s).

Exhibits Objected to by the Defendant:

The Defendant objects to Plaintiff's Exhibits P-5 as it is hearsay, to P-5 and P-6 as duplicative, and to P-7 through P-10 on the grounds that the aforementioned exhibits are irrelevant in Phase 1 of the trial and the probative value is substantially outweighed by the danger of unfair prejudice. Also, there is not evidence from which the issue of punitive damages should be submitted to the jury to justify the introduction of these exhibits.

**B.** To be offered by the Defendant, State Farm Fire & Casualty Company:

- D-1 State Farm Insurance Homeowners Policy Number 24-CE-1819-2.
- D-2 State Farm Claim File.
- D-3 Blow up of Color photograph from the Claim File 0071.
- D-4 Blow up of Color photograph from the Claim File 0069.
- D-5 Blow up of Color photograph from the Claim File 0067.
- D-6 Blow up of Color photograph from the Claim File 0065.

- D-7 Blow up of Color photograph from the Claim File 0063.
- D-8 Blow up of Color photograph from the Claim File 0061.
- D-9 Blow up of Color photograph from the Claim File 0031.
- D-10 Blow up of Color photograph from the Claim File 0030.
- D-11 Blow up of Color photograph from the Claim File 0029.
- D-12 Blow up of Color Photographs from Dr. Kurt Gurley's Expert Report.
- D-13 Blow up of Color Photographs from Dr. Kurt Gurley's Supplemental Expert Report.
- D-14 FEMA Flood Recovery Map showing elevation of Plaintiff's property.
- D-15 FEMA Flood Recovery Map showing surge/flood level measurements at location of Plaintiff's property.
- D-16 Expert Report of Dr. Kurt Gurley with Exhibits.
- D-17 Supplemental Expert Report of Dr. Kurt Gurley with Exhibits.
- D-18 Expert Report of Dr. Bob Weisberg with Exhibits.
- D-19 Arial Photographs of the Long Beach area Pre-Katrina
- D-20 Arial Photographs of the Long Beach area Post-Katrina
- D-21 Video made by Kevin Abraham.
- D-22 Video made by John Lestrade.
- D-23 Video "A Storm Chaser's Story."
- D-24 "Battle at the Beachfront" Video.
- D-25 Pass Christian Library Video.

Defendant reserves the right to introduce into evidence any exhibits listed by Plaintiff.

The authenticity and admissibility in evidence of the preceding exhibits are

stipulated. If the authenticity and/or admissibility of any of the preceding exhibits is objected to, the exhibit must be identified below, together with a statement of the specific ground(s) for the objection(s).

Exhibits Objected to by the Plaintiff:

D-12 Hearsay;

D-13 Hearsay;

D-16 Hearsay;

D-17 Hearsay;

D-18 Hearsay;

D-21, D-22, D-23, D-24, D-25 Hearsay, relevance, authenticity;

**13.** The following is a list and brief description of charts, graphs, models, schematic diagrams, and similar objects which will be used in opening statements or closing arguments, but which will not be offered in evidence:

**a.** By Plaintiff:

Objections, if any, to use of the preceding objects are as follows:

Enlargements of any Exhibits listed.

By Defendant:

See objections to exhibits above in Paragraph 12.

**b.** By Defendant:

1. Enlargements of any Exhibits listed.

2. Power Point Presentation based on the Expert Reports of Dr. Gurley and Dr. Weisberg.

Objections, if any, to use of the preceding objects are as follows:







By Plaintiff:


See objections to Exhibits; see also Plaintiff's objections to power point presentations, etc., in Motions *In Limine*.

If any other objects are to be used by any party, such objects will be submitted to opposing counsel at least three days prior to trial. If there is then any objection to use of the objects, the dispute will be submitted to the court at least one day prior to trial.

14. The following is a list of witnesses Plaintiff anticipates calling at trial (excluding witnesses to be used solely for rebuttal or impeachment). All listed witnesses must be present to testify when called by a party unless specific arrangements have been made with the trial judge prior to commencement of trial. The listing of a WILL CALL witness constitutes a professional representation, upon which opposing counsel may rely, that the witness will be present at trial, absent reasonable written notice to counsel to the contrary.

May testify live:

<u>Name</u>	 <u>Will Call</u>	 <u>May Call</u>	<u>Fact/Liability Expert Damages</u>	<u>Residence Address &amp; Tel. No.</u>	<u>Business Address &amp; Tel. No.</u>
Michael McCoy			Fact/Liab Damages		
Jennifer McCoy			Fact/Liab Damages		
Terry Blalock			Fact/Liab Damages		
Tim Slider			Expert/Liab Damages		720 East Park Blvd Ste 110 Plano, TX 75074 214-563-1149

Mark Drain		Fact/Liab Damages
State Farm Corp. Rep. At Trial		Fact/Liab Damages

Plaintiff reserves the right to call any witness listed by any other party.

May testify by deposition:

<u>Name</u>	 Will <u>Call</u>	 May <u>Call</u>	<u>Fact/Liability Expert Damages</u>	<u>Residence Address &amp; Tel. No.</u>	<u>Business Address &amp; Tel. No.</u>
Terry Blalock * State Farm 30(b)(6)			Fact/Liab Damages		
Mark Drain * State Farm 30(b)(6)			Fact/Liab Damages		












\*portions of depositions may be used

State whether the entire deposition, or only portions, will be used. Counsel shall confer, no later than twenty days before the commencement of trial, to resolve all controversies concerning all depositions (videotaped or otherwise). All controversies not resolved by the parties shall be submitted to the trial judge not later than ten days prior to trial. All objections not submitted within that time are waived.


15. The following is a list of witnesses Defendant anticipates calling at trial (excluding witnesses to be used solely for rebuttal or impeachment). All listed witnesses must be present to testify when called by a party unless specific arrangements

have been made with the trial judge prior to commencement of trial. The listing of a WILL CALL witness constitutes a professional representation, upon which opposing counsel may rely; that the witness will be present at trial, absent reasonable written notice to counsel to the contrary.

May testify live:

<u>Name</u>	 <u>Will Call</u>	 <u>May Call</u>	<u>Fact/Liability Expert Damages</u>	<u>Residence Address &amp; Tel. No.</u>	<u>Business Address &amp; Tel. No.</u>
Terry Blalock 30(b)(6)			Fact/Liability		
Mark Drain			Fact/Liability		
Tudi Edwards			Fact/Liability		
Dr. Kurt Gurley			Expert		P.O. Box 116580 Gainesville, FL 32611 352.392.9537
Dr. Bob Weisberg			Expert		140 7 <sup>th</sup> Ave. S. St. Petersburg, FL 33701 727.553.1568
Dreux Seghers			Fact/Liability		1102 Iberville Drive Ocean Springs, MS 39564 228.875.8608
Christie Greer 30(b)(6)			Fact/Liability		
Kevin Abraham			Fact/Liability		
John LeStrade			Fact Liability		

May testify by deposition:

<u>Name</u>	 <u>Will Call</u>	 <u>May Call</u>	<u>Fact/Liability Expert Damages</u>	<u>Business Address &amp; Tel. No.</u>
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Terry Blalock\*

30(b)(6)



Fact/Liability


Mark Drain\*



Fact/Liability

\*portions of depositions may be used

State whether the entire deposition or only portions, will be used. Counsel shall confer, no later than twenty days before the commencement of trial, to resolve all controversies concerning all depositions (videotaped or otherwise). All controversies not resolved by the parties shall be submitted to the trial judge not later than ten days prior to trial. All objections not submitted within that time are waived.

16. This  is \_\_\_\_\_ is not a jury case.
17. Counsel suggest the following additional matters to aid in the disposition of this civil action: None.
18. Counsel estimates the length of the trial will be 3 days.
19. As stated in paragraph 1, this pretrial order has been formulated (a) at a pretrial conference before the United States District Court Judge, notice of which was duly served on all parties, and at which the parties attended as is stated above, or (b) the final pretrial conference having been dispensed with by the Magistrate Judge, as a result of conferences between the parties. Reasonable opportunity has been afforded for corrections or additions prior to signing. This order will control the course of the trial, as provided by Rule 16, Federal Rules of Civil Procedure, and it may not be amended except by consent of the parties and the court, or by order of the court to prevent manifest injustice.

ORDERED, this the 11<sup>th</sup> day of May, 2007.

  
UNITED STATES DISTRICT JUDGE

  
ATTORNEY FOR PLAINTIFF

  
ATTORNEY FOR PLAINTIFF

  
ATTORNEY FOR DEFENDANT