

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

**NORMAN BROUSSARD and
GENEVIEVE BROUSSARD**

PLAINTIFFS

VERSUS

1:06cv6LTS-JR

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

**STATE FARM'S MEMORANDUM OF LAW
RE BURDEN OF PROOF**

I. INTRODUCTION

It is well-established that “[u]nder Mississippi law a plaintiff has the burden of proving a right to recover under the insurance policy sued on.” *Britt v. Travelers Ins. Co.*, 566 F.2d 1020, 1022 (5th Cir. 1978). Although the insurer must prove the applicability of an exclusion on which it seeks to rely, “[t]hat basic burden never shifts from the plaintiff.” *Id.* See also *Coahoma County Bank & Trust Co. v. Feinberg*, 241 Miss. 381, 389, 128 So. 2d 562, 565 (1961) (reiterating rule that burden of proving entitlement to insurance policy proceeds rests on person seeking proceeds).

As part of their “basic burden,” 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. App. 2002). This rule applies equally in the insurance context, and requires that the insured plaintiff prove “the extent or amount of [his] damage from which a jury could reasonably calculate damages.” *Harbor House Condominium Ass’n v. Massachusetts Bay Ins. Co.*, 915 F.2d 316, 319

(7th Cir. 1990) (“open peril” or “all risks” policy); accord *City of Tacoma v. Great American Ins. Cos.*, 897 F. Supp. 486, 488 (W.D. Wash. 1995) (noting that insured must prove “all elements of coverage, including the monetary value of coverage”).

Stated differently:

It is axiomatic that in order to prove a cause of action for breach of contract the plaintiff must prove a breach by the defendant and the amount of damages caused by the breach. [Citation omitted.] Relying on Golden Eagle's admission that it could not differentiate any of its damages as to cause and time the insurers thereby presented undisputed evidence that Golden Eagle would be unable to make a prima facie case for breach of contract.

Golden Eagle Refinery v. Associated Int'l, 102 Cal. Rptr. 2d 834, 844 (Cal. App. 2001).

As the Court has itself recognized, “[u]nder applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind.” *Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684, 695 (S.D. Miss. 2006); see *Mamma v. Homeland Ins. Co. of America*, 21 N.E.2d 726, 728-29 (Ill. 1939) (recognizing general rule that “[i]n a case of the concurrence of two causes of loss, one at the risk of the assured and the other insured against, or one insured against by A and the other by B, if the damage by the perils respectively can be discriminated, each party must bear his proportion”).

Thus, “[b]ecause an insured can recover only for covered events, *the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof.*” *Wallis v. United Servs. Auto. Ass’n*, 2

S.W.3d 300, 303 (Tex. App. 1999) (emphasis added); *accord Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. 2004). Moreover, “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); *accord Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971) (noting that “[i]t 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” and reversing judgment for insured because insured failed to do so).

Plaintiffs here seek recovery for damage to their dwelling and personal property caused by Hurricane Katrina. These elements of Plaintiffs’ claimed loss are subject to different coverage sections of the homeowners policy issued to Plaintiffs by State Farm and must be separately evaluated. *See Travelers Indem. Co. v. Wetherbee*, 368 So. 2d 829, 835 (Miss. 1979) (various items of coverage in homeowners policy “may be considered as separate contracts although bound together in one policy”); *Claxton v. Fidelity & Guar. Fire Ins. Corp.*, 179 Miss. 556, 175 So. 2d (1937) (same).

II. CLAIMED DAMAGE TO THE DWELLING

Insurance benefits for damage to Plaintiffs’ dwelling are governed by the provisions of Coverage A of the policy, which provides coverage for “accidental direct physical loss” to the insured dwelling, “except as provided in SECTION I - LOSSES NOT INSURED” or as otherwise limited by the policy’s terms and conditions. The policy expressly excludes “loss which would not have occurred in the absence of,” among other perils, “water damage,” defined to include “flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not[.]” Accordingly, in order to make out a *prima facie* case

for coverage, Plaintiffs must prove by a preponderance of the evidence: (1) that their dwelling sustained "accidental direct physical loss"; (2) that they complied with all relevant policy conditions; and (3) the extent of their loss – i.e., the amount of damage – that is covered by the policy. As to the latter, even "the admitted fact of damage is insufficient to prove the *amount* of damage," *Harbor House*, 915 F.2d at 319 (emphasis added) (quoting *S.C. Johnson & Son, Inc. v. Louisville R. Co.*, 695 F.2d 253, 261 (7th Cir. 1982)), and the burden rests entirely on Plaintiffs to adduce evidence of the extent of their covered loss. *Id.* And while Plaintiffs "need not prove their damages to a mathematical certainty, neither can they rely on mere speculation or conjecture" to satisfy their burden on this issue. *Id.*; accord *Savage v. LaGrange*, 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). Only then would the burden shift to State Farm to prove the applicability of the water damage exclusion. To the extent Plaintiffs fail in any respect to meet their burden, then the verdict with respect to Plaintiffs' claim for damage to their dwelling must be for State Farm.

III. CLAIMED DAMAGE TO PERSONAL PROPERTY

Plaintiffs' claim for damage to their personal property is subject to the provisions of Coverage B of the policy. Coverage B provides coverage for "accidental direct physical loss" to insured personal property caused by certain specifically enumerated perils, again subject to the policy's exclusions and conditions. Among the perils for which coverage is provided under Coverage B is the peril of "windstorm."

Unlike Coverage A, which is written on an "open peril" (formerly called "all risks") basis, Coverage B is written on a named (or specified) peril basis. Accordingly, in order to recover for damage to their personal property, Plaintiffs must prove by a

preponderance of the evidence that the damage to that property was caused by wind. *Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696, 699 (Miss. 1973) (noting that in specified peril policy covering wind, burden of proof was properly placed on the insured). As addressed above, to satisfy this burden, Plaintiffs must prove both the fact and amount of covered damage, as well as compliance with the policy's terms and conditions. To the extent they fail to establish that the damage to their personal property was caused by accidental direct physical loss to their property caused by wind, or fail to establish the amount of damage caused by wind, then the verdict with respect to Plaintiffs' claim for damage to their personal property must be for State Farm.

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