

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
CASE NO.: 07-60443**

NORMAN J. BROUSSARD and
GENEVIEVE BROUSSARD

APPELLEES/PLAINTIFFS

VERSUS

STATE FARM FIRE AND CASUALTY
COMPANY

APPELLANT/DEFENDANT

BRIEF OF STATE FARM FIRE AND CASUALTY COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION

JOHN BANAHAN
BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
1103 JACKSON AVENUE
P.O. DRAWER 1529
PASCAGOULA, MS 39568-1529
(228)762-6631

SHEILA L. BIRNBAUM
DOUGLAS W. DUNHAM
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
FOUR TIMES SQUARE
NEW YORK, NY 10036-6522
(212) 735-3000

SUSAN M. POPIK
CHAPMAN, POPIK & WHITE LLP
650 CALIFORNIA STREET
19TH FLOOR
SAN FRANCISCO, CA 94108
(415) 352-3000

ATTORNEYS FOR
APPELLANT/DEFENDANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the Circuit Judges of this Court may evaluate possible disqualification or recusal:

A. Interested Parties:

1. State Farm Fire and Casualty Company, Appellant/Defendant
2. Norman Broussard, Appellee
3. Genevieve Broussard, Appellee

B. Attorneys:

1. For State Farm Fire and Casualty Company:


John Banahan
Bryan, Nelson, Schroeder, Castigliola
& Banahan, PLLC

Sheila L. Birnbaum
Douglas W. Dunham
Skadden, Arps, Slate, Meagher
& Flom LLP

Susan M. Popik
Chapman, Popik
& White LLP

2. For Norman and Genevieve Broussard:

Jack L. Denton
William C. Walker
Denton Law Firm, PLLC



Douglas W. Dunham

STATEMENT REGARDING ORAL ARGUMENT

Appellant/Defendant State Farm Fire and Casualty Company believes that oral argument would benefit the Court and respectfully requests the same.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
STATEMENT REGARDING ORAL ARGUMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	2
STATEMENT OF THE CASE AND THE FACTS	3
SUMMARY OF ARGUMENT.....	11
ARGUMENT	15
I. STANDARDS OF REVIEW	15
II. THE DISTRICT COURT ERRED IN GRANTING JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CLAIM FOR LOSS OF THEIR PERSONAL PROPERTY BECAUSE PLAINTIFFS FAILED TO PROVE THE PROPERTY WAS DESTROYED BY WIND	16
III. THE DISTRICT COURT ERRED IN RULING THAT PLAINTIFFS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER THEIR DWELLING COVERAGE	22
A. The District Court's Grant of JMOL for Plaintiffs as to Dwelling Coverage Must Be Reversed Because the District Court Erred as to the Parties' Respective Burdens of Proof.....	25
B. Even If State Farm Had the Burden of Segregating Wind and Water Damage to Plaintiffs' Dwelling, State Farm Introduced Sufficient Evidence to Go to the Jury.....	30
IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING THE TESTIMONY OF PLAINTIFFS' EXPERT JAMES SLIDER	36

A.	Applicable Legal Standards	37
B.	Mr. Slider's Opinions Were Not Based on Sufficient Facts or Data to Satisfy <i>Daubert</i>	38
C.	Mr. Slider's Principles and Methods Were Unreliable	39
V.	AS A MATTER OF LAW, THE PUNITIVE DAMAGES AWARDED AGAINST STATE FARM WERE IMPROPER AND UNSUPPORTED BY THE EVIDENCE	41
A.	Mississippi Law Does Not Permit Punitive Damages in this Case	41
B.	Alternatively, Further Remittitur Is Required Because the Punitive Damages Award Is Grossly Excessive	54
VI.	THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING VENUE TRANSFER.....	57
	CONCLUSION.....	62
APPENDIX		
CERTIFICATE OF SERVICE		
CERTIFICATE OF COMPLIANCE		

TABLE OF AUTHORITIES

CASES

<i>A & F Props., LLC v. Lake Caroline, Inc.</i> , 755 So. 2d 1276 (Miss. App. Ct. 2000).....	26
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 483 So. 2d 254 (Miss. 1985).....	16
<i>Blue Cross & Blue Shield v. Campbell</i> , 466 So. 2d 833 (Miss. 1984).....	42, 49
<i>Boerner v. Brown & Williamson Tobacco Co.</i> , 394 F.3d 594 (8th Cir. 2005)	55
<i>Britt v. Cambridge Mutual Fire Insurance Co.</i> , 717 S.W.2d 476 (Tex. App. 1986)	25
<i>Britt v. Travelers Insurance Co.</i> , 566 F.2d 1020 (5th Cir. 1978).....	26
<i>Brown v. PFL Life Insurance Co.</i> , 312 F. Supp. 2d 863 (N.D. Miss.), <i>aff'd</i> , 111 F. App'x 258 (5th Cir. 2004).....	27
<i>Cain v. Mid-South Pump Co.</i> , 458 So. 2d 1048 (Miss. 1984).....	33
<i>Casumpang v. International Longshore & Warehouse Union, Local 142</i> , 411 F. Supp. 2d 1201 (D. Haw. 2005).....	55
<i>Ceimo v. General American Life. Insurance Co.</i> , 2003 WL 25481095 (D. Ariz. Sept. 17, 2003), <i>aff'd</i> , 137 Fed. App'x 968 (9th Cir. 2005).....	55
<i>Coahoma County Bank & Trust Co. v. Feinberg</i> , 128 So. 2d 562 (Miss. 1961)	26
<i>Commercial Union Insurance Co. v. Byrne</i> , 248 So. 2d 777 (Miss. 1971).....	27

<i>Computer System Engineering v. Qantel Corp.</i> , 571 F. Supp. 1365 (D. Mass. 1983), <i>aff'd</i> , 740 F.2d 59 (1st Cir. 1984)	33
<i>Comsys Information Technology Services, Inc. v. Twin City Fire Insurance Co.</i> , 130 S.W.3d 181 (Tex. App. 2003)	29
<i>Cooper Industries, Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001)	16
<i>Daubert v. Merrell Dow Pharmaceuticals</i> , 509 U.S. 579 (1993)	36, 37
<i>Dunn v. State Farm Fire & Casualty Co.</i> , 927 F.2d 869 (5th Cir. 1991)	43, 52
<i>Ellis v. Weasler Engineering Inc.</i> , 258 F.3d 326 (5th Cir. 2001)	30
<i>Evans v. Ford Motor Co.</i> , 484 F.3d 329 (5th Cir. 2007)	15
<i>Ferguson v. State Farm Insurance Co.</i> , 2007 WL 1378507 (E.D. La. May 9, 2007)	25
<i>Fiess v. State Farm Lloyds</i> , 392 F.3d 802 (5th Cir. 2004)	29
<i>Grace v. Lititz Mutual Insurance Co.</i> , 257 So. 2d 217 (Miss. 1972)	34, 35
<i>Guajardo v. Texas Department of Criminal Justice</i> , 363 F.3d 392 (5th Cir. 2004)	15
<i>Gulf Guaranty Life Insurance Co. v. Kelley</i> , 389 So. 2d 920 (Miss. 1980)	43, 44
<i>Harbor House Condominium Association v. Massachusetts Bay Insurance Co.</i> , 915 F.2d 316 (7th Cir. 1990)	26, 27
<i>Hartford Underwriters Insurance Co. v. Williams</i> , 936 So. 2d 888 (Miss. 2006)	42
<i>Haworth, Inc. v. Herman Miller, Inc.</i> , 821 F. Supp. 1476 (N.D. Ga. 1992)	59, 60
<i>Hines v. Grand Casino</i> , 358 F. Supp. 2d 533 (W.D. La. 2005)	55
<i>Hinton v. McKee</i> , 329 So. 2d 519 (Miss. 1976)	28

<i>Home Insurance Co. v. Greene</i> , 229 So. 2d 576 (Miss. 1969).....	26
<i>Home Insurance Co. v. Sherrill</i> , 174 F.2d 945 (5th Cir. 1949).....	35, 36
<i>In re Volkswagen AG</i> , 371 F.3d 201 (5th Cir. 2004).....	16
<i>Joubert v. Travelers Indemnity Co.</i> , 736 F.2d 191 (5th Cir. 1984).....	27
<i>Kemp v. America Universal Insurance Co.</i> , 391 F.2d 533 (5th Cir. 1968)	19
<i>Knight v. Kirby Inland Marine, Inc.</i> , 482 F.3d 347 (5th Cir. 2007).....	16
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999).....	38
<i>Liberty Mutual Insurance Co. v. McKneely</i> , 862 So. 2d 530 (Miss. 2003).....	43
<i>Liberty Universal Insurance Co. v. Hall</i> , 289 So. 2d 683 (Miss. 1974)	36
<i>Lititz Mutual Insurance Co. v. Boatner</i> , 254 So. 2d 765 (Miss. 1971).....	19
<i>Lunday v. Lititz Mutual Insurance Co.</i> , 276 So. 2d 696 (Miss. 1973).....	17, 19, 20, 25, 27
<i>Mayola v. Alabama</i> , 623 F.2d 992 (5th Cir. 1980).....	60
<i>McDonough Power Equipment, Inc. v. Greenwood</i> , 464 U.S. 548 (1984).....	60
<i>Michaels v. Avitech, Inc.</i> , 202 F.3d 746 (5th Cir. 2000)	39
<i>Mitchell Energy Corp. v. Bartlett</i> , 958 S.W.2d 430 (Tex. App. 1997).....	39
<i>Moore v. Ashland Chemicals Inc.</i> , 151 F.3d 269 (5th Cir. 1998)	37, 38
<i>Mukhtar v. California State Univ. Hayward</i> , 299 F.3d 1053 (9th Cir. 2002)	41

<i>Northern Indiana Public Service Co. v. Envirotech Corp.</i> , 566 F. Supp. 362 (N.D. Ind. 1983).....	59
<i>Patrick Schaumberg Automobiles, Inc. v. Hanover Insurance Co.</i> , 452 F. Supp. 2d 857 (N.D. Ill. 2006)	29
<i>Paulson v. Fire Insurance Exchange</i> , 393 S.W.2d 316 (Tex. 1965).....	28
<i>Pawlik v. State Farm Mutual Automobile Insurance Co.</i> , 302 F.2d 255 (7th Cir. 1962).....	27, 28
<i>Progressive Casualty Insurance v. All Care, Inc.</i> , 914 So. 2d 214 (Miss. Ct. App.), <i>cert. denied</i> , (Miss. 2005)	33
<i>Royal Surplus Lines Insurance Co. v. Brownsville Independent School District</i> , 404 F. Supp. 2d 942 (S.D. Tex. 2005)	25
<i>Savage v. LaGrange</i> , 815 So. 2d 485 (Miss. Ct. App. 2002)	26, 56
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966).....	60
<i>Skaggs v. Otis Elevator Co.</i> , 164 F.3d 511 (10th Cir. 1998).....	60
<i>Sobley v. Southern Natural Gas Co.</i> , 302 F.3d 325 (5th Cir. 2002).....	16, 43
<i>Southern United Life Insurance Co. v. Caves</i> , 481 So. 2d 764 (Miss. 1985).....	52
<i>State Farm Mutual Automobile Insurance Co. v. Campbell</i> , 538 U.S. 408 (2003)	54, 55, 56
<i>State Farm Mutual Automobile Insurance Co. v. Commercial Union Insurance Co.</i> , 394 So. 2d 890 (Miss. 1981)	32
<i>Strickland v. Motors Insurance Corp.</i> , 970 F.2d 132 (5th Cir. 1992).....	52
<i>Tipton v. Nationwide Mutual Fire Insurance Co.</i> , 381 F. Supp. 2d 572 (S.D. Miss. 2004)	42

<i>Tuepker v. State Farm Fire & Casualty Co.</i> , No. 1:05CV559 LTS-JMR, 2006 WL 1442489 (S.D. Miss. May 24, 2006)	23
<i>United States v. Beckner</i> , 69 F.2d 1290 (5th Cir. 1995).....	61
<i>United States v. Davis</i> , 583 F.2d 190 (5th Cir. 1978).....	61
<i>United States v. McVeigh</i> , 918 F. Supp. 1467 (W.D. Okla. 1996).....	60
<i>United States Fidelity & Guaranty v. Wigginton</i> , 964 F.2d 487 (5th Cir. 1992)	42
<i>Waldorf v. Shuta</i> , 3 F.3d 705 (3d Cir. 1993)	61
<i>Wall v. Swilley</i> , 562 So. 2d 1252 (Miss. 1990).....	32
<i>Wallis v. United States Automobile Association</i> , 2 S.W.3d 303 (Tex. App. 1999)	28
<i>Warwick v. Matheney</i> , 603 So. 2d 330 (Miss. 1992).....	26
<i>Williams v. ConAgra Poultry Co.</i> , 378 F.3d 790 (8th Cir. 2004).....	55

STATUTES AND RULES

28 U.S.C. § 1291.....	1
28 U.S.C. § 1332.....	1
28 U.S.C. § 1404.....	60
Federal Rule of Civil Procedure 50	9
Mississippi Code Ann. § 11-1-65(l)(f)(ii)	54
Mississippi Code Ann. § 83-9-19	56, 57
Mississippi Code Ann. § 83-17-71(l)(g), (h).....	56

MISCELLANEOUS

12 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance*
(3d ed. 1998)28, 29

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the subject matter and the parties under 28 U.S.C. § 1332. The District Court entered final judgment in Plaintiffs' favor on February 23, 2007. 4R.1106.¹ State Farm filed a motion for partial judgment as a matter of law and for new trial on March 9, 2007. 4R.1112-5R.1412. The District Court denied State Farm's motion on May 11, 2007. 5R.1516-18. State Farm filed a timely notice of appeal from the final judgment on June 4, 2007. 5R.1519-20. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

¹ The Record on Appeal is cited herein as "R.." The first entry lists the volume number of the Record, and the second entry lists the page number. The trial transcript is cited herein as "TR.____." Trial exhibits of Plaintiffs and State Farm are cited herein as PX and DX respectively. The Record Excerpts of State Farm are cited as "R.E.____."

STATEMENT OF THE ISSUES

1. Whether the District Court erred in entering judgment as a matter of law on Plaintiffs' claim for damage to their personal property during Hurricane Katrina where Plaintiffs failed to meet their burden of proving a direct loss by wind, as required by Mississippi law.

2. Whether the District Court erred in ruling that Plaintiffs were entitled as a matter of law to policy limits under their dwelling coverage, on the ground that State Farm was unable to segregate the wind and water damage sustained by Plaintiffs' dwelling during Hurricane Katrina.

3. Whether the District Court abused its discretion in admitting the testimony of Plaintiffs' expert James Slider.

4. Whether (a) the punitive award should be reversed under Mississippi law because State Farm had an arguable reason for, and did not act with malice or gross negligence in, denying Plaintiffs' claim, or (b) if not reversed entirely, the punitive award should be substantially further remitted as a matter of Mississippi law and federal constitutional law.

5. Whether the District Court abused its discretion in not transferring venue to the Northern District of Mississippi, Western Division.

STATEMENT OF THE CASE AND THE FACTS

Plaintiffs Norman and Genevieve Broussard owned a home at 154 Brady Drive, Biloxi, Mississippi, approximately 1/4 mile from the Gulf of Mexico. DX85 at 2. On August 29, 2005, during Hurricane Katrina, storm surge flooding from the Gulf swept away the Broussards' home, leaving only the foundation.

A. Plaintiffs' Homeowners Policy

The Broussards were insured under a homeowners policy issued by State Farm, with policy limits of \$120,698.00 for the dwelling, \$12,070.00 for the dwelling extension, and \$90,524.00 for personal property.² 4R.941. Coverage A of the State Farm homeowners policy covers Plaintiffs' dwelling and insures for "accidental direct physical loss to [the dwelling] except as provided in **Section I – Losses Not Insured.**" 1R.170; DX1 at 7; R.E. Tab 15; Appendix ("App.") Tab A *infra*. Coverage B, for personal property, insures for "accidental direct physical loss" caused by specified perils (including "windstorm"), also expressly subject to "Section I – Losses Not Insured." *Id.*

The "Section I – Losses Not Insured" portion of the policy provides:

2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of

² Plaintiffs had no separate flood insurance.

the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

* * *

- c. **Water Damage**, meaning: (1) 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[.]

1R.173; DX1 at 10; R.E. Tab 15; App. Tab B.

B. State Farm's Investigation and Denial of Plaintiffs' Claim

After Hurricane Katrina, a State Farm claim representative inspected the remains of Plaintiffs' dwelling, Plaintiffs' lot and trees, and the surrounding area. DX113[0021-EC]. Concluding that Plaintiffs' home had been destroyed by storm surge flooding, State Farm denied Plaintiffs' insurance claim. DX113[0022-EC].

C. Plaintiffs' Lawsuit and Pretrial Proceedings

Plaintiffs filed their lawsuit against State Farm in the Circuit Court of Harrison County, Mississippi, on November 28, 2005. 1R.25-27; R.E. Tab 13. Their Complaint asserted claims for breach of contract and bad faith denial of their insurance claim, and sought policy limits and extracontractual

and punitive damages.³ *Id.* State Farm removed the action to the United States District Court for the Southern District of Mississippi on January 6, 2006. 1R.20-24.

Before trial, State Farm moved to strike the testimony of Plaintiffs' expert James Slider, who was to testify that wind or a tornado destroyed Plaintiffs' home prior to the advent of the storm surge, as unreliable and without scientific basis. 1R.204-99. After this motion was denied on December 28, 2006 (4R.961; R.E. Tab 8), State Farm moved for reconsideration (4R.994-1020), which was also denied. 4R.1050; R.E. Tab 9.

State Farm also moved, *inter alia*, for transfer of venue to the Northern District of Mississippi, Western Division, on the ground that it could not receive a fair trial in the Southern District, given the vast extent of the damage and destruction affecting area residents and the pervasive inflammatory publicity against insurance companies. 1R.300-77. The District Court denied this motion on February 1, 2007. 4R.1047-49; R.E. Tab 11.

³ The Complaint also asserted a claim for breach of fiduciary duty (1R.26,¶6), which was dismissed on summary judgment. 3R.860-61.

D. The Trial

The trial began on January 8, 2007. In the first phase, which addressed coverage issues, Plaintiffs called four witnesses: their expert James Slider, the Broussards, and State Farm employee Terry Blalock. State Farm called two witnesses, its experts Drs. Kurt Gurley and Robert Dean.

Plaintiffs testified that they believed "tornadic action" (TR.201:16) completely destroyed their house, although they admitted that they left their house before the storm "to go to higher ground" (TR.209:24-25,210:1), and thus did not witness the destruction of their home. James Slider, Plaintiffs' expert, testified that although by his own estimate the storm surge in the area was approximately 27 feet high (TR.235:16-19), in his opinion "it is most likely that the Broussard residence was either destroyed by the winds of Katrina, including tornadic winds prior to the advent of the storm surge, or damaged first by the winds of Katrina and later by the combined forces of both the wind and the storm surge."⁴ TR.228:18-22. He later conceded, however, that he "did not see evidence of a tornado" at Plaintiffs' property nor any evidence that a tornado struck power lines or poles on Plaintiffs' street. TR.264:23-266:21,271:9-17. Mr. Slider conceded further that all the trees on Plaintiffs' lot were still standing (TR.266:11-21), that the shingles

⁴ The District Court denied State Farm's renewed objections to Mr. Slider's testimony. TR. 222:5-7,332:9-334:14,338:22-25.

remained on the roofs of nearby apartment buildings (TR.257:2-25), that no houses between Plaintiffs' property and the Gulf to the south remained standing (TR.253:5-11), but not a single house north of the debris line (the furthest reach of the storm surge) had been "knocked down" or "destroyed" like the Broussards' house. TR.263:1-264:22,274:15-18,278:16-279:3.

State Farm presented testimony and evidence concerning the respective roles of storm surge and wind in the destruction of the house. State Farm's experts were Dr. Kurt Gurley, a Professor in the Department of Civil and Coastal Engineering at the University of Florida whose specialty is the way that wind interacts with housing (TR.339:19-25,340:25-341:11), and Dr. Robert Dean, also a Professor at the University of Florida and an expert in water wave mechanics and coastal engineering. TR.440:6-442:15. Both testified that the structural damage to Plaintiffs' house (as opposed to shingle damage or other superficial damage) was caused by "surge and waves" and that Hurricane Katrina's winds could not have caused structural damage or destroyed the home. TR.471:25-472:3,347:15-16,389:23-25.

Dr. Dean testified that Hurricane Katrina produced the largest storm surges and waves ever observed within the Gulf of Mexico. TR.454:13-15. He opined that the Broussard property would have had seven to nine feet of

water present with superimposed waves of over five feet, creating destructive forces equivalent to a 520 mile-an-hour wind. TR.460:5-7,464:21-465:1.

Dr. Gurley conducted a survey of the damage to over 300 homes in the immediate area from aerial photographs taken shortly after Hurricane Katrina. DX88 at 7; TR.379:6-14, TR.384:12-18. The survey showed that houses north of the storm surge debris line were "structurally intact with varying levels of either none or some amount of roof cover loss." TR.381:11-12. Based on his survey, Dr. Gurley determined that "a possibility" existed that there was some "superficial" damage to Plaintiffs' roof before the advent of the storm surge (TR.347:16-18), concluding (as the District Court noted) that it was "75% likely that the Broussard residence suffered less than 35% roof cover loss (between none and 35% roof cover loss) before water inundation." DX88 at 9; 4R.1039-40,¶7; R.E. Tab 6.⁵ Dr. Gurley made clear, however, that it was possible that the Broussards' roof had sustained no wind damage at all and that the exact percentage of damage

⁵ Dr. Gurley's initial report concluded that "[t]here is a greater than 50 percent probability that the Broussard residence experienced minor roof cover shingle loss on the order of ten percent of shingles damaged or lost prior to the destruction of the home by water." TR.389:12-15; DX87 at 12. Dr. Gurley characterized the difference between his initial and supplemental reports as "not large" and stated that he stood behind both numbers, but "more closely behind" the supplemental report (which included the survey results). TR.413:2-3.

to the shingles, if any, could not be determined as no physical evidence of the roof remained. TR.385:13-22,438:3-20,439:6-10; DX88 at 8.

E. The District Court's Grant of JMOL for Plaintiffs

At the conclusion of the evidence by both sides, Plaintiffs and State Farm made oral cross-motions for judgment as a matter of law (JMOL) under Fed. R. Civ. P. 50.⁶ State Farm moved for JMOL as to Plaintiffs' personal property claim and extracontractual and punitive damages claim. TR.485:4-487:5. On January 11, 2007, the District Court denied State Farm's motions and entered JMOL for Plaintiffs on their coverage claims, awarding them policy limits under both their dwelling coverage and their personal property coverage. (This ruling was issued as a written opinion on January 17. 4R.1038-41; R.E. Tab 6.)

In granting JMOL for Plaintiffs, the District Court concluded that Plaintiffs had met their burden of proving that a specified peril, "windstorm," had damaged their personal property. 4R.1039,¶2; R.E. Tab 6. The District Court based its ruling upon State Farm's pretrial stipulation, as paraphrased by the Court, that Plaintiffs "sustained a loss of the contents of their dwelling as a result of Hurricane Katrina, a windstorm." 4R.1039,¶2.

⁶ State Farm also moved for JMOL on Plaintiffs' claim for policy limits on the loss of their personal property after Plaintiffs rested their case-in-chief. TR.332:8-333:9. The District Court denied this initial motion without prejudice. TR.338:22-25.

In fact, State Farm stipulated only that Plaintiffs' property "was destroyed during Hurricane Katrina." 4R.941,¶9(3); R.E. Tab 14. Nonetheless, the Court (incorrectly) viewed State Farm's purported stipulation as a concession that Plaintiffs' personal property was destroyed by "windstorm" within the meaning of the policy term. 4R.1039-40,¶¶2,13.

As to Plaintiffs' dwelling, which had "open peril" coverage, the District Court ruled that Plaintiffs were entitled to JMOL for policy limits because "[t]he evidence establishes, conclusively, that the plaintiffs' dwelling sustained wind damage during Hurricane Katrina" 4R.1039,¶5. Although the District Court went on to acknowledge that the evidence was "overwhelming" that flood waters were "sufficient in force and duration to destroy the dwelling regardless of the extent of the preceding wind damage" (4R.1040,¶8), the Court held that State Farm had the burden of proving either that there was no wind damage or the extent of wind damage. 4R.1040,¶10. In the District Court's view, Dr. Gurley's evidence that there was a 75% probability the house sustained wind loss of between 0% and 35% of the shingles was insufficiently definite to meet this burden. 4R.1039-40,¶7.

F. The Punitive Damages Phase

In phase two of the trial, the jury rendered a verdict awarding Plaintiffs \$2,500,000 in punitive damages. 4R.1036; R.E. Tab 3. The District Court *sua sponte* reduced the punitive award to \$1,000,000 by Order dated January 31, 2007. 4R.1042-45; R.E. Tab 7.

G. Post-Trial Proceedings

Judgment was entered on February 23, 2007. 4R.1106; R.E. Tab 4. By Order dated May 11, 2007, the District Court denied State Farm's post-trial motion for partial JMOL as to personal property and punitive damages, for further remittitur of the punitive award, and for a new trial. 5R.1516-18; R.E. Tab 5. State Farm filed its timely notice of appeal on June 4, 2007. 5R.1519-20.

SUMMARY OF ARGUMENT

The District Court committed reversible error on several separate and independent grounds. First, the Court erred in granting Plaintiffs JMOL on coverage for their personal property. State Farm was entitled to JMOL on that claim because Plaintiffs did not satisfy their burden of proving that the loss of their personal property was caused by "windstorm." Although the District Court apparently recognized that Plaintiffs bore the burden of proof on this issue, the Court erred in finding that Plaintiffs met their burden

simply by virtue of the parties' pretrial stipulation, which the Court incorrectly paraphrased as stipulating that Plaintiffs' loss of the contents of their dwelling was "a result of Hurricane Katrina, a windstorm." 4R.1039,¶2; R.E. Tab 6.

The Mississippi courts have made clear that, to establish the right to recover under a specified peril policy for loss by "windstorm," a plaintiff must show that the loss was caused by *wind*, not simply that the loss occurred during or as a result of hurricane. The District Court erred in departing from settled Mississippi law construing the policy term "windstorm" and in treating State Farm's stipulation as a concession that Hurricane Katrina was *only* a windstorm and that wind forces alone destroyed Plaintiffs' personal property. These purportedly stipulated "facts" were very much in dispute, as State Farm consistently maintained that Plaintiffs' personal property was destroyed by Hurricane Katrina's storm surge. The Court's erroneous grant of JMOL to Plaintiffs for coverage of their personal property should be reversed, and JMOL in favor of State Farm or a new trial should be granted.

The District Court also made fundamental errors with respect to the parties' burdens of proof under the "open peril" coverage for Plaintiffs' dwelling. The Court recognized that State Farm had presented

"overwhelming" evidence that the flood waters were "sufficient in force and duration to destroy the dwelling regardless of the extent of the preceding wind damage." 4R.1040,¶8. In addition, State Farm's experts testified that storm surge flooding in fact destroyed the house. The District Court, however, ruled that it was State Farm's additional burden to provide evidence "as to the segregation of this total loss into wind damages, which are covered, and water damages which are excluded from coverage" and to establish the "portion of the total loss that was attributable to excluded flooding and rising water." 4R.1040,¶¶10-12.

To the contrary, under Mississippi law, once an insurer presents evidence showing that an exclusion applies, as did State Farm, the insured has the burden of presenting evidence that rebuts that showing or, alternatively, that segregates the amount of damage caused by a covered peril (wind) from an excluded peril (water). Moreover, even assuming *arguendo* that the burden was properly State Farm's, it was satisfied by the testimony of State Farm's expert, who quantified with reasonable precision the maximum likely amount of wind damage to the dwelling (from 0% to 35% of the roof shingles). Mississippi law does not require greater precision, and the District Court erred in granting JMOL for Plaintiffs and taking the issue away from the jury.

The District Court's erroneous admission of the testimony of Plaintiffs' purported expert on causation issues, James Slider, also requires reversal and a new trial. Mr. Slider was unfamiliar with principles and methodologies of wind engineering. Among other deficiencies in his methodology, he admitted that the technique he used for determining that wind supposedly destroyed Plaintiffs' house had never been peer-reviewed and that he did not know whether it had ever been used by any other expert.

The District Court also erred in permitting Plaintiffs' claim for punitive damages to go to the jury. Under Mississippi law, before punitive damages can be imposed for the bad faith denial of an insurance claim, clear and convincing evidence is required both that the insurer denied the claim without an arguable basis and that the insurer acted with malice or gross negligence. Here, after investigating Plaintiffs' claim, State Farm concluded that storm surge flooding destroyed Plaintiffs' house. State Farm's experts at trial opined that there was at most minor wind damage to the roof of the house before the storm surge destroyed the house and that there may have been *no* wind damage. Moreover, arguable legal issues existed (and exist) as to the burdens of proof on Plaintiffs' claim and other matters. Thus, the threshold requirements for punitive damages were not met as a matter of law. Furthermore, assuming *arguendo* that an award of punitive damages was

permissible, the award in this case, even as remitted to \$1 million by the District Court, is grossly excessive in violation of both Mississippi law and the federal constitution and should be substantially further remitted.

In addition, the District Court erred in denying State Farm's motion for a transfer of venue to the Northern District of Mississippi, Western Division. The entire jury venire of the Southern District was subjected to pervasive and extreme negative publicity regarding Katrina insurance claims, insurance companies, and State Farm in particular. In such circumstances, prejudice is presumed, and a transfer of venue should have been granted to preserve State Farm's right to a fair and impartial jury.

ARGUMENT

I. STANDARDS OF REVIEW

Judgment as a Matter of Law: The District Court's rulings on JMOL motions are reviewed de novo. *Evans v. Ford Motor Co.*, 484 F.3d 329, 334 (5th Cir. 2007).

Burden of Proof: "A district court's allocation of the burden of proof is reviewed de novo." *Guajardo v. Texas Dep't of Criminal Justice*, 363 F.3d 392, 395 (5th Cir. 2004).

Expert Testimony: The District Court's rulings on the admissibility of expert evidence are reviewed for abuse of discretion. *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347, 351 (5th Cir. 2007).

Punitive Damages: The District Court's denial of State Farm's JMOL motion on punitive damages is reviewed de novo, *Sobley v. S. Natural Gas Co.*, 302 F.3d 325, 335 (5th Cir. 2002), as is whether the punitive award, as remitted, is constitutionally excessive. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001). The Court's refusal to remit further the punitive award under Mississippi law is reviewed for abuse of discretion. *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 279 (Miss. 1985).

Venue: The District Court's denial of State Farm's motion to transfer venue is reviewed for abuse of discretion. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004).

II. THE DISTRICT COURT ERRED IN GRANTING JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CLAIM FOR LOSS OF THEIR PERSONAL PROPERTY BECAUSE PLAINTIFFS FAILED TO PROVE THE PROPERTY WAS DESTROYED BY WIND

The District Court erred in denying State Farm's motions for JMOL on Plaintiffs' claim for the loss of their personal property and in granting Plaintiffs JMOL on that issue. TR.493:2-499:1; 4R.1038-41. Plaintiffs

failed to meet their burden of proving that the damage to their personal property was caused by a covered peril – namely "windstorm" – and thus failed to establish a right to recovery under their homeowners policy. The judgment should be reversed, and JMOL should be entered for State Farm on Plaintiffs' personal property claim, or a new trial granted.

Under settled Mississippi law, Plaintiffs had the burden of proving that the damage to their personal property was caused by wind. Plaintiffs' homeowners policy provides coverage for personal property (or contents) on a "named" or "specified" peril basis.⁷ Under specified peril coverage, the insured has the burden of proving that his loss was caused by a peril enumerated in the policy. *See Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696, 699 (Miss. 1973) (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"). As relevant here, to make out a prima facie case for coverage, Plaintiffs had the burden of proving that their personal property was damaged by "windstorm," including rain entering the dwelling through an

⁷ Named peril policies provide coverage only for the specific risks enumerated in the policy. "Open peril" policies (formerly called "all risk" policies) provide coverage for a broad range of risks subject to the policies' specific exclusions, conditions and limitations. *See Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696, 698-99 (Miss. 1973) (noting distinction).

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*. They did neither, as a result of which their claim fails as a matter of law.

The District Court erroneously ruled that Plaintiffs' burden was satisfied by the mere showing that Plaintiffs' property was damaged during Hurricane Katrina:

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. Thus, the Court found, the parties had stipulated to every fact necessary to satisfy Plaintiffs' burden and held that the burden was therefore on State Farm to prove "that portion of the total loss that was attributable to excluded flooding and rising water." 4R.1039-40; R.E. Tab 6.

The fatal flaw in the District Court's analysis on this point is in its initial premise. Although it is true that the parties stipulated that Plaintiffs' property "was destroyed during Hurricane Katrina, leaving only a slab" (4R.941; R.E. Tab 14), they *never* stipulated that Hurricane Katrina was exclusively "a windstorm," as the Court's Order suggests, or that Plaintiffs'

personal property was damaged "as a result of . . . a windstorm," as it states. 4R.1039-41. Rather, State Farm's position, as reflected in the pretrial order, was and is that "the property was destroyed by flood and tidal surge" and that it "was unable to conclude there was any wind damage during its investigation of the claim." 4R.941.

In short, Hurricane Katrina was comprised of both wind forces and water forces. Thus, the fact that the parties stipulated that Plaintiffs' house and its contents were destroyed "*during Hurricane Katrina*" does not answer the question whether the damage to Plaintiffs' personal property was *caused by windstorm*. In such a case, established Mississippi precedent holds that, under specified peril coverage for windstorm, the burden is on Plaintiffs to prove that their personal property was actually damaged "by direct action of the wind." *Lunday*, 276 So. 2d at 699 (Hurricane Camille); *see also, e.g., Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765, 767 (Miss. 1971) (in Hurricane Camille case, holding that 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 policy term "windstorm" as "'any *wind* . . . of such extraordinary force and violence as to thereby injuriously disturb the ordinary condition of things insured'") (citation omitted).

Thus, contrary to the District Court's logic, the fact that a hurricane is primarily defined "based on the strength of the winds it generates" (5R.1517; R.E. Tab 5) does not establish that all hurricane damage is prima facie "windstorm" damage, as the Mississippi courts have defined that term. As the Mississippi Supreme Court made clear in *Lunday*, a Hurricane Camille case addressing damage under a "specified peril" policy affording coverage for "Direct Loss by Windstorm,"⁸ it was not enough for the plaintiff to show that the damage to his rooming house occurred as a result of the hurricane. Instead:

[T]he 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. . . . [W]hen plaintiff proves that, he negatives 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, much less holds, that 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 District Court improperly relieved Plaintiffs of their burden of proving that the damage to

⁸ *Lunday*, 276 So. 2d at 697. Similarly, Plaintiffs' State Farm policy provides specified peril coverage for personal property for "accidental direct physical loss . . . caused by . . . Windstorm." 1R.170; DX1 at 7; R.E. Tab 15; App. Tab A.

their personal property was caused by one of the policy's specified perils and obliterated the distinction between the applicable burdens of proof for named peril and open peril coverages.

Thus, with respect to their personal property, Plaintiffs bore the burden of proof as to "[t]he key issue" of "how much damage had occurred as a result of wind before the storm surge arrived." 4R.1040, ¶8; R.E. Tab 6. Plaintiffs clearly failed to satisfy that burden of proof. Plaintiffs' burden was not satisfied by their own assertions that they believed their house was destroyed by a tornado (*see* TR.201:16), inasmuch as they were not eyewitnesses to the event. TR.196:15-25. Moreover, as discussed in Point IV below, the testimony of Plaintiffs' expert James Slider was incompetent and inadmissible, and, in any case, Mr. Slider conceded that he "did not see evidence of a tornado" at Plaintiffs' property (TR.264:23-266:21,271:9-17), that all the trees on Plaintiffs' lot were still standing (TR.266:11-21), that the shingles remained on the roofs of nearby apartment buildings (TR.257:2-25), and that no houses between Plaintiffs' property and the Gulf to the south remained standing (TR.253:5-11), while not a single house north of the debris line had been "knocked down" or "destroyed" like the Broussards' house. TR.263:1-264:22, 274:15-18, 278:16-279:3.

JMOL for Plaintiffs on their personal property claim must be reversed, and JMOL should be entered for State Farm, or alternatively, a new trial granted.

III. THE DISTRICT COURT ERRED IN RULING THAT PLAINTIFFS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER THEIR DWELLING COVERAGE

The District Court also erred in granting JMOL on Plaintiffs' claims for the damage to their dwelling, both in its allocation of the burden of proof and in its determination that State Farm had not satisfied the burden of proof imposed upon it by the Court.

In entering JMOL for Plaintiffs, the District 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." 4R.1040, ¶9; R.E. Tab 6. The Court then concluded that "the burden of proof 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."
4R.1040, ¶10.⁹

State Farm presented evidence that Plaintiffs' house was not structurally damaged by wind, that the house was destroyed by storm surge, and that there was no physical evidence that any wind damage occurred. TR.347:15-16,384:5-7,389:23-25,385:6-7;450:15-16,471:25-472:3,302:17-18,23-25; DX88 at 8-9, DX113[0021-0022-EC]. That evidence was ample to sustain State Farm's burden to show the applicability of the water damage exclusion. Moreover, that the destruction of the house was caused by storm surge, not wind, was supported not only by scientific evidence presented by State Farm's experts, but also by the fact, established by photographic evidence of the area and conceded by Plaintiffs' expert, that *none* of the houses in the area to the north of Plaintiffs' home beyond the reach of the storm surge was destroyed and that *every* house south of Plaintiffs' house and in the storm surge area was destroyed. TR.253:5-11,263:1-264:22,274:15-18. State Farm's expert also testified that (the entire house

⁹ The District Court also erred to the extent the burdens it articulated reflect its earlier ruling in *Tuepker v. State Farm Fire & Cas. Co.*, 2006 WL 1442489, at *4-5 (S.D. Miss. May 24, 2006) (appeal pending), finding ambiguity in State Farm's anti-concurrent cause lead-in language, which provides that any loss that would not have occurred in the absence of an excluded event (*e.g.*, storm surge) is excluded even if a covered risk was also a cause of the damage. State Farm does not contend that this language would apply to exclude separate, independent wind damage, occurring before, during or after water damage.

and roof being gone) it was not possible to determine the precise number of shingles on Plaintiffs' roof (if any) that had been damaged by wind and that it was not possible to determine that there had in fact been any wind damage to Plaintiffs' house. TR.347:16-18,385:6-7,439:6-10. However, based upon his site visit, examination of trees and still-standing structures in the neighborhood, and analysis of the shingle damage to 308 houses in the area surrounding Plaintiffs' house, State Farm's expert was able to state that there was a 75% likelihood that the damage to Plaintiffs' roof consisted of the loss of between 0% and 35% of the shingles on the roof of the dwelling. DX88 at 9. The District Court erroneously rejected this showing, ruling that State Farm had "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" (4R.1040,¶13) and was therefore liable to Plaintiffs as a matter of law for the full policy limits.

The District Court's determination as to the burdens of proof and its finding that State Farm failed to present sufficient evidence to go to the jury are both erroneous, requiring reversal of the judgment on Plaintiffs' claim for policy limits under their dwelling coverage.

A. The District Court's Grant of JMOL for Plaintiffs as to Dwelling Coverage Must Be Reversed Because the District Court Erred as to the Parties' Respective Burdens of Proof

Plaintiffs' homeowners policy covers Plaintiffs' dwelling on an "open peril" (or comprehensive) basis. Under such a coverage grant, if the insured meets his threshold burden of proving that his property sustained 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. However, once the insurer adduces evidence from which the jury could find that the insured's loss was caused by an excluded peril, the burden shifts back to the insured to rebut that showing in whole or in part and 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)).¹⁰

This "shifting back" of the burden of proof accords with established principles of Mississippi law. First, "a plaintiff has the burden of proving a

¹⁰ The court in *Ferguson v. State Farm Ins. Co.*, 2007 WL 1378507, at *1-2 (E.D. La. May 9, 2007), a Hurricane Katrina case, adopted shifting burdens of proof for open peril coverage, under which (i) the insured had the "threshold burden of proving an accidental direct physical loss to the insured property," (ii) the insurer then had the "threshold burden of proving the exclusion" by a preponderance of the evidence, and (iii) the burden then would "shift back" to plaintiffs to prove that they "fall under an exception to the exclusion." *Ferguson* established these shifting burdens in the context of the "apportionment of damage between those caused by flood and those caused by wind." *Id.* at *2 n.12.

right to recover under the insurance policy sued on," and "[t]hat basic burden never shifts from the plaintiff." *Britt v. Travelers Ins. Co.*, 566 F.2d 1020, 1022 (5th Cir. 1978); *see also Coahoma County Bank & Trust Co. v. Feinberg*, 128 So. 2d 562, 565 (Miss. 1961) (reiterating rule that claimant has burden of proving entitlement to insurance policy proceeds). Thus, as in any other action for breach of contract, "[a] plaintiff has the burden to prove by a preponderance of the evidence the existence of a binding contract, that the defendant breached it, and that damages proximately resulted from the breach." *A&F Props., LLC v. Lake Caroline, Inc.*, 775 So. 2d 1276, 1279 (Miss. App. Ct. 2000) (citing *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992)). In other words, 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 principle 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"); *Harbor House Condo. Ass'n v. Mass. Bay Ins. Co.*, 915 F.2d 316, 318 (7th Cir. 1990) (Illinois law) (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").

Moreover, as in any other case, once a defendant-insurer establishes an affirmative defense,¹¹ the plaintiff-insured must refute that defense or the defendant will prevail. In *Brown v. PFL Life Insurance Co.*, 312 F. Supp. 2d 863 (N.D. Miss.), *aff'd*, 111 F. App'x 258 (5th Cir. 2004), for example, after the insurer satisfied its burden of proving the applicability of the exclusion at issue, the court, applying Mississippi law, shifted the burden back to the plaintiff to rebut that showing, as part of the plaintiff's burden to "prove her right to benefits" under her policy. *Id.* at 868. Because the plaintiff "offered no evidence, whatsoever, to contradict the [insurer's] findings," the court upheld the insurer's determination of noncoverage. *Id.* at 868-69. *See also Joubert v. Travelers Indem. Co.*, 736 F.2d 191, 193 (5th Cir. 1984) (party that establishes affirmative defense will prevail in absence of credible rebuttal evidence); *Pawlik v. State Farm Mut. Auto. Ins. Co.*, 302 F.2d 255, 257 (7th Cir. 1962) (Illinois law) (defendant had burden of proving affirmative defense of violation of duty to cooperate, and plaintiff "had the

¹¹ The Mississippi courts have long treated an insurer's reliance on a policy exclusion as an affirmative defense. *See Commercial Union Ins. Co. v. Byrne*, 248 So. 2d 777, 782 (Miss. 1971); *accord Lunday*, 276 So. 2d at 698 ("In an all-risk (CDP) policy where an exclusion is specifically pleaded as an affirmative defense the burden of proving such affirmative defense is upon the insurer . . .").

burden of refuting the affirmative defense by evidence of justification or excuse"). In other words, as the Mississippi Supreme Court has recognized, where a defendant "having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail" and therefore "the other party, if he would avoid the effect of such prima facie case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail." *Hinton v. McKee*, 329 So. 2d 519, 520-21 (Miss. 1976) (citation omitted).

The District Court's ruling also contravenes "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"). 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 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."). 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, 868, 872-73 (N.D. Ill. 2006) (denying insured's motion for summary judgment even though it was "undisputed that [insured] suffered some covered loss," because insured failed to satisfy its "burden of proving the amount of the covered loss").

As these authorities demonstrate, the District Court erred in imposing on State Farm the burden of proving that there was *no* wind damage to Plaintiffs' dwelling or segregating wind and water damage. 4R.1040, ¶¶12-13; R.E. Tab 6. Accordingly, the District Court's grant of JMOL as to

coverage for Plaintiffs' dwelling should be reversed and the case remanded for a new trial.

B. Even If State Farm Had the Burden of Segregating Wind and Water Damage to Plaintiffs' Dwelling, State Farm Introduced Sufficient Evidence to Go to the Jury

Under Fed. R. Civ. P. 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, 337 (5th Cir. 2001). In this case, State Farm presented a more than sufficient evidentiary basis for the jury to determine the wind and water damage to Plaintiffs' home, and the District Court's erroneous grant of JMOL on Plaintiffs' coverage claim should be reversed.

First, Plaintiffs' claim was at all times for policy limits for the *total loss* of their house. As to this claim, State Farm's expert Kurt 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 also opined 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. Plaintiffs' expert Slider, by contrast, testified that the total destruction of the house was "most likely" due to wind. TR.228:18-19. This conflict in the evidence (assuming for these purposes Mr. Slider's testimony was competent and admissible) created a triable issue as to what caused the total destruction of the house, and the question should have been put to the jury.

Second, the District Court erred in ruling that State Farm did not adduce sufficient evidence to go to the jury on the issue of the "segregation of this total loss into wind damages . . . and water damages." 4R.1040,¶12. In so ruling, the Court evidently believed that expert Kurt Gurley's "attempt to quantify" the amount of wind damage was insufficiently definite because (since the house and roof were gone) Dr. Gurley could give only 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." 4R.1039-40,¶7; R.E. Tab 6. 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, could definitively state that any wind damage had in fact occurred (TR.348:3-11)¹² or quantify the extent of the wind damage with greater specificity. TR.385:13-22,438:11-20.

The Court's conclusion that State Farm did not present sufficiently precise evidence of the amount of covered wind damage to create a triable issue is contrary to Mississippi law. *See, e.g., Wall v. Swilley*, 562 So. 2d 1252, 1256-58 (Miss. 1990) (reversing trial court's ruling that buyer's evidence of damages was speculative and insufficiently precise; holding that the evidence, although somewhat speculative, was nonetheless "adequate such that a hypothetical reasonable juror could have found damages for [plaintiffs] at some amount above nominal damages"); *State Farm Mut. Auto. Ins. Co. v. Commercial Union Ins. Co.*, 394 So. 2d 890, 894 (Miss. 1981) (coinsurer introduced adequate evidence to allocate attorney fees and expenses incurred in defending two underlying actions, where witness "c[ould]n't say" how much of bill was "due directly" to uncovered action, but "c[ould] say if there had been only one lawsuit you would still be looking at probably at least 75 percent of the bill").

¹² Notably, contrary to the Court's finding, neither Dr. Gurley's testimony, nor the parties' stipulations, nor any other evidence "establishe[d], conclusively, that the plaintiffs' dwelling sustained wind damage." 4R.1039,¶5.

Courts in Mississippi and elsewhere afford even greater latitude in cases where, as here, certainty as to the amount of damage is virtually impossible. As the Mississippi Supreme Court has explained, "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, . . . 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). *See also Progressive Cas. Ins. v. All Care, Inc.*, 914 So. 2d 214, 221 (Miss. Ct. App.) (evidence was sufficient that 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 calculate any reasonably exact amount of loss . . ."), *cert. denied*, (Miss. 2005); *Computer Sys. Eng'g v. Qantel Corp.*, 571 F. Supp. 1365, 1377-78 (D. Mass. 1983) (although 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).

Here, Plaintiffs' expert Slider testified that it was "most likely" that wind destroyed Plaintiffs' house before the storm surge arrived.¹³ TR.228:18-19. Dr. Gurley's conflicting 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 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 at all or, if it did, the *precise* amount of that damage, provided evidence from which the jury could make a "fair and approximate" calculation of separate wind damage.

This conclusion is buttressed by the fact that 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 that issue presents a question of fact for the jury – even in cases in which the insurers adduced far less definitive and certain evidence than in this case. For example, in *Grace v. Lititz Mutual Insurance Co.*, 257 So. 2d 217, 219 (Miss. 1972), a Hurricane Camille case, the question of causation went to the jury

¹³ As discussed in Point IV below, Mr. Slider should not have been allowed to testify.

(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 quantification. Confirming that this evidence was sufficient to raise a triable issue for the jury, 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), this Court held that the determination whether the plaintiff's loss was caused by a covered or excluded peril 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) (holding in Hurricane Camille case that "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").

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 maximum amount of damage that could have been caused by wind. Accordingly, this question should have been put to the jury, and the District Court erred in entering JMOL for Plaintiffs.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING THE TESTIMONY OF PLAINTIFFS' EXPERT JAMES SLIDER

As shown below, the testimony of Plaintiffs' purported expert on causation, James Slider, did not meet the standards of reliability dictated by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and its

progeny. Accordingly, the District Court abused its discretion in allowing his testimony.

A. Applicable Legal Standards

Federal Rule of Evidence 702 governs the admissibility of expert testimony. In *Daubert*, the United States Supreme Court held that Rule 702 requires that the trial court act as a "gatekeeper" by determining at the outset "whether the reasoning or methodology underlying the [expert's] testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-93. The Court set forth several factors to aid this gatekeeping function, including whether a "theory or technique . . . can be (and has been) tested," whether it "has been subjected to peer review and publication," whether the particular technique involved has a "known or potential rate of error," whether there are "standards controlling the technique's operation," and whether the theory or technique enjoys "'general acceptance'" within a "'relevant scientific community.'" *Id.* at 592-94. These factors do not constitute a "definitive checklist or test," and the inquiry must be "'tied to the facts'" of a particular case. *Id.* at 591. The proponent of the expert testimony "must demonstrate that the expert's findings and conclusions are based on the scientific method,

and, therefore, are reliable." *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

The purpose of the *Daubert* inquiry is to ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). In performing its screening function, the court must meaningfully scrutinize an expert's testimony, or its "factual basis, data, principles, methods, or their application," to ensure its reliability. *Id.* at 149.

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

Mr. Slider purported to testify about the relative effect of hurricane wind and storm surge in damaging Plaintiffs' house. His 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;472:8-23.

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 nearby properties that were left standing after the hurricane for whatever light they might shed on the cause of Plaintiffs' damage.¹⁴ See TR.250:7-23,251:12-15,261:25-262:4. He did not determine the wind speeds of earlier hurricanes 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 residential structures from previous storms with wind speeds similar to Katrina's. TR.255:1-5.

C. Mr. Slider's Principles and Methods Were 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 Cir. 2000); 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).

¹⁴ 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.

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 destroyed like Plaintiffs' home. TR.263:23-264:1. Mr. Slider did not know at what time the storm surge at the Broussards' residence would have reached, for example, five feet or nine feet and did not know FEMA's conclusions, published in its rebuilding recommendations for the Gulf Coast, as to the waves that such levels of storm surge would push against a house. TR.246:7-247:22. He was also unaware that the American Society of Civil Engineers had sent a damage assessment team to Mississippi after Hurricane Katrina and did not know the conclusions it reached regarding Katrina's storm surge and the destruction it caused. TR.275:1-19. Mr. Slider knew the Saffir-Simpson Hurricane Scale "only by name," although he ventured the incorrect opinion that it was based on "three-second gusts."¹⁵ TR.243:12-22.

Notably, Mr. Slider did not know whether the "technique" he employed for determining the cause of the damage to Plaintiffs' residence had ever been used by anyone else to reach conclusions about the cause of damage to structures during hurricanes (TR.220:5-13), and, to his

¹⁵ As Dr. Gurley testified, the Saffir-Simpson Scale categorizes hurricanes by one-minute sustained wind speeds and sets forth expected levels of damage for the different categories; and, on that Scale, the winds at the Broussards were "definitively not strong enough to cause structural failure to residences." TR.371:14-372-18.

knowledge, this "technique" had never received peer review in the field of civil engineering. TR.221:22-25. Moreover, Mr. Slider failed to use accepted techniques in analyzing the sustained wind speed at Plaintiffs' home during the hurricane. TR.373:12-20. Indeed, Mr. Slider was unfamiliar with the principles of wind engineering and admitted that he "wouldn't have a clue" as to what a wind engineer does. TR.220:1-4,276:13-16.

For all these reasons, Mr. Slider should not have been allowed to testify, and the erroneous and prejudicial admission of his testimony warrants a new trial.¹⁶

V. 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

The District Court erred in denying State Farm's motion for JMOL on punitive damages, and the punitive award should be reversed as a matter of Mississippi law.

¹⁶ In granting JMOL for Plaintiffs, the Court stated that it had relied upon "all of the evidence," necessarily including Mr. Slider's testimony. 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.*, 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.").

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 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"); *Blue Cross & Blue Shield v. Campbell*, 466 So. 2d 833, 844 (Miss. 1984) (to recover punitive damages for bad faith, plaintiff must establish by clear and convincing evidence "that there was no reasonably arguable basis for the insurance carrier to deny the claim"). Neither of these requirements was met, and State Farm is therefore entitled to JMOL on Plaintiffs' claim for punitive damages.

Under Mississippi law, an arguable factual basis for the denial of an insurance claim 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) (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 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. *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 District 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. 4R.1043; 4R.1040-41,¶14; 5R.1517. The Court also faulted State Farm for "us[ing] the debris line [from the storm surge] as its sole investigative guide" (4R.1043), and stated that the testimony of State Farm's experts "confirmed and established the contribution of wind to the loss." 5R.1517. The law and the evidence compel a different result.

First, as shown above, State Farm had an arguable and reasonable basis for concluding that Plaintiffs' house was swept away by storm surge, leaving only a slab and that the house was substantially undamaged when the storm surge arrived. That conclusion was consistent with the condition of nearby houses beyond the storm surge line, and with its adjuster's conclusions. The District Court, however, chose to emphasize a single phrase from the adjuster's "initial assessment" of the damage to Plaintiffs' house – that the property was "more damaged by flood than wind." 4R.1043; 5R.1517. According to the District Court, this phrase meant that the adjuster had concluded that "flood was not the exclusive causative agent." 5R.1517.

The District Court's analysis, singling out one phrase from the adjuster's log, incorrectly disregards the overall context of that initial assessment. The adjuster's log, which contains the phrase relied upon by the District Court, also states that the Plaintiffs' "House and shed are completely gone" and 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.

DX113[0021-EC]. Thus, the actual facts recorded by the adjuster do not support the District Court's interpretation of the log as finding "the probability (as assessed initially) that some damage occurred from a cause other than flood." 4R.1043. Rather, the log supports State Farm's ultimate conclusion, recorded in the log, "that flood/tidal surge damaged the home" and that

SF is unable to speculate that wind damaged the home and further unable to separate wind damage, if it occurred, from the flood damage. Our investigation shows that the insured location and surrounding neighborhood was damaged by a tidal surge and flood. Advised that based upon the information available and our investigation the claim is not covered.

DX113[0022-EC].

The evidence is clear that the District Court also was incorrect in stating that State Farm "used the debris line as its sole investigative guide." 4R.1043. Indeed, the adjuster's assessment, quoted above, makes clear that the adjuster did not rely solely on the debris line, but examined the property and the trees immediately surrounding the house site as well as the trees in the neighborhood. State Farm also urged Plaintiffs to provide it with any other evidence or witnesses Plaintiffs might have to substantiate their claim that a tornado had destroyed the house before the advent of the storm surge.

DX113[0021-0022-EC].

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. TR.381:10-12,402:11-23,452:2-4,253:5-11. 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.303:9-304:18. This testimony and other evidence demonstrate that District Court was in error in concluding that the evidence showed that State Farm did not have a legitimate or arguable reason for denying Plaintiffs' claim.

The District Court also erred in stating that State Farms' experts at trial "confirmed and established the contribution of wind to the loss" and that State Farm was therefore in dereliction of its continuing duty to pay

damages. 5R.1517. 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. 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. 4R.1039-40,¶7. In other words, wind might have caused relatively minor damage to Plaintiffs' roof – and might have caused no damage at all. Dr. Gurley also testified that the houses north of the debris line were "structurally intact with varying levels of either none or some amount of roof cover loss." TR.381:10-12. 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 nearby 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. TR.471:25-472:3.

In short, as the District Court found, State Farm through its experts presented "overwhelming" evidence that "the force of the storm surge was sufficient to destroy the [Plaintiffs'] dwelling." 4R.1040,¶8. State Farm's experts also presented overwhelming evidence that storm surge, not wind

and not a tornado, in fact destroyed Plaintiffs' dwelling. Moreover, as discussed above, Dr. Gurley never determined "that in fact there was [wind] damage to the Broussard property." TR.348:3-11. Even if the hypothetical possibility of shingle damage raised by Dr. Gurley supports payment of a portion of Plaintiffs' insurance claim, it certainly does not support a punitive award under the standards of Mississippi law set forth above. Accordingly, the evidence that the house was destroyed by storm surge 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 851 ("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").

The District Court also erroneously found a basis for punitive damages in State Farm's wind/water claim handling protocol, which the District 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 "[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." 4R.1043. In fact, the wind/water claim handling protocol bears little resemblance to the District Court's description of it. The 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." PX13 at 2.¹⁷ The fact that the District 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 District 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." 4R.1043. Rather, it instructed adjusters to handle each claim "on its merits"; to conduct a "causation investigation" documenting and

¹⁷ Nor has State Farm "urge[d] an interpretation of its anti-concurrent cause clause that would entitle it to collect premiums from policyholders for what amounts to no coverage if even a small part of a loss was due to water." 5R.1517. State Farm has repeatedly maintained before the District Court and this Court that, under its policy language, wind damage that would have occurred in the absence of the excluded water peril is covered. That position does not operate to exclude wind damage simply because "a small part of the loss was due to water." And most assuredly, that was not what State Farm attempted to do in this case, where the evidence overwhelmingly established that Plaintiffs' house was standing and structurally sound when the storm surge hit.

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." PX13 at 1,3.

In addition, the District Court erred in finding a basis for punitive damages in State Farm's contentions as to the burdens of proof and in characterizing State Farm as "unreasonable in attempting to shift its burden of proof to the plaintiffs, and leaving the plaintiffs no alternative to seeking legal redress through this court." 4R.1041, ¶14. In fact, the burdens of proof advocated by State Farm follow the burdens of proof adopted by numerous courts and are consistent with Mississippi law. *See supra* Point III.A. Given the substantial authority placing the burden on policyholders to segregate separate wind damage in circumstances such as these, State Farm certainly acted in good faith in denying Plaintiffs' claim on the basis that State Farm's "investigation [had] show[n] that the insured location and surrounding neighborhood was damaged by a tidal surge and flood" and that State Farm was "unable to speculate that wind damaged the home and further unable to

separate wind damage, if it occurred from the flood damage." DX113 [0010-HO].

Moreover, under Mississippi law, State Farm cannot be subject to punitive damages for litigating the legal issue of the burdens 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). Thus, contrary to the District Court's analysis, Mississippi law does not permit State Farm to be penalized for not "shouldering its burden of proof" and instead taking the case to trial. 4R.1044.

Finally, 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 very minor portion of Plaintiffs' claim. However, given that there was

indisputable evidence of storm surge – and no evidence that could definitively establish *any* actual wind damage – State Farm 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 claimed that the house was totally destroyed by "tornadic action" before the storm surge hit. TR.201:16. Thus, although the District 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" (4R.1044;4R.1041,¶14), the expert reports State Farm had in hand did not support payment of policy limits as Plaintiffs sought. Contrary to the District 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.

In short, in light of the case law on burden of proof and the testimony and evidence in this case, State Farm had an arguable basis for denying Plaintiffs' claim. Nor is there clear and convincing evidence to support a finding that State Farm acted with gross negligence or in reckless disregard of Plaintiffs' rights. The award of punitive damages should be reversed.

B. Alternatively, Further Remittitur Is Required Because the Punitive Damages Award Is Grossly Excessive

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 the District 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 discussed 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.*, 2003 WL 25481095, at *1-2 (D. Ariz. Sept. 17, 2003) (reducing punitive damages award from a 11.79:1 ratio to 1:1 ratio), *aff'd*, 137 Fed.App'x 968 (9th Cir. 2005).¹⁸

¹⁸ *See also Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing punitive 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 10.1:1 ratio to 1:1); *Hines v. Grand Casino*, 358 F. Supp. 2d 533, 552-53 (W.D. La. 2005) (reducing 10:1 ratio to 1.5:1); *Casumpang v. Int'l Longshore & Warehouse Union, Local 142*, 411 F. Supp. 2d 1201, 1220-22 (D. Haw. 2005) (reducing 4:1 ratio to 1:1).

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. Assuming *arguendo* that the facts and law would allow a finding of bad faith by State Farm, that bad faith, as shown by the evidence recounted above, could be found to exist only with regard to the shingle damage that State Farm's expert 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 Plaintiffs' claim that they were entitled to policy limits for their dwelling or their personal property claim.¹⁹ *See* Point V.A *supra*. Plainly, the punitive award, even as remitted, bears no reasonable relationship to the relevant damages in this case.

The third punitive damages guidepost is a comparison of the award with the most relevant civil sanction for comparable conduct. *See Campbell*, 538 U.S. at 428. In this case, the relevant sanction is the penalty of up to \$1,000 per violation that may be levied for "any insurance unfair trade practice or fraud." Miss. Code Ann. § 83-17-71(1)(g), (h); *see also id.* § 83-

¹⁹ Moreover, if any portion of the compensatory damage award is set aside, the punitive damage award must be vacated as well. *Savage v. LaGrange*, 815 So. 2d 485, 494 (Miss. Ct. App. 2002).

9-19. The gross disparity between the punitive award and the comparable civil penalty requires a further significant reduction of the punitive award.

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.

VI. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING VENUE TRANSFER

The District Court abused its discretion in denying State Farm's change of venue motion. As State Farm established in pretrial proceedings and during voir dire, the entire venire had had their lives impacted by Hurricane Katrina and had been subjected to pervasive, inflammatory publicity on Katrina insurance controversies.²⁰ Given these circumstances, this case should not have been tried in the Southern District of Mississippi.

State Farm's experts, Dr. Kent Tedin and Dr. Edward Bronson, established that State Farm could not secure an impartial jury in the Southern District. Dr. Tedin conducted a survey of potential jurors that substantiated the negative effect of the extreme publicity and the natural tendency to support community members after a catastrophe, particularly when the defendant is a "distant corporation." 2R.324, ¶40. Of those polled,

²⁰ State Farm's request for an evidentiary hearing on its motion to change venue (TR.8:19) was not granted by the Court.

49 percent agreed with Congressman Gene Taylor's much publicized statement equating insurance executives with "child molesters." 2R.323,¶37. Dr. Tedin also demonstrated that voir dire is ineffective in detecting bias among potential jurors under such circumstances. 2R.334-38,¶¶73-90.

Dr. Bronson conducted an in-depth review of media coverage in the *Sun Herald*, WLOX-TV newscasts and other programs, and other media outlets. His analysis established the detrimental impact on the venire of the *hundreds* of negative and inflammatory news articles on Katrina insurance issues, as well as other media coverage. 3R.731,¶3;3R.739-58,¶¶30-106;3R.797-825;1R.305-15,348-50;5R.1257-64,1265-1344,1385-1412. Dr. Bronson also analyzed the effect of Plaintiffs' status (3R.757-61,¶¶102-14); the perception of State Farm as a distant, unappealing and unsympathetic defendant (3R.761-66,¶¶115-35); the political overtones of this case (3R.770-72,¶¶152-63); the inadequacy of voir dire in determining juror bias in these circumstances (3R.773-78,¶¶168-82); and the impossibility of overcoming juror bias with judicial instructions. 2R.778-79,¶¶183-86. In his supplemental affidavit, Dr. Bronson showed that the highly prejudicial news coverage continued up to, through and after the trial in this case. 5R.1220-23,¶¶5-25.

Voir dire confirmed the conclusions of State Farm's experts, showing that:

- Of the 130 persons summoned, 50 were eliminated because they (or a family member) were parties to a Katrina lawsuit. TR.11:7-8,14:8-19.
- Of the remaining 80, only nine suffered no damage from Katrina, and only 20-21 were from a non-coastal county. TR.25:18-28:25,11:14-19.
- Of the 57 remaining after 23 more were excused (TR.19-109), 41 (71%) had been exposed to the media coverage of Katrina insurance disputes and/or had discussed with others whether Katrina claims had been properly paid. TR.109-145.

Of the impanelled jurors, two experienced storm surge/flood damage to their homes, one had his claim denied by Allstate, all but one knew of the media coverage on Katrina insurance disputes, and two had had discussions with others regarding whether their Katrina claims were properly paid. TR.37-41,38:9-14,103:17-21,109:10-22.

Under 28 U.S.C. § 1404, 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). In cases involving inflammatory pretrial publicity, "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). Contrary to the District Court's ruling, 28 U.S.C. § 1404 mandated transfer to another venue.

State Farm's right under due process and the Seventh Amendment to "an impartial jury free from outside influences" also required venue transfer. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *accord McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 514-15 & n.2 (10th Cir. 1998).

In *Mayola v. Alabama*, this Court stated:

[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."

623 F.2d 992, 997 (5th Cir. 1980) (citation omitted). Here, the evidence of massive negative publicity, combined with the venire's "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," *United States v. McVeigh*, 918 F. Supp. 1467, 1473 (W.D. Okla. 1996), warranted a presumption of jury prejudice and a change of venue.

Moreover, even assuming that voir dire could have assured a fair trial, the voir dire that took place was insufficient. 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, in such circumstances, the trial 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 196; *see also United States v. Beckner*, 69 F.3d 1290, 1293 (5th Cir. 1995) (asking the venire as a group whether "anyone had been so affected by pretrial publicity that he or she could not be completely fair and impartial" was insufficient to assure a fair trial).²¹

Here, however, the District Court did not allow individual questioning on the effect of 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. The District Court's group questioning of the prospective jurors did not assure an impartial jury. *See Davis*, 583 F.2d at 196; *Beckner*, 69 F.3d at 1294 & n.4. In sum, the District Court abused its discretion in denying venue transfer.

²¹ These same principles apply in civil proceedings. *See Waldorf v. Shuta*, 3 F.3d 705, 712 n.7 (3d Cir. 1993).

CONCLUSION

For all the foregoing reasons, State Farm respectfully requests that this Court reverse the judgment below in its entirety and (i) order the entry of JMOL for State Farm on Plaintiffs' personal property claim or, alternatively, a new trial on that claim; (ii) order a new trial on Plaintiffs' dwelling claim; and (iii) order the entry of JMOL for State Farm on Plaintiffs' punitive damages claim, or, alternatively, a further substantial remittitur of the punitive award. In addition, should the Court order a new trial of any claim, such trial should be held in the Western Division of the Northern District of Mississippi.

This, the 30th day of July 2007

Respectfully submitted,



JOHN A. BANAHAN



SHEILA L. BIRNBAUM



DOUGLAS W. DUNHAM



SUSAN M. POPIK

ATTORNEYS FOR APPELLANT/DEFENDANT STATE FARM FIRE
AND CASUALTY COMPANY

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
CASE NO.: 07-60443**

NORMAN J. BROUSSARD and
GENEVIEVE BROUSSARD

PLAINTIFFS

VERSUS

STATE FARM FIRE AND CASUALTY
COMPANY

DEFENDANT

APPENDIX

- Tab A. Excerpt from Policy's Coverage Provisions. 1R.170; DX1 at 7.
- Tab B. Policy's Anti-Concurrent Cause Language and Water Damage Exclusion. 1R.173; DX1 at 10.

Tab A

Excerpt from Policy's Coverage Provisions

SECTION I – LOSSES INSURED

COVERAGE A - DWELLING

We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I - LOSSES NOT INSURED.

COVERAGE B – PERSONAL PROPERTY

We insure for accidental direct physical loss to property described in Coverage B caused by the following perils, except as provided in SECTION I – LOSSES NOT INSURED:

. . .

2. Windstorm or hail. This peril does not include loss to property contained in a building caused by rain, snow, sleet, sand or dust. This limitation does not apply when the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening. . . .

1R.170; DX1 at 7.

Tab B

Policy's Anti-Concurrent Cause Lead-In Language and Water Damage Exclusion

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: * * *

c. Water Damage, meaning:

- (1) 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[.]

1R.173; DX1 at 10.

CERTIFICATE OF SERVICE

I, Douglas W. Dunham, an attorney for State Farm Fire and Casualty Company, hereby certify that this 30th day of July, A.D., 2007, two paper copies of the Brief of State Farm Fire and Casualty Company have been served on counsel listed below, via U.S. Mail, First Class, properly addressed and postage prepaid and an electronic version of the Brief has been served via email.

Jack L. Denton, Esq.
Denton Law Firm, PLLC
955 Howard Avenue
Biloxi, MS 39530

William C. Walker, Jr., Esq.
299 S. 9th Street
Suite 100
Oxford, MS 38655

THIS, the 30th day of July, 2007.



DOUGLAS W. DUNHAM

ATTORNEY FOR STATE FARM
FIRE AND CASUALTY COMPANY

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the applicable type-volume limitation. According to the word count in Word 2003, there are 13,988 words in the body of this brief, exclusive of the Cover, Certificate of Interested Persons Statement Regarding Oral Argument, Table of Contents, Table of Authorities, Signature Block, Appendix, Certificate of Service and Certificate of Compliance.



DOUGLAS W. DUNHAM

ATTORNEY FOR STATE FARM
FIRE AND CASUALTY COMPANY