06-61075
06-61076

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Nos. 06-61075 & 06-61076

KSA

JOHN AND CLAIRE TUEPKER, — APPELLEES/CROSS-APPELLANTS/PLAINTIFFS

VERSUS

STATE FARM FIRE AND CASUALTY COMPANY AND JOHN DOES 1 THROUGH 10, — APPELLANT/CROSS-APPELLEE/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

W. SCOTT WELCH, III
WILLIAM N. REED
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
4268 I-55 NORTH OFFICE PARK
JACKSON, MS 39211
(601) 351-2400

JOHN C. HENEGAN
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
17TH FLOOR, AMSOUTH PLAZA
210 EAST CAPITOL STREET
JACKSON, MS 39225-2567
(601) 948-5711

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

ROBERT C. GALLOWAY
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
1300 25TH AVENUE, SUITE 204
GULFPORT, MS 39501
(228) 575-3019

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

ATTORNEYS FOR
APPELLANT/CROSS-APPELLEE/DEFENDANT

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CALDWELL & BERKOWITZ, PC
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BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
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210 EAST CAPITOL STREET
JACKSON, MS 39225-2567
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MEAGHER & FLOM LLP
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NEW YORK, NY 10036-6522
(212) 735-3000

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BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
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GULFPORT, MS 39501
(228) 575-3019

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

ATTORNEYS FOR
APPELLANT/CROSS-APPELLEE/DEFENDANT

OF COUNSEL:

SHEILA L. BIRNBAUM
ELLEN P. QUACKENBOS
MELISSA A. RULE
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
FOUR TIMES SQUARE
NEW YORK, NY 10036-6522
(212) 735-3000

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 Local 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/Cross Appellee/Defendant

2. John Tuepker, Appellee/Cross-Appellant/Plaintiff

3. Claire Tuepker, Appellee/Cross-Appellant/Plaintiff

B. Attorneys:

1. For State Farm Fire and Casualty Company:

W. Scott Welch, III
William N. Reed
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

John C. Henegan
Robert C. Galloway
Butler, Snow, O'Mara, Stevens & Cannada PLLC

Douglas W. Dunham
Sheila L. Birnbaum
Ellen P. Quackenbos
Melissa A. Rule
Skadden, Arps, Slate, Meagher
& Flom LLP

Susan M. Popik
Chapman, Popik
& White LLP

2. For John and Claire Tuepker:

Richard F. Scruggs
David Zachary Scruggs
Scruggs Law Firm, PA

Mary E. McAlister
Nutt & McAlister, PLLC

Don John Barrett
Barrett Law Offices

Dewitt M. Lovelace
Lovelace Law Firm, PA

John G. Jones
Jones, Funderburg, Sessums,
Peterson & Lee

Benjamin H. McGee, III
Scruggs Law Firm, PA

John C. Henegan

John C. Henegan

STATEMENT REGARDING ORAL ARGUMENT

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

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STATEMENT OF JURISDICTION

The District Court has jurisdiction over the subject matter and the parties under 28 U.S.C. § 1332. The District Court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) its Memorandum Opinion and Order dated May 24, 2006, which denied State Farm's Motion to Dismiss. This Court granted this interlocutory appeal on November 21, 2006 (3R.924; R.E. Tab 3*), and appellate jurisdiction exists under 28 U.S.C. § 1292(b).

* 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 Record Excerpts of State Farm are being cited as "R.E.___."

STATEMENT OF THE ISSUES

The issues raised by State Farm are:

1. Is the anti-concurrent cause language in State Farm's policy, which introduces and governs the scope and application of the water damage exclusion, valid and enforceable under Mississippi law?

2. What are the parties' respective burdens of proof with regard to Plaintiffs' insurance claims?

> The following two issues have been raised by the Tuepkers in their Cross-Petition for Interlocutory Appeal and are also addressed in this brief:

3. Is the water damage exclusion valid and enforceable under Mississippi law and does it apply to damage caused by "storm surge"?

4. Does Mississippi follow the efficient proximate cause doctrine in determining insurance coverage in property damage cases?

STATEMENT OF THE CASE

On August 29, 2005, Hurricane Katrina destroyed Plaintiffs' residence, leaving only the foundation. Plaintiffs made a claim under their State Farm homeowners policy, which State Farm denied on October 6, 2005, on the basis that the damage to Plaintiffs' home "was a result of 'storm surge, wave wash, and flood.'" 3R.664 (citation omitted); R.E. Tab 5. Plaintiffs filed this lawsuit on November 21, 2005, alleging that the damage to their home "was caused by 'hurricane wind, rain, and/or storm surge from Hurricane Katrina.'" *Id.* (citation omitted). State Farm moved to dismiss Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(6). 1R.49-145. In its Memorandum Opinion and Order dated May 24, 2006, the District Court denied State Farm's motion to dismiss.[1] 3R.663-72; R.E. Tabs 4-5. The District Court subsequently certified its Memorandum Opinion and Order for interlocutory appeal. 3R.886; R.E. Tab 2. This Court granted the appeal on November 21, 2006. 3R.924; R.E. Tab 3.

[1] By Order dated August 18, 2006, the District Court denied State Farm's motion to alter or amend its May 24, 2006, Memorandum Opinion and Order. 3R.769; R.E. Tab 6. State Farm then moved under 28 U.S.C. § 1292(b) for certification of the Court's Memorandum Opinion and Order. 3R.850. Plaintiffs opposed State Farm's motion and filed a cross-motion in the alternative for certification of additional issues. 3R.872.

STATEMENT OF FACTS

A. Background

Plaintiffs' residence in Long Beach, Mississippi, was completely destroyed during Hurricane Katrina. Their residence was insured under a homeowners policy issued by State Farm that excludes "water damage," which is defined to include "flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not."[2] 3R.821; R.E. Tab 8; Appendix ("App.") Tab B *infra*. The policy's water damage exclusion is prefaced by "anti-concurrent cause" language that provides that water damage (and other "excluded events" to which the anti-concurrent cause language applies) is not covered, even when a covered peril is a concurrent cause of the loss. The anti-concurrent cause language states:

> 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

[2] Although homeowners policies such as State Farm's typically exclude water and flood damage, homeowners are able to purchase flood insurance under the National Flood Insurance Program. *See* 42 U.S.C. § 4001 *et seq.; United States v. Parish of St. Bernard*, 756 F.2d 1116, 1120 (5th Cir. 1985) ("The National Flood Insurance Act of 1968 was enacted . . . to provide previously unavailable flood insurance protection to property owners in flood prone areas.").

> natural or external forces, or occurs as a result of any combination of these : . . . .

Id. Water damage and other excluded events such as earth movement are listed and defined in the policy immediately following this lead-in anti-concurrent cause language. *See id.* Thus, under the relevant policy language, water damage is not covered if the damage would not have occurred in the absence of flood, waves, tidal water or the overflow of a body of water, even if there are other contributing causes of loss (such as wind) which are not excluded under the policy.

Plaintiffs' policy also has a Hurricane Deductible Endorsement, which provides that losses that occur during a hurricane are subject to a higher deductible than the deductible otherwise applicable under the policy. The Endorsement defines a "hurricane" as "a storm system that has been declared to be a hurricane by the National Hurricane Center of the National Weather Service" and specifies the time period for which a hurricane is deemed to continue for purposes of the deductible by reference to hurricane notices issued by the National Hurricane Center. 3R.837; R.E. Tab 8; App. Tab C *infra*. The Endorsement provides that "[t]he following Deductible language is added to the policy:"

> Deductible
>
> The Hurricane deductible percentage (%) shown in the

> Declarations applies only for direct physical loss or damage to covered property caused by wind, wind gusts, hail, rain, tornadoes, or cyclones caused by or resulting from a hurricane as defined above. The deductible for loss caused by each hurricane occurrence is the amount determined by applying the deductible percentage (%) shown in the Declarations to the COVERAGE A - DWELLING limit shown in the Declarations.
>
> In the event of a hurricane loss, this deductible will apply in place of any other deductible stated in the policy. In no event will this deductible be less than the Section I deductible amount shown in the Declarations.
>
> All other policy provisions apply.

Id. The Declarations page of Plaintiffs' policy shows that the hurricane deductible amount for their policy is $3,784.00.[3] 3R.808; 3R.837; R.E. Tab 8.

B. The District Court's Opinion

In its Memorandum Opinion and Order, the District Court correctly held that the water damage exclusion in State Farm's policy is valid and excludes coverage for damage caused by storm surge. 3R.668; R.E. Tab 5. However, the District Court incorrectly concluded that State Farm's anti-concurrent cause language, which introduces and governs the scope and application of the water damage exclusion, is ambiguous and unenforceable in the context of hurricane loss. *See* 3R.669-70.

---

[3] Contrary to the Plaintiffs' assertions, the hurricane deductible amount is not an "additional $3,784 *premium*." *See* 1R.226 (emphasis added); s*ee also* Pl. Cross-Pet. at 2.

In invalidating State Farm's anti-concurrent cause language, the District Court ruled that "[u]nder applicable Mississippi law, where there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage) the amount payable under the insurance policy becomes a question of which is the proximate cause of the loss." 3R.669. The Court concluded that "[t]o the extent that the State Farm policy is inconsistent with this settled rule of Mississippi law, the exclusionary language is invalid." *Id.* The Court further held that State Farm's anti-concurrent cause language "creates ambiguities in the context of damages sustained by the insured during a hurricane." *Id.* According to the Court, the provisions of the anti-concurrent cause language "purport to exclude coverage for wind and rain damage, both of which are covered losses under this policy, where an excluded cause of loss, e.g. water damage, also occurs." *Id.* The Court concluded that these exclusions are "ambiguous in light of the other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a 'hurricane deductible' as part of the policy." 3R.669-70.

SUMMARY OF ARGUMENT

State Farm's anti-concurrent cause language, which was held invalid and unenforceable by the District Court, provides the contractual standard

for the application of the policy's water damage exclusion. It plainly states that "any loss which would not have occurred in the absence of" certain excluded events, including water damage, is not covered under the policy, "regardless of" the operation or effect of other causes of the loss. 3R.821; R.E. Tab 8. The District Court incorrectly held that the anti-concurrent cause language is ambiguous in the context of hurricane loss. The District Court did not explain how the anti-concurrent cause language could be construed to have two or more reasonable meanings, which is the definition of ambiguity employed by the Mississippi courts. In fact, there is no ambiguity – in the context of hurricanes, just as in other contexts, the anti-concurrent cause language addresses and specifies the scope and application of exclusions when covered and excluded perils combine to cause damage that is not separable or divisible into distinct losses attributable to one cause or the other.[4] In holding the anti-concurrent cause language invalid, the District Court contravened fundamental principles of Mississippi law that require that an insurance contract be enforced as written and given its plain and ordinary meaning.

[4] The anti-concurrent cause language does not apply, for example, in a circumstance where there is separate damage attributable to wind, even if there is also water damage. Thus, if the lower story of a house is flooded and the roof is separately damaged by wind, the roof damage would have "occurred in the absence of" the water damage and is covered.

Mississippi state and federal courts have held that State Farm's anti-concurrent cause language is unambiguous and enforceable. Thus, in *Boteler v. State Farm Casualty Insurance Co.*, 876 So. 2d 1067 (Miss. Ct. App. 2004), the Mississippi Court of Appeals found the identical anti-concurrent cause language to be "clear" and "[u]nambiguous language of exclusion." *Id.* at 1069-70. State Farm's anti-concurrent cause language was also upheld and applied in *Rhoden v. State Farm Fire & Casualty Co.*, 32 F. Supp. 2d 907 (S.D. Miss. 1998) (Mississippi law), *aff'd*, 200 F.3d 815 (5th Cir. 1999). Courts in many other jurisdictions have likewise upheld the validity of this same language.

Moreover, contrary to the holding of the District Court, State Farm's anti-concurrent cause language is not rendered ambiguous – or affected in any way – by the policy's Hurricane Deductible Endorsement or by other policy provisions granting coverage for wind and rain damage. State Farm's coverage provisions are expressly made subject to the policy's exclusions section, which contains the anti-concurrent cause language. Furthermore, the deductible contains no language that could be interpreted as altering, providing or expanding the coverage under the policy and explicitly states that "[a]ll other policy provisions apply." 3R.837; R.E. Tab 8. Courts that have addressed the function and meaning of deductibles have consistently

held that deductibles do not create or alter coverage or affect the meaning of other policy provisions.

In addition, the District Court erred in holding that Mississippi law requires that "where there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage) the amount payable under the insurance policy becomes a question of which is the proximate cause of the loss." 3R.669; R.E. Tab 5. The Mississippi courts have not mandated a specific contractual standard, but look to the language of the insurance policy itself to provide the standard by which coverage is determined. Thus, contrary to the rulings of the District Court, the contractual standard expressly defined by State Farm's anti-concurrent cause language cannot be disregarded; it is valid and enforceable under Mississippi law.

The District Court also misstated the parties' respective burdens of proof in this case. First, the law is clear that once State Farm demonstrates that an excluded peril (*i.e.*, storm surge) caused or contributed to Plaintiffs' loss, it is Plaintiffs' burden to show that the exclusion does not apply to some or all of their claimed damages and that, in all cases, Plaintiffs have the burden of proving the amount and extent of independent damage caused by a covered peril (*i.e.*, wind). The Court also overlooked that, under the policy's "named peril" coverage for personal property, it is Plaintiffs that have the

initial burden of establishing that any claimed personal property damage is attributable to wind or another named peril.

In their Cross-Petition for Interlocutory Appeal, Plaintiffs have put forward various contentions and issues for this Court's review. All are without merit. First, contrary to Plaintiffs' claims, the District Court correctly held that State Farm's water damage exclusion is valid and enforceable and applies to damage caused by storm surge. Moreover, even assuming *arguendo* that the District Court was correct in finding ambiguity in the anti-concurrent cause language, that purported ambiguity would not render the water damage exclusion itself ambiguous and unenforceable. Finally, Plaintiffs are simply wrong in asserting that Mississippi has adopted the "efficient proximate cause" doctrine in property damage cases and that the doctrine would override the policy's anti-concurrent cause language.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

Under 28 U.S.C. § 1292(b), this Court "may 'address any issue *fairly included* within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Melder v. Allstate Corp.*, 404 F.3d 328, 331 (5th Cir. 2005) (emphasis in original; citation omitted).

The District Court's rulings on State Farm's motion to dismiss are subject to *de novo* appellate review. *Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003). Under Federal Rule of Civil Procedure 12(b)(6), this Court must accept as true the well-pleaded factual allegations of the Complaint, viewing them in the light most favorable to Plaintiffs. *Id.* However, a "plaintiff must plead specific facts, not mere conclusional allegations, to avoid dismissal for failure to state a claim." *Id.* In addition, the Court may also consider facts that are properly the subject of judicial notice. *Kitty Hawk Aircargo, Inc. v. Chao,* 418 F.3d 453, 457 (5th Cir. 2005) (judicial notice of information on government agency's website); *Terrebonne v. Blackburn*, 646 F.2d 997, 1000 n.4 (5th Cir. 1981) ("courts have not hesitated to take judicial notice of agency records and reports"). Furthermore, the Court may consider documents that are specifically mentioned in or attached to the Complaint. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

II. THE DISTRICT COURT INCORRECTLY HELD THAT STATE FARM'S ANTI-CONCURRENT CAUSE LANGUAGE IS AMBIGUOUS AND UNENFORCEABLE IN THE CONTEXT OF HURRICANE LOSS

State Farm's anti-concurrent cause language makes clear that the policy's water damage exclusion applies to all damage that would not have occurred "in the absence of" an excluded water peril "regardless of . . . other

causes" of the loss. 3R.821; R.E. Tab 8. The District Court erroneously invalidated State Farm's anti-concurrent cause language, holding that it is "ambiguous in light of other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a 'hurricane deductible' as part of the policy." 3R.669-70; R.E. Tab 5. In so ruling, the District Court improperly declined to enforce the clear and unambiguous language of the State Farm policy.

Under well-settled principles of Mississippi law, if the language of an insurance policy is clear and unambiguous, courts "are bound to enforce contract language as written and give it its plain and ordinary meaning . . . ." *Miss. Farm Bureau Cas. Ins. Co. v. Britt*, 826 So. 2d 1261, 1266 (Miss. 2002); *accord Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So. 2d 400, 403-04 (Miss. 1997). "[A] court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured." *Titan Indem. Co. v. Estes*, 825 So. 2d 651, 656 (Miss. 2002); *accord Farmland Mut. Ins. Co. v. Scruggs*, 886 So. 2d 714, 717 (Miss. 2004). "There is an ambiguity in an insurance contract when the policy can be interpreted as having two or more reasonable meanings." *Britt*, 826 So. 2d at 1265. Although "[a]mbiguities in insurance contracts are read to favor the insured," that principle "does not permit the creation of ambiguity where

there is none."[5] *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067, 1069 (Miss. Ct. App. 2004).

The District Court did not specify what two or more reasonable interpretations it believed the anti-concurrent cause language could bear. Nor did it identify what other policy provisions or language in the hurricane deductible endorsement could render State Farm's anti-concurrent cause language ambiguous. In fact, as numerous courts have held, State Farm's anti-concurrent cause language is clear, unambiguous, and enforceable.

A. The District Court's Finding of Ambiguity Is Contrary to Mississippi State and Federal Court Decisions Holding That State Farm's Anti-Concurrent Cause Language Is Clear and Unambiguous

Contrary to the District Court's ruling, Mississippi state and federal courts have concluded that State Farm's anti-concurrent cause language is unambiguous and enforceable. In *Boteler v. State Farm Casualty Insurance Co.*, 876 So. 2d 1067 (Miss. Ct. App. 2004), the Mississippi Court of Appeals held that the identical language is "clear" and "[u]nambiguous language of exclusion," *id.* at 1069-70, and "makes the cause of the

[5] As the District Court acknowledged, the interpretation of an insurance contract, including the question of whether an insurance contract provision is ambiguous, is a question of law. *See* 3R.666 ("The interpretation of the terms of an insurance policy present questions of law, not fact."); R.E. Tab 5; *Gladney v. Paul Revere Life Ins. Co.*, 895 F.2d 238, 241 (5th Cir. 1990) ("[T]he 'interpretation of a contract is a question of law, including the question whether the contract is ambiguous . . . .'") (citation omitted).

[excluded event] irrelevant." *Id.* at 1069. *Boteler* arose out of damage to the insured's residence when the foundation shifted as a result of earth movement. The Court of Appeals affirmed summary judgment on the basis of State Farm's earth movement exclusion, which is prefaced by the same anti-concurrent cause language at issue here.[6] The Mississippi Court of Appeals rejected the insured's contention that judgment as a matter of law was improper because there was a factual dispute as to what caused the earth to move. In ruling that State Farm's "'earth movement' exclusion . . . makes the cause of the movement irrelevant," the court quoted and relied on State Farm's anti-concurrent cause language. *Boteler*, 876 So. 2d at 1069. The court was emphatic in its description of the anti-concurrent language as "clear" and "[u]nambiguous." *Id.* at 1069-70.

State Farm's anti-concurrent cause language was also upheld and applied in *Rhoden v. State Farm Fire & Casualty Co.*, 32 F. Supp. 2d 907, 911-13 (S.D. Miss. 1998) (Mississippi law), *aff'd*, 200 F.3d 815 (5th Cir. 1999) (App. Tab D, *infra*),[7] a decision whose analysis the Mississippi Court of Appeals recounted and found persuasive in *Boteler*, 876 So. 2d at 1069-

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[6] *See* 3R.821; R.E. Tab 8.

[7] In *Rhoden*, the Fifth Circuit in an unpublished opinion affirmed the district court's judgment as a matter of law for State Farm "for essentially the reasons given by the district court." 1999 WL 1095617, at *1; *see* App. Tab D, *infra*. Pursuant to Fifth Circuit Local Rule 47.5.4, this Court's unpublished affirmance in *Rhoden* is persuasive authority.

70. Like *Boteler*, the court in *Rhoden* analyzed and upheld State Farm's anti-concurrent cause language in the context of the earth movement exclusion. The court in *Rhoden* held that State Farm's "policy is not ambiguous as to the extent and meaning of the 'earth movement' exclusion," explaining that "[t]he preface to the 'earth movement' exclusion" – *i.e.*, the same anti-concurrent cause language at issue here –

> specifically states that the policy does not insure under any coverage for loss which would not have occurred in the absence of one or more of the subsequently listed events, one of which is earth movement, regardless of the cause of the event, whether the event occurs suddenly or gradually, or whether the event involves isolated or widespread damage.

32 F. Supp. 2d at 912. Relying on this "qualifying clause," *id.*, the court granted summary judgment for State Farm. *Id.* at 914.

Moreover, in a recent opinion, the Circuit Court of the First Judicial District of Hinds County, Mississippi, cited both *Boteler* and *Rhoden* in upholding State Farm's anti-concurrent cause language, stating that this language has been "judicially determined to be clear and unambiguous." *Wallace v. City of Jackson*, No. 251-05-941 CIV, slip op. at 3 (Hinds County Cir. Ct. Miss. Sept. 15, 2006) (App. Tab E, *infra*).[8]

[8] In *Wallace*, the state circuit court granted summary judgment in favor of State Farm, holding that State Farm's water damage exclusion barred coverage for flooding from "water or sewage from outside the residence premises plumbing system that enters through the sewers or drains." *Wallace*, slip op. at 3, App Tab E, *infra*. The *Wallace*

Although *Boteler* and *Rhoden* involved earth movement rather than water damage, the courts in both cases addressed the very anti-concurrent cause lead-in language at issue in this case. *See Boteler*, 876 So. 2d at 1068-70; *Rhoden*, 32 F. Supp. 2d at 911-13. That same language introduces both the earth movement exclusion and the water damage exclusion in State Farm's homeowners policies. 3R.821; R.E. Tab 8. Thus, as the *Wallace* court recognized, these courts' analyses of the anti-concurrent cause language are equally applicable in the context of the water damage exclusion.[9]

The function of the anti-concurrent cause language is to specify the scope of exclusions when covered risks combine with excluded risks to cause a loss. The anti-concurrent cause language operates to exclude coverage in precisely the same way in situations where (as here) a covered risk such as wind from a hurricane is alleged to be a concurrent cause of damage that would not have occurred in the absence of flood, as it does in

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court rejected the plaintiffs' contention that they were entitled to coverage because a covered peril had been the first cause of the flooding in their residence. The court correctly ruled that under State Farm's anti-concurrent cause language the policy excluded coverage "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss." *Id.* at 6.

[9] In addition, although *Boteler* and *Rhoden* involved summary judgment motions, the courts' resolution of the meaning and validity of State Farm's anti-concurrent cause language in those cases is fully applicable here, since the issue is one of law. *See* Brief of State Farm, *supra* at 14 n.5.

situations where (as in *Boteler*) covered risks are concurrent causes of damage that would not have occurred in the absence of earth movement. In both situations, under the policy language, the fact that an otherwise covered peril contributed to or in part caused the damage is irrelevant. The District Court's finding of ambiguity is directly contrary to the Mississippi Court of Appeals' holding in *Boteler* that the anti-concurrent cause language is "clear" and "[u]nambiguous language of exclusion" and "makes the cause of the [excluded event] irrelevant." *Boteler*, 876 So. 2d at 1069-70.[10]

Moreover, courts in numerous other jurisdictions have upheld the validity of State Farm's anti-concurrent cause lead-in language. For example, in the Hurricane Katrina litigation pending in the Eastern District of Louisiana, the court recently held that State Farm's lead-in language was "clear to the Court" and unambiguous in excluding coverage for flood

[10] In ruling that State Farm's anti-concurrent cause language is ambiguous, the court below apparently believed that if Plaintiffs' home were damaged by flood or storm surge during Hurricane Katrina, then the lead-in language would preclude coverage even for separate and independent wind damage. *See* 3R.669 (stating that the lead-in language "purport[s] to exclude from coverage losses that would otherwise be covered, such as wind damage, when that covered loss happens to accompany water damage (an excluded loss)" and "purport[s] to exclude coverage for wind and rain damage, both of which are covered losses under this policy, where an excluded cause of loss, e.g. water damage, also occurs") (R.E. Tab 5). To the contrary, the effect of the lead-in language in such a situation is to preclude coverage for indivisible damage caused by a *combination* of wind and water, since such damage "would not have occurred" in the absence of water damage. Accordingly, if the evidence demonstrates that hurricane winds operating independently of water damaged Plaintiffs' roof, that damage would be covered, even if storm surge later destroyed their entire house.

damage "regardless of the cause." *In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182, 2006 WL 3421012, at *30 (E.D. La. Nov. 27, 2006); *see also Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1130 (D.C. 2001) (State Farm's lead-in language is unambiguous); *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244-46 (Fla. Dist. Ct. App. 2002) (noting "the unambiguous language of the lead-in clause"); *Toumayan v. State Farm Gen. Ins. Co.*, 970 S.W.2d 822, 826 (Mo. Ct. App. 1998) (State Farm's "exclusionary language in the lead-in clause" is "unambiguous"); *Kula v. State Farm Fire & Cas. Co.*, 628 N.Y.S.2d 988, 990-91 (App. Div. 1995) ("the 'lead-in' clause . . . clearly excludes coverage for any loss regardless of the cause"); *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1276-77 (Utah 1993) (lead-in language is clear and unambiguous).[11]

[11] Many other courts have also upheld and applied State Farm's anti-concurrent cause lead-in language. *See, e.g., State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 313-14 (Ala. 1999); *State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042, 1045-46 (Alaska 1996); *Millar v. State Farm Fire & Cas. Co.*, 804 P.2d 822, 826 (Ariz. Ct. App. 1990); *Whitt v. State Farm Fire & Cas. Co.*, 734 N.E.2d 911, 915 (Ill. App. Ct. 2000); *Rodin v. State Farm Fire & Cas. Co.*, 844 S.W.2d 537, 539 (Mo. Ct. App. 1992); *Schroeder v. State Farm Fire & Cas. Co.*, 770 F. Supp. 558, 561 (D. Nev. 1991); *Silow v. State Farm Ins. Co.*, No. Civ. A. 94-2956, 1994 WL 709362, at *2 (E.D. Pa. Dec. 20, 1994); *State Farm Fire & Cas. Co. v. Paulson*, 756 P.2d 764, 767 (Wyo. 1988); 1R.124-26 (citing cases). Furthermore, courts in many jurisdictions have upheld the enforceability of similar language used by other insurers, which typically excludes coverage for loss "caused directly or indirectly" by the enumerated perils (including water damage and earth movement), "regardless of any other cause or event contributing concurrently or in any sequence to the loss." *See* 1R.126-30 (citing cases); *Moschitto v. Traveler's Prop. Cas.*, 846 N.E.2d 793 (Mass. App. Ct. 2006) (text available at 2006 WL 1275979)

In sum, the District Court's ruling that State Farm's anti-concurrent cause language is ambiguous is contrary to Mississippi law as articulated in *Boteler* and *Rhoden* as well as to the solid weight of authority across the country.

B. State Farm's Anti-Concurrent Cause Language Is Not Rendered Ambiguous by Other Policy Provisions

Contrary to the District Court's reasoning, "other policy provisions granting coverage for wind and rain damage" (3R.669; R.E. Tab 5) do not create any inconsistency or ambiguity with regard to the water damage exclusion and its anti-concurrent cause lead-in language. The District Court's Memorandum Opinion does not specify the "other policy provisions" on which the Court is relying. However, with regard to coverage for the dwelling, the insuring agreement of the policy simply provides that "We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I – LOSSES NOT INSURED." 3R.818; R.E. Tab 8; App. Tab A *infra*. "SECTION I – LOSSES NOT INSURED" includes the water damage exclusion and its anti-concurrent cause lead-in language. Thus, the provision for dwelling coverage explicitly and prominently incorporates the policy's exclusionary

(precluding recovery for damage caused in part by water; holding that "[a]n 'anticoncurrent cause' provision . . . does not create an ambiguity").

language and does not create any ambiguity regarding the application of the water damage exclusion and its lead-in provision.

As to personal property (household items, furnishings, etc.), the policy specifically lists the perils that are covered under the policy, including "windstorm." In relevant part, the policy states:

> 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. . . .

3R.818 (emphasis added); R.E. Tab 8; App. Tab A *infra*. Thus, the coverage provided for personal property loss caused by windstorm is clearly made subject to the water damage exclusion and its lead-in language, which are contained in paragraph 2 of Section I – LOSSES NOT INSURED. The coverage provision for personal property does not conflict with or create any

ambiguity with regard to the water damage exclusion and its lead-in language.[12]

In *Arjen Motor Hotel Corp. v. General Accident Fire & Life Assurance Corp.*, 379 F.2d 265 (5th Cir. 1967), the Court rejected the contention that ambiguity resulted from the fact that a coverage provision in a multi-peril property insurance policy was limited and restricted by the policy's water damage exclusion. The Court held that when the coverage provision and the exclusion were "read in conjunction," "no ambiguity results despite the fact that the comprehensive Exclusions provision does serve to restrict, in some instances rather severely, the coverage of the Perils-Insured-Against provision." *Id.* at 267. Noting that "[t]hese limitations are readily apparent . . . upon a reading of the policy as a whole," the Court concluded that the "plain wording" of the exclusion, including its prefatory language ("[t]he policy does not insure against loss . . . [c]aused by, resulting from, contributed to or aggravated by any of the following") was valid and enforceable. *Id.* at 267-68.

Here, likewise, the State Farm policy's provisions regarding coverage both for the dwelling and for personal property explicitly and clearly reference the policy's exclusions and specifically state that those exclusions

[12] There are no other references in the policy to coverage for wind and rain that could serve as a basis for the District Court's finding of ambiguity.

are applicable to both dwelling and personal property. Contrary to the District Court's ruling, the policy's provisions regarding wind and rain coverage do not conflict with the anti-concurrent cause language or render it ambiguous.[13]

C. The Hurricane Deductible Endorsement Does Not Create Ambiguity or Conflict with the Coverages and Exclusions of State Farm's Homeowners Policy

The District Court also erred in concluding that the Hurricane Deductible Endorsement (the "Deductible") somehow creates ambiguity as to the meaning of the anti-concurrent cause language in the context of water damage caused during a hurricane. 3R.669-70; R.E. Tab 5. The Deductible contains no language that provides for or relates to substantive coverage or that could affect the scope of the water damage exclusion or the meaning and validity of the anti-concurrent cause language. Rather, the Deductible

[13] In addition, the District Court misapprehended the effect of the "weather conditions" provision in State Farm's policy. *See* 3R.668-69; R.E. Tab 5. State Farm does not contend that this provision excludes coverage for separate or divisible hurricane wind damage. Rather, the "weather conditions" provision makes clear that water damage is excluded even if weather conditions "directly or indirectly cause, contribute to or aggravate the loss" or "occur before, at the same time, or after the loss or any other cause of the loss." 3R.821-22; R.E. Tab 8. Under the "weather conditions" provision, losses resulting from weather conditions are covered unless they combine with water damage (or some other excluded peril) to cause the loss. *See id.* ("we do insure for any resulting loss from items a., b., and c. unless the resulting loss is itself a Loss Not Insured by this Section"). Both courts that have interpreted a similarly-worded weather exclusion have upheld it, noting that an insurer may properly exclude weather conditions in some circumstances but not others. *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 910-11 (Cal. 2005); *Findlay v. United Pac. Ins. Co.*, 917 P.2d 116, 120 (Wash. 1996). Thus, the weather conditions provision would not exclude separate, discrete, and ascertainable wind damage.

merely imposes a deductible for covered damage occurring during a hurricane that is higher than the deductible ordinarily applicable under the policy. For this purpose, the Deductible sets forth a definition of hurricane "[a]s used in this endorsement" and provides that "[t]he Hurricane deductible percentage (%) shown in the Declarations applies only for direct physical loss or damage to covered property caused by wind, wind gusts, hail, rain, tornadoes, or cyclones caused by or resulting from a hurricane as defined above." 3R.837; R.E. Tab 8.

This listing of perils merely limits the applicability of the Deductible to certain kinds of covered losses, *i.e.*, losses from wind, hail and rain perils, that typically occur during hurricanes. Thus, for example, if an insured dwelling burns down during a hurricane, the special hurricane deductible would not apply – only the normal deductible would apply.[14] There is no language in the Deductible that could be understood to alter, either implicitly or explicitly, the coverage and exclusions contained in the policy.

The District Court did not specify how the Deductible purportedly renders the anti-concurrent cause language ambiguous, *i.e.*, susceptible to "two or more reasonable meanings." *See Britt*, 826 So. 2d at 1265. In fact, whether read by itself or in conjunction with the Deductible (or other policy

[14] However, if an insured dwelling sustains wind damage during a hurricane (as defined in the Deductible), the higher hurricane deductible would apply.

provisions), State Farm's anti-concurrent cause language is clear and unambiguous. No language in the Deductible suggests that damage due to a combination of wind and water that would not have occurred in the absence of water (clearly excluded under the policy) becomes a covered loss simply because it occurs during a hurricane.

Courts that have addressed the function and meaning of deductibles have consistently held that deductibles do not create or alter coverage. "A deductible is, by definition, '[t]he portion of an insured loss to be borne by the insured before he is entitled to recovery from the insurer.'" *Dorsey v. Fed. Ins. Co.*, 798 N.E.2d 47, 52 (Ohio Ct. App. 2003) (quoting *Black's Law Dictionary* 413 (6th ed. 1990)); *accord Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc.*, 874 So. 2d 26, 31-33 (Fla. Dist. Ct. App. 2004). Thus, as the court recently held in the Hurricane Katrina litigation pending in the Eastern District of Louisiana, "any Hurricane Deductible Endorsement contained in a policy does not increase coverage provided to a homeowner or insured." *In re Katrina Canal Breaches Consolidated Litig.*, 2006 WL 3421012, at *41; *accord Dallas Handbag Co. v. Royal Indem. Co.*, 390 S.W.2d 863, 865 (Tex. Civ. App. 1965) (deductible provision of policy "does not create any new coverage or restore any coverage which has been excluded by [the policy]"). Nor does a hurricane deductible modify, affect, or render

ambiguous a policy's anti-concurrent cause language. *See Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312, 1322 (M.D. Fla. 2002) ("Because the windstorm and hail deductible clause modifies application of the deductible only, it does not negate anti-concurrent language in the exclusion section of the policy's General Policy Conditions."). [15]

In short, neither the language of the Deductible nor the case law offers any support either for Plaintiffs' contention that the Deductible "purport[s] to provide full and comprehensive coverage for all loss proximately caused by a hurricane" (Complt. ¶ 13; 1R.18; R.E. Tab 7) or for the District Court's conclusion that the Deductible somehow renders the policy's anti-concurrent cause language ambiguous. The language of the Deductible does not override or modify the clear and unambiguous language of the water damage exclusion and its anti-concurrent cause lead-in language.

Indeed, the Deductible specifically states that "[a]ll other policy provisions apply." 3R.837; R.E. Tab 8. Courts have routinely held that language such as this means that an endorsement, such as the Deductible, is "subject to all of the provisions of *the original policy.*" *Cherokee Farms, Inc.*

[15] As noted above (*see supra* at 6 & n.3), contrary to Plaintiffs' contentions, there is no additional premium payment for the Hurricane Deductible Endorsement. Rather, as shown on the Declarations page of Plaintiffs' policy, the amount of $3,784.00 is the amount of the "2.00%" hurricane *deductible* (which is 2.00% of the Coverage A – Dwelling policy limit ($189,200)). *See* 3R.808; 3R.837; R.E. Tab 8.

v. Fireman's Fund Ins. Co., 526 So. 2d 871, 873 (Ala. 1988) (emphasis in original). As one court has explained:

> "Endorsements or riders on a policy become a part of the policy, and must be construed with it. Such provisions in the body of the policy are not to be abrogated, waived, limited, or modified by the provisions of an endorsement or rider unless expressly stated therein that such provisions are substituted for those in the body of the policy, or unless the provisions in the policy proper and in the rider or endorsement are conflicting."

Pete Lien & Sons, Inc. v. First Am. Title Ins. Co., 478 N.W.2d 824, 827 (S.D. 1991) (quoting 13A J. Appleman, *Insurance Law and Practice* § 7538 (1976)); *accord EMCASCO Ins. Co. v. Diedrich*, 394 F.3d 1091, 1096 (8th Cir. 2005) (finding that exclusions listed in endorsement that stated "[a]ll other provisions of this policy apply" were "in addition to and supplement the exclusions listed in the basic Homeowners Policy").[16]

Plaintiffs' contention below that the use of the term "hurricane" in the Deductible modifies or conflicts with the water damage exclusion, or that it renders that exclusion or the anti-concurrent cause language ambiguous, is likewise without merit. Indeed, such an argument has consistently been rejected, even when – in contrast to the situation here – the policy expressly *covers* loss by hurricane. *See Hardware Dealers Mut. Ins. Co. v. Berglund,*

[16] *Accord Bonito v. Cambridge Mut. Fire Ins. Co.*, 780 A.2d 984, 987 (Conn. App. Ct. 2001); *Chase,* 780 A.2d at 1131; *Bertulli v. Fitchburg Mut. Ins. Co.*, No. 03-P-16 , 2004 WL 396112, at *1 (Mass. App. Ct. Mar. 3, 2004).

393 S.W.2d 309, 313-15 (Tex. 1965) (policy that covered "hurricane" damage but excluded water damage covered only "wind damage unmixed with water damage occasioned by the hurricane"); *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 318-19 (Tex. 1965) (rejecting plaintiffs' argument that "'the insuring clause by the use of the word "hurricane" should be construed and found to cover all losses directly and proximately caused by Hurricane Carla, including any and all parts of such losses caused in whole or in part by water, hurricane surge, . . . [or] rising ocean waters, . . . and other conditions forming inseparable and integral part of a hurricane when it makes a landfall on the Texas coast'"; holding that only damage caused by the force of hurricane winds alone was covered); *Newark Trust Co. v. Agric. Ins. Co.*, 237 F. 788, 789-92 (3d Cir. 1916) (construing "Standard Tornado Policy" covering damage from "windstorms, tornadoes, cyclones or hurricanes," but excluding "loss or damage occasioned directly or indirectly by . . . tidal wave, . . . high water, overflow, [or] cloudburst"; holding that property damage caused by "perils of water" was excluded).

Accordingly, contrary to the District Court's holding, the Deductible does not render ambiguous the water damage exclusion or its anti-concurrent cause lead-in language.

D. The District Court Misapprehended Mississippi Law in Holding that, Where There Is Damage Caused by Both Wind and Water, the Standard for Determining Insurance Coverage Is "Which Is the Proximate Cause of the Loss"

The District Court also erred in holding that Mississippi law requires that "where there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage) the amount payable under the insurance policy becomes a question of which is the proximate cause of the loss." 3R.669; R.E. Tab 5. To the contrary, Mississippi case law does not mandate a specific contractual standard, but looks to the language of the insurance policy itself to provide the standard by which coverage is determined. *See Lynch v. Miss. Farm Bureau Cas. Ins. Co.*, 880 So. 2d 1065, 1070 (Miss. Ct. App. 2004) ("Mississippi law acknowledges that the standard insurance policy is a contract, and its terms are a matter of usual contract interpretation unless some statutory imperative controls.").

Moreover, the decisions of the Mississippi Supreme Court in Hurricane Camille cases, which the District Court relied on in formulating its proximate cause standard, do not establish such a rule of law. Rather, those decisions are based on the analysis and interpretation of specific contractual language in the insurance policies at issue in those cases – policy language that is different from State Farm's. For example, in *Grain Dealers Mutual Insurance Co. v. Belk*, 269 So. 2d 637 (Miss. 1972), the Mississippi

Supreme Court interpreted policy language providing coverage for "Direct Loss by Windstorm," *id.* at 638, as requiring that windstorm be the "proximate" or "dominant and efficient" cause of the loss. *Id.* at 639-40. At the same time, the Court made clear that insurers are free to draft their policies so as to exclude coverage where there are concurrent or sequential causes of a loss and one (or more) of those causes is a peril excluded under the policy. *See id.* at 640 (if a covered risk is the dominant and efficient cause of the loss, there is coverage even if other noncovered risks contributed to the loss "*unless the contributing cause is expressly excluded by the terms of the policy*") (emphasis added).

Likewise, in *Grace v. Lititz Mutual Insurance Co.*, 257 So. 2d 217 (Miss. 1972), the Mississippi Supreme Court looked to the particular policy language as providing the applicable standard for determining coverage. In that case, the Court addressed damage claims under a policy that covered loss caused directly by windstorm but excluded loss "[c]aused by, resulting from, contributed to, or aggravated by" flood, tidal water and other water perils, "all whether driven by wind or not." *Id.* at 219. In light of this specific policy language, the Court held that the question in determining coverage was "whether the destruction of a building was caused by the wind

forces of Hurricane Camille or whether *tidal water contributed to or aggravated the loss*." *Id.* (emphasis added).[17]

Similarly, both the Mississippi Supreme Court and this Court have looked to the specific policy language excluding damage "contributed to" or "aggravated by" water in holding that a named peril windstorm policy covered only loss "result[ing] *solely* directly and proximately from wind storm." *See Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696, 697, 699 (Miss. 1973) (where policy excluded "loss caused by, resulting from, contributed to or aggravated by . . . flood, surface water, waves, tidal water or tidal wave," only loss "result[ing] *solely* directly and proximately from wind storm" was covered) (emphasis added); *Home Ins. Co., N.Y. v. Sherrill*, 174 F.2d 945, 945-46 (5th Cir. 1949) (under policy insuring against direct loss by windstorm, but excluding "loss caused directly or indirectly by . . . tidal wave, high water or overflow, whether driven by wind or not," coverage

[17] The parties' factual contentions in *Grace* did not raise any issue regarding coverage for damage caused by a *combination* of wind and water. Rather, the plaintiffs in *Grace* asserted that the insured building was completely destroyed by wind before the storm surge hit, while the defendant contended that all the damage was done by storm surge. *See Grace*, 257 So. 2d at 224 (finding that there was "ample testimony to sustain the appellants' contention that their office building was destroyed by wind before the tidal waters reached the property"). Thus, to the extent *Grace* posits the question whether wind or tidal wave was the cause of the damage, the question reflects the "either/or" nature of the factual dispute in the case. *Cf. Commercial Union Ins. Co. v. Byrne*, 248 So. 2d 777, 780-81 (Miss. 1971) (noting different factual and legal issues in different cases as to whether the wind/water damage is combined and inseparable, whether there is separable wind damage, or whether the loss is caused entirely by wind or entirely by water).

existed only if "the building was destroyed by the *direct and sole action* of the wind" (emphasis added)).[18] As *Lunday* and *Sherrill* make clear, contract language that excludes damage resulting from a combination of a covered cause and an excluded cause (*i.e.,* in the *Lunday* and *Sherrill* policies, damage caused in part by wind and "aggravated by" or "contributed to" by water) is valid and enforceable in Mississippi.

Thus, under Mississippi law, State Farm's policy language, including its anti-concurrent cause language, provides the applicable standard for determining coverage for damage that is caused by a combination of wind and water. Under that language, the standard is not "which is the proximate cause" of the damage, but whether the damage would not have occurred "in the absence of" the excluded water peril. Such damage is excluded regardless of other causes, concurrent or in any sequence. *See Sherrill*, 174 F.2d at 945-46. By contrast, damage that would have occurred in the absence of water damage — e.g., separate identifiable wind damage to a roof

[18] *See also Byrne*, 248 So. 2d at 782 (to establish that loss was excluded "damage by flood waters" insurer had burden to prove that damage "resulted from or was contributed to or aggravated by flood, surface water, or waves or tidal water, etc."); *Firemen's Ins. Co. of Newark, N.J. v. Schulte*, 200 So. 2d 440, 440-41 (Miss. 1967) (question determining coverage under policy language was "whether there was a direct loss by windstorm unaffected by subsection (a)" of the policy, excluding loss caused by, contributed to or aggravated by water).

or separate identifiable wind damage that occurred prior to any flood damage — is covered.

In sum, Mississippi law gives full effect to provisions that exclude coverage where an excluded peril is one cause of the loss even though covered perils also were causes of the loss, without requiring an inquiry into which peril was "the proximate cause" of the loss. The District Court's ruling erroneously rendered the anti-concurrent cause language in State Farm's policy null and without effect. State Farm respectfully submits that this Court should reverse the District Court and make clear that Plaintiffs' contractual claims are governed by the clear and unambiguous language of State Farm's anti-concurrent cause language. Under that language, any damage to Plaintiffs' residence attributable to the combined and indivisible effect of wind and water is excluded because that damage would not have occurred "in the absence of" Hurricane Katrina's flooding and storm surge.

III. THE DISTRICT COURT MISSTATED THE PARTIES' RESPECTIVE BURDENS OF PROOF WITH REGARD TO PLAINTIFFS' INSURANCE CLAIMS

This Court should also address questions raised by the District Court's pronouncements as to the parties' respective burdens of proof with respect to excluded and covered losses. The relevant principles governing burden of proof were in part misstated and in part ignored in the District Court's

Memorandum Opinion. First, the District Court failed to make explicit that, even under an "open peril" or comprehensive policy,[19] Plaintiffs must establish the extent of their claimed loss as part of their burden of proving their contract damages. Second, the District Court improperly disregarded the fact that the State Farm policy provides different and separate coverages for dwelling ("open peril" coverage) and contents ("named peril" coverage) and that the terms of those coverages significantly affect the burden of proof analysis.[20]

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

In one portion of its opinion, the District Court correctly recognized that Plaintiffs have the burden of proving the extent of separate wind damage, stating:

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[19] "Open peril" (formerly "all risk") policies provide coverage for a broad range of risks, subject to the policy's specific exclusions, conditions and limitations. Beginning in the mid-1980's, the insurance industry began to using the term "open peril" to describe these comprehensive policies to avoid any unintended expansion of their liabilities based on the use of the phrase "all risk." Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 Tort & Ins. L.J. 777, 783-84 (2001). "Named" (or "specified") peril policies, by contrast, provide coverage only for the specific risks enumerated in the policy. *Lunday*, 276 So. 2d at 698-99 (noting distinction). Plaintiffs' policy provides open peril coverage for the dwelling (Coverage A) and named peril coverage for personal property (Coverage B). 3R.818-26; R.E. Tab 8.

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

> *To the extent that plaintiffs can prove their allegations* that the hurricane winds (or objects driven by those winds) and rains entering the insured premises through openings caused by the hurricane winds proximately caused damage to their insured property, *those losses will be covered* under the policy . . . .

3R.670 (emphasis added); R.E. Tab 5; *accord Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684, 695 (S.D. Miss. 2006). The District Court also stated, however, that "because [the water damage exclusion] is an exclusion from coverage in a comprehensive homeowners insurance policy, and because the exclusion constitutes an affirmative defense, State Farm would bear the burden of proving that the exclusion applies to the plaintiffs' claims." 3R.668. As discussed more fully below, while the latter statement is true as far as it goes, it fails to account for the further shifting of the burden necessary to establish Plaintiffs' entitlement to recover under the policy.

In the context of an "open peril" policy, if the insured meets his threshold burden of proving an accidental direct physical loss to insured property, the burden shifts to the insurer to prove the applicability of any exclusion asserted as an affirmative defense. *Lunday*, 276 So. 2d at 698. However, as many courts have held (but the District Court here overlooked), once the insurer adduces evidence that the insured's loss was caused by an excluded peril, the burden "shifts back" to the insured to show that the claim

does not fall within the exclusion or to segregate covered losses from noncovered losses. *See, e.g., Royal Surplus Lines Ins. Co. v. Brownsville Indep. Sch. Dist.*, 404 F. Supp. 2d 942, 949 n.7 (S.D. Tex. 2005) ("Once the insurer demonstrates that an exclusion arguably applies, the burden then shifts back to the insured to show that the claim does not fall within the exclusion or that it comes within an exception to the exclusion.") (citing *Britt v. Cambridge Mut. Fire Ins. Co.*, 717 S.W.2d 476, 482 (Tex. App. 1986)).[21]

This shifting back of the burden of proof to the plaintiff is in accord with the established principles of Mississippi law that "a plaintiff has the burden of proving a right to recover under the insurance policy sued on" and that "[t]hat basic burden never shifts from the plaintiff." *Britt v. Travelers Ins. Co.*, 566 F.2d 1020, 1022 (5th Cir. 1978) (Mississippi law); *accord Brown v. PFL Life Ins. Co.*, 312 F. Supp. 2d 863, 868 (N.D. Miss.), *aff'd*, 111 F. App'x 258 (5th Cir. 2004); *see also Coahoma County Bank & Trust*

[21] The burden shifting rule applied in *Royal Surplus* is routinely applied in cases dealing with exceptions to exclusions. *See U.S. Fid. & Guar. Co. v. B&B Oil Well Serv., Inc.*, 910 F. Supp. 1172, 1181 (S.D. Miss. 1995) (recognizing that "most courts have held that the burden is on the insured to prove" the applicability of an exception to an exclusion); *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1020 (6th Cir. 1995) (similar); *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 108 P.3d 469, 476 (Mont. 2005) (similar). Among the rationales offered for the rule are that the insured has the burden of proving its entitlement to coverage and that placing the burden on the insured "absolves the insurer from bearing the difficult burden of proving the negative." *Highlands Ins. Co. v. Aerovox Inc.*, 676 N.E.2d 801, 805 (Mass. 1997). Both of these rationales apply equally here.

Co. v. Feinberg, 128 So. 2d 562, 565 (Miss. 1961) (reiterating rule that burden of proving entitlement to insurance policy proceeds rests on person seeking proceeds). Thus, in *Brown v. PFL Life*, after the insurer satisfied its burden of proving the applicability of the exclusion at issue, the court shifted the burden back to the plaintiff to rebut that showing; and because the plaintiff had "offered no evidence, whatsoever, to contradict the [insurer's] findings," the court upheld the insurer's determination of noncoverage. 312 F. Supp. 2d at 868-9.

In the present context, where covered and excluded perils have arguably contributed to an insured's loss, once the insurer satisfies its initial burden of showing the applicability of the exclusion at issue,[22] it becomes the insured's burden to show the extent and amount of any covered damage for which he seeks to recover. As noted in one leading insurance treatise:

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

[22] In this case, Plaintiffs' own allegations acknowledge that storm surge (an excluded peril) was or may have been a cause of the damage to their home. *See* 3R.664 ("Plaintiffs allege that the damage [to the insured property] was caused by hurricane wind, rain, and/or storm surge from Hurricane Katrina.") (citing Complt. ¶15); R.E. Tab 5.

12 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 175:9 (3d ed. 1997) (emphasis added); *see also* 17A *Couch on Insurance* § 254:75 ("insureds whose losses are only partially reimbursable by the insurer" have been deemed to have the burden of "[s]egregating damages to the insured building from a covered peril from those caused by a noncovered peril").

The rule imposing on the insured the burden of proving the amount of loss attributable to a covered peril flows from "the basic principle that insureds are entitled to recover only that which is covered under their policy; that for which they paid premiums." *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex. App. 1999). Thus, as stated in *Fiess v. State Farm Lloyds*:

> If covered and non-covered perils combine to create a loss, the insured may only recover the amount caused by the covered peril. . . . 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.*

392 F.3d 802, 807 (5th Cir. 2004) (emphasis added) (all risk property insurance policy); *see also Paulson,* 393 S.W.2d at 319 (property policy covering hurricane but excluding water damage) ("It is essential that the insured produce evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy.").

Notably, this burden applies even when the policy is written on an open peril basis and despite the insurer's burden of proving the applicability of its exclusionary language. In *Harbor House Condominium Ass'n v. Massachusetts Bay Insurance Co.*, 915 F.2d 316 (7th Cir. 1990), for example, the insureds sought indemnification under their open peril policy for damage to the perimeter heating system of the insured building when freezing temperatures caused several of the pipes to freeze, crack and burst. The insurer paid the insureds for partial repairs, but denied payment for the remainder because the insureds had abandoned the system before ascertaining the full extent of their damage. *Id.* at 317-18. In the ensuing litigation, the district court granted summary judgment to the insurer, in part based on the insureds' failure "to prove the extent or amount of their damages." *Id.* at 318 & n.5. The Seventh Circuit affirmed:

> It is not enough to show that a loss may have occurred. *Plaintiffs must prove the nature, extent or amount of their loss to a reasonable degree of certainty* before any award of damages can be made under the policy. . . . [E]ven if we assume that the freezing temperatures may have caused additional damage to the heating system, plaintiffs have failed to provide any evidence of the extent or amount of that damage from which a jury could reasonably calculate damages. This they must do.

Id. (emphasis added); *accord Simplexdiam, Inc. v. Brockbank*, 727 N.Y.S.2d 64, 67 (App. Div. 2001) (all risk jewelers' block policy); *see also Fiess*, 392 F.3d at 807; *Wallis*, 2 S.W.3d at 303.

The rule shifting the burden to the insured to prove the amount of covered loss also accords with the basic tenet of Mississippi law that a plaintiff must prove "not only the fact of his injury, but the extent of the injury in order to support an award of monetary damages." *Savage v. LaGrange*, 815 So. 2d 485, 491 (Miss. Ct. App. 2002). This rule applies equally in the insurance context. *See Home Ins. Co. v. Greene*, 229 So. 2d 576, 579 (Miss. 1969) (noting that "[a]n insured seeking recovery on a policy insuring against fire has the burden of proving the loss and its extent"); *Coastal Plains Feeders, Inc. v. Hartford Fire Ins. Co.*, 545 F.2d 448, 453 (5th Cir. 1977) (Alabama law) (noting general rule that insured "of course, bore the burden of proving the amount of its damages; the jury could not be left free to speculate as to this amount"). In light of this burden, when an insured dwelling is damaged by both covered and excluded causes, the insured must prove the amount of damage attributable to the covered cause, even though the insurer has the burden of proving the applicability of an exclusion.

Indeed, because allocation is central to the coverage claim, the insured's "failure to segregate covered and noncovered perils is fatal to recovery."[23] *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App. 2003) (liability policy); *see also Royal Surplus Lines*, 404 F. Supp. 2d at 950 (applying same rule under first party property policy); *Patrick Schaumburg Autos., Inc. v. Hanover Ins. Co.*, 452 F. Supp. 2d 857, 863, 868-9, 872-73 (N.D. Ill. 2006) (denying insured's motion for summary judgment even though it was "undisputed that [the insured] suffered some covered loss," because insured failed to satisfy its "burden of proving the amount of the covered loss"); *Macon Light House Revival Ctr., Inc. v. Cont'l Ins. Co.*, 651 F. Supp. 417, 421-22 (M.D. Ga. 1987) (no coverage for roof collapse under multi-peril policy where evidence was "wholly insufficient to meet [plaintiff's] burden" of "demonstrating what damages proximately resulted from [covered] 'explosion,' or alternatively, what damages were caused by the [noncovered] structural failure itself").

[23] Requiring the insurer not only to prove the effect of the excluded peril but also to quantify the scope and extent of any separate damage caused by the covered peril leads to totally anomalous results. For example, if an insured dwelling were completely destroyed by floodwaters during a hurricane, but the insurer could not conclusively disprove the possibility that the dwelling sustained some damage by wind prior to its destruction, it could be argued that the insurer has failed to meet its burden of quantifying the amount of loss attributable to the excluded peril of flood and thus must pay policy limits, no matter how unlikely the fact of the separate wind damage or how minimal the extent of such damage, if any.

Accordingly, in order to prove their right to recover for alleged wind damage to their dwelling, Plaintiffs must prove, in addition to the other issues on which they bear the burden of proof, the extent of their covered loss – i.e., the amount of damage – that was caused by wind, "in the absence of" the action of excluded water. As to the latter, even "the admitted *fact* of damage is insufficient" to sustain their burden, because they must also prove "the *amount* of damage." *Harbor House*, 915 F.2d at 319 (emphasis added). And while Plaintiffs "need not prove their damages to a mathematical certainty, neither can they rely on mere speculation or conjecture" to satisfy their burden on this issue. *Id.*; *accord Savage*, 815 So. 2d at 491 (reversing damage award for personal injuries based on plaintiffs' failure to present sufficient evidence of nature or extent of alleged injuries).

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

In contrast to the coverage provided for Plaintiffs' dwelling, Plaintiffs' policy provides coverage for personal property on a named peril basis. *See* note 19 *supra*. Thus, under Mississippi law, Plaintiffs have the burden to prove, as a threshold matter, that their personal property was damaged by one of the perils specifically enumerated in Coverage B of the policy – in this case, "windstorm," including rain entering the dwelling through an opening caused by the direct force of wind. *See Lunday*, 276 So. 2d at 699

(in specified peril policy covering wind, burden of proof was properly placed on insured). The District Court ignored this critical element of Plaintiffs' burden of proof. Accordingly, this Court should correct the District Court's errors regarding the parties' respective burdens of proof concerning coverage for their personal property, as well as their dwelling.

IV. THE DISTRICT COURT CORRECTLY HELD THAT STATE FARM'S WATER DAMAGE EXCLUSION IS VALID AND ENFORCEABLE AND EXCLUDES DAMAGE CAUSED BY STORM SURGE

A. Water Damage Caused by Storm Surge Is Excluded by the Unambiguous Terms of State Farm's Water Damage Exclusion

Plaintiffs in their Cross-Petition challenge the District Court's holding that State Farm's water damage exclusion is enforceable and applies to damage caused by "storm surge." Pl. Cross-Pet. at 11, 15-16. As discussed above, the policy clearly and unambiguously excludes from coverage losses that would not have occurred in the absence of water damage, including "flood," "tidal water," "waves," "overflow of a body of water," and other enumerated forms of water, whether driven by wind or not. 3R.821; R.E. Tab 8. The District Court correctly held that State Farm's water damage exclusion is "valid and enforceable" under Mississippi law. 3R.668; R.E. Tab 5; *see also Buente v. Allstate Prop. & Cas. Co.*, No. 1:05CV712 LTS JMR, 2006 WL 980784, at *2 (S.D. Miss. Apr. 12, 2006) (analyzing nearly

identical water damage exclusion and holding that "the terms of the [insurance] policy, specifically the 'flood exclusions' . . . , are clear and unambiguous").[24]

As the District Court noted, "similar policy terms have been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions." 3R.668 (citing Mississippi state and federal cases); *Buente v. Allstate Ins. Co.*, 422 F. Supp. 2d 690, 696 (S.D. Miss. 2006) (same). Indeed, for more than half a century, courts applying Mississippi law have repeatedly applied policy provisions that, like State Farm's, exclude water damage even if the water in question was "driven by wind." *See, e.g., Sherrill*, 174 F.2d at 945-46; *Lunday*, 276 So. 2d at 697, 699.

Plaintiffs attempt to escape the water damage exclusion in their policy by characterizing the water in question as "storm surge" from the Gulf of Mexico, which Plaintiffs argue does not fall within the "water damage"

[24] Courts in numerous other jurisdictions have agreed that State Farm's water damage exclusion and similar exclusions in the policies of other insurance companies are clear, unambiguous, and enforceable. *See, e.g., Whitt v. State Farm Fire & Cas. Co.*, 734 N.E.2d at 912-13, 915 (Illinois: damage to insured homeowner's basement from flood water was "clearly and unambiguously excluded" by water damage exclusion); *Paulson*, 756 P.2d at 766 (Wyoming: State Farm's "water damage" exclusion "is not ambiguous. . . . It has but a single meaning, and that meaning is not uncertain."); *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d at 313-14 (Texas: rejecting insured's contention "that an interpretation of the water exclusion clause so as to exclude water damage caused by a hurricane would create an ambiguity").

exclusion. *See* Pl. Cross-Pet. at 15-16; Complt. ¶¶ 21-22; 1R.20; R.E. Tab 7. Specifically, Plaintiffs assert that "the Gulf of Mexico does not 'flood' or 'overflow'" and that "'[w]aves' or 'tidal waters', as those terms are commonly used, likewise did not occur during Hurricane Katrina." Complt. ¶ 21; 1R.20; R.E. Tab 7. Plaintiffs' reliance on such semantics is contrary to the generally accepted definitions and common sense meaning not only of the term "storm surge," but also of the terms used in Plaintiffs' policy to define water damage, such as "flood," "waves," "tidal water," and "overflow of a body of water." 3R.821; R.E. Tab 8. These terms clearly encompass hurricane and storm surge flooding from the Gulf of Mexico such as occurred during Hurricane Katrina. As the District Court held, "[l]osses attributed to water in the form of a 'storm surge' are excluded from coverage because this damage was caused by the inundation of plaintiffs' home by tidal water from the Mississippi Sound driven ashore during Hurricane Katrina. This is water damage within the meaning of that policy exclusion." 3R.668; R.E. Tab 5.

The District Court also stated that "[t]he inundation that occurred during Hurricane Katrina was a flood, as that term is ordinarily understood . . . [and t]he terms of an insurance policy are to be given their ordinary meaning unless some special usage must be applied from the policy

itself."[25] *Buente,* 2006 WL 980784, at *1-2. The District Court's ruling is supported by ordinary dictionary definitions of the word "flood" -- *i.e.*, "an overflow of a large amount of water over dry land," *Compact Oxford English Dictionary of Current English* (3d ed. 2005), or "a rising and overflowing of a body of water especially onto normally dry land." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2004). *See also American Heritage Dictionary of the English Language* (4th ed. 2000) ("An overflowing of water onto land that is normally dry"); *Oxford American Dictionary of Current English* (1999) ("an overflowing or influx of water beyond its normal confines, esp. over land; an inundation").[26]

Definitions of "storm surge" on government and scientific websites make clear that storm surge is a meteorological phenomenon occurring in hurricanes that results in abnormally high tides, waves, and flooding, all

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[25] In construing insurance contracts, Mississippi courts apply the "ordinary and plain meaning of words." *Wooten v. Miss. Farm Bureau Ins. Co.*, 924 So. 2d 519, 523 (Miss. 2006).

[26] Ordinary dictionary definitions also make it evident that "storm surge" is encompassed by other terms of the water damage exclusion such as "wave" or "overflow of a body of water." *Webster's Ninth New Collegiate Dictionary* 1188 (1993) defines "surge" when used as a noun as "2.a: A large wave or billow: swell. b (1) a series of such swells or billows (2) the resulting elevation of water level." *See also American Heritage Dictionary of the English Language* 1807 (3d ed. 1992) (defining surge as "1. A heavy billowing or swelling motion like that of great *waves*") (emphasis added). In addition, contrary to Plaintiffs' contentions, the Gulf of Mexico is clearly within the ordinary definition of a "body of water." *See* Dictionary.com ("body of water" is "the part of the earth's surface covered with water (such as a river or lake or ocean)," http://dictionary.reference.com/search?r=2&q=body%20of%20water.

excluded perils under Plaintiffs' policy. For example, the Federal Emergency Management Agency defines storm surge as follows:

> Storm surge is simply *water* that is pushed toward the shore by the force of the winds swirling around the storm. This advancing surge combines with the normal tides to create the *hurricane storm tide*, which can increase the mean water level 15 feet or more. In addition, *wind driven waves* are superimposed on the storm tide. This rise in water level can cause severe *flooding* in coastal areas . . . .

1R.131 (emphasis added); R.E. Tab 9.

Similarly, the National Weather Service ("NWS") explains that storm surge flooding occurs when a hurricane moves close to the coast:

> The advancing storm surge combines with the normal astronomical tide to create the *hurricane storm tide*. In addition, wind waves 5 to 10 feet high are superimposed on the storm *tide*. This buildup of water level can cause severe *flooding* in coastal areas particularly when the storm surge coincides with normal high tides . . . . *Wave* and current action associated with the surge also causes extensive damage.

1R.134 (emphasis added); R.E. Tab 9; *see also* 1R.136 (*Illustrated Glossary of Geologic Terms*, Iowa State University Geological and Atmospheric Sciences website) ("storm surge" is a "ridge of high water associated with a hurricane and which *floods* over the shore") (emphasis added); R.E. Tab 9. In other words, "storm surge" is a storm tide that results in a flood of tidal water, waves and overflow of a body of water. Thus, contrary to Plaintiffs'

assertions, "storm surge" falls within the meaning of the policy terms "flood," "tidal water," "waves" and "overflow of a body of water."[27]

State Farm has found no judicial decision holding that property damage from "storm surge" does not fall within the ambit of a water damage exclusion like State Farm's. By contrast, several courts have implicitly recognized that "storm surge" *is* included within such an exclusion. For example, in *Lower Chesapeake Associates v. Valley Forge Insurance Co.*, 532 S.E.2d 325 (Va. 2000), the trial court ruled a marina owner was not entitled to coverage under a property insurance policy for dock damage caused when "Hurricane Fran . . . affected the Norfolk area with wind, rain and a storm surge." *Id.* at 327. The Virginia Supreme Court affirmed the trial court's ruling that the loss was excluded by a "water damage" exclusion similar to State Farm's:[28]

> Under the plain terms of [the exclusion], coverage is excluded under the policy if a loss is caused "directly or indirectly" by one of the enumerated causes of events, "regardless of any other cause or event that contributes concurrently or in any sequence" to the loss. The evidence amply supports the trial court's

[27] Plaintiffs have also complained that the exclusion should not be read to apply to "wave wash," one of the phrases used by State Farm to describe the water forces that destroyed Plaintiffs' property ("storm surge, wave wash and flood"). Pl. Cross-Pet. at 5, 8. "Wave wash," like storm surge, is clearly encompassed within the policy's exclusion.

[28] As does State Farm's policy, the "water" exclusion in *Lower Chesapeake* specifically referred to "'[f]lood, surface water, waves, tides, tidal waves, overflowing of any body of water, or their spray, all whether driven by wind or not.'" 532 S.E.2d at 330 (citation omitted). It did not expressly refer to "storm surge."

> finding that the damage to [the insured docks] resulted, at least in part, from the excluded causes of "[f]lood, . . . waves, tides, tidal waves, . . . all whether driven by wind or not," or from the excluded cause of "gradual deterioration," or from any combination of these excluded causes.

Id. at 331.

The Mississippi Supreme Court apparently agrees: Despite the fact that 1969's Hurricane Camille is considered an "Historic Storm Surge Event,"[29] the Court has repeatedly treated the water damage resulting from that hurricane as falling within insurance policy water damage/flood exclusions. *See, Lunday*, 276 So. 2d at 698-99; *Grace*, 257 So. 2d at 224; *Liberty Universal Ins. Co. v. Hall*, 289 So. 2d 683, 684 (Miss. 1973); *Littiz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765, 767 (Miss. 1971).

In short, Plaintiffs' assertion that "storm surge" damage is not water damage is entirely lacking in merit and does not transform their excluded losses into covered losses.

B. The Water Damage Exclusion Is Not Rendered Ambiguous and Unenforceable by Any Purported Ambiguity in the Anti-Concurrent Cause Language

Plaintiffs also argue that if the anti-concurrent cause language in State Farm's homeowners policy is found to be ambiguous, the water damage exclusion itself must be deemed inoperable and "coverage goes to the

[29] National Hurricane Center, "Hurricane Preparedness: Storm Surge, Historic Storm Surge Events," hhtp://www.nhc.noaa.gov/HAW2/english/storm_surge.shtml.

insured." Pl. Cross-Pet. at 12-13; *see also id.* at 8-9. Plaintiffs claim this result is required by the doctrine of *contra proferentem*. *Id.* at 13 n.10, 16.

Plaintiffs have cited no authority that supports the proposition that the finding of an ambiguity in one provision would mandate or even permit other provisions in the policy to be treated as inoperable. *Williams v. Life Insurance Co. of Georgia*, 367 So. 2d 922 (Miss. 1979), upon which Plaintiffs rely in their Cross-Petition, does not support any such result. *Williams* holds only that a life insurance policy issued pursuant to an employment package plan was group insurance and therefore subject to a six-year statute of limitations, even though a complete, self-contained policy was delivered to each employee. In fact, the rule is simply that *ambiguities* in an insurance policy are construed against the insurer, not that entire provisions or otherwise clear language is disregarded. *See Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994). As the Mississippi Court of Appeals stated in *Boteler*, "[a]mbiguities in insurance contracts are read to favor the insured, but that principle does not permit the creation of ambiguity where there is none." *Boteler*, 876 So. 2d at 1069. Thus, even assuming that State Farm's anti-concurrent cause language were ambiguous or inconsistent with other language in the policy (which it is not), the clear language of the water damage exclusion would still bar coverage for storm

surge flooding, such as that which destroyed Plaintiffs' residence. The meaning and intent of State Farm's water damage exclusion is clear and, as the District Court correctly ruled, that exclusion is valid and enforceable as a matter of Mississippi law.

V. CONTRARY TO PLAINTIFFS' CONTENTIONS, MISSISSIPPI DOES NOT FOLLOW THE EFFICIENT PROXIMATE CAUSE DOCTRINE IN PROPERTY INSURANCE CASES

Plaintiffs in their Cross-Petition "request that the Court rule that the efficient proximate cause doctrine applies to the subject policy and that, as a result, the policy may not be interpreted so as to apportion between wind-caused damage and water-caused damage." Pl. Cross-Pet. at 16. Plaintiffs contend that this doctrine is "long recognized as the law in Mississippi" and that under the doctrine "it is sufficient for an insured to show that the covered loss (here, wind) proximately caused the loss, even though other causes may have contributed." *Id.* at 14.

Contrary to Plaintiffs' contentions, Mississippi has not adopted the efficient proximate cause doctrine. Both *Rhoden* and *Eaker v. State Farm Fire & Casualty Insurance Co.*, 216 F. Supp. 2d 606 (S.D. Miss. 2001), which Plaintiffs ignore, expressly hold that the doctrine of efficient proximate cause is *not* part of Mississippi law and does *not* override the unambiguously worded exclusions in State Farm's policies. *See Rhoden*, 32

F. Supp. 2d at 912 ("Since Mississippi courts have not adopted the doctrine of 'efficient proximate cause,' the Court declines to apply the doctrine in this case."); *Eaker*, 216 F. Supp. 2d at 623-24 & n.18 (applying State Farm's water damage exclusion, following *Rhoden*).

Moreover, Plaintiffs have misconstrued the cases they cite, assuming that because some Mississippi courts have used the terms "efficient cause" and "proximate cause," Mississippi has thus adopted the efficient proximate cause doctrine in first-party property insurance cases. That is simply not so.[30]

The efficient proximate cause doctrine is a means of determining whether an insurer is liable for a loss caused by a combination of covered and excluded perils. 7 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 101:57 (3d ed. 2005). The point of the doctrine is to identify the single cause from among all of the loss-producing factors to which the loss may be attributed for coverage purposes. If that cause is covered, the loss is covered; if it is excluded, the loss is excluded.

In the property insurance cases cited by Plaintiffs (Pl. Cross-Pet. at 14), the courts were not analyzing covered and excluded causes to determine

[30] Indeed, as far as State Farm is able to determine, other than *Rhoden* and *Eaker*, which reject the doctrine, there is not a single property insurance case decided under Mississippi law that even uses the phrase "efficient proximate cause."

their relative effect, as is the hallmark of the efficient proximate cause doctrine; instead, they were attempting to define the term "direct" within the meaning of policies covering "direct loss by" (or loss caused "directly by") windstorm. *See, e.g., Belk*, 269 So. 2d at 639 (noting that "[t]here are various interpretations of the words 'Direct Loss' in insurance policies"). All that these cases establish is that Mississippi follows the general rule that, to constitute a "direct loss" under such a policy, the windstorm must be an "efficient" or "proximate" cause of the loss. *See Kemp v. Am. Universal Ins. Co.*, 391 F.2d 533, 534-35 (5th Cir. 1968) (in order to recover under policy covering "direct physical loss or damage by . . . windstorm," it is "sufficient to show that wind was the proximate or efficient cause of loss or damage notwithstanding other factors"); *accord Boatner*, 254 So. 2d at 767 (citing *Kemp*); *Grace,* 257 So. 2d at 224 (citing *Boatner* and *Kemp*).[31]

Moreover, the factual analyses in Plaintiffs' cited cases make plain that the courts were not applying the efficient proximate cause doctrine. For example, in *Boatner*, the insured's windstorm policy excluded loss "[c]aused by, resulting from, contributed to, or aggravated by" various forms of water, including "flood, surface water, waves, tidal water, or tidal wave." *Boatner*,

[31] In fact, *Kemp* did not involve an excluded cause at all; instead, the question before the court was merely whether the damage was caused by windstorm in the first instance. 391 F.2d at 534-35. In such circumstances, the court could not have been applying an efficient proximate cause analysis.

254 So. 2d at 765. After reciting the facts and the disputed evidence, the court found that "the jury had ample testimony to sustain appellees' contention that the house was destroyed by wind before the tidal wave reached the property." *Id.* at 767; *see also id.* at 766 (noting that "the great weight of the evidence shows that the house and its contents had already been destroyed and distributed over a large area long before the tidal wave came ashore"). Likewise, in *Grace*, the court held that "the jury had ample testimony to sustain the appellants' contention that their office building was destroyed by wind before the tidal waters reached the property." *Grace*, 257 So. 2d at 224. Obviously, if the sole cause of loss is a covered peril, the efficient proximate cause doctrine is not even implicated.

The Mississippi Supreme Court's opinion in *Belk* makes the point even more clearly. In analyzing a windstorm policy similar to those at issue in *Kemp*, *Boatner*, and *Grace*, the Court articulated the following rule for determining whether a loss is covered under such a policy:

> If the [covered peril] is the proximate cause of the loss, it need not be the sole cause, and it is generally sufficient to authorize a recovery on the policy that the cause designated therein was the efficient cause of the loss, although other causes contributed thereto, *unless the contributing cause is expressly excluded by the terms of the policy.*

Belk, 269 So. 2d at 640 (emphasis added). Obviously, the Court was not describing the efficient proximate cause doctrine; if it had been, the fact that

windstorm was the "efficient cause of the loss" would necessarily mean that the entire loss would be covered, *regardless of the operation of an excluded cause.* Instead, the court made plain that if "the contributing cause is expressly excluded" – as water damage is here – then the exclusion applies and there is no coverage.

Plaintiffs also cite two Mississippi cases involving claims under policies covering accidental death and injury, *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), and *Peerless Insurance Co. v. Myers*, 192 So. 2d 437 (Miss. 1966). Pl. Cross-Pet. at 14. Neither case mentions the "efficient proximate cause doctrine." Both *Peerless* and *Crenshaw* address the effect of specific policy language providing coverage for "'loss resulting directly and independently of all other causes from accidental bodily injury.'" *Crenshaw*, 483 So. 2d at 270 (quoting *Peerless*, 192 So. 2d at 439). Interpreting this language, the Mississippi Supreme Court held that "recovery may be had" under an accidental death and injury policy "where the accidental injury aggravates, renders active, or sets in motion a latent or dormant pre-existing physical condition or disease, which in turn contributes to the disability or death for which recovery is sought, and where the accidental injury is a proximate cause of the resulting loss." *Peerless*, 192 So. 2d at 439.

The Mississippi Supreme Court's analysis of what constitutes "direct" causation under the policy language at issue in *Peerless* and *Crenshaw* has no bearing on the very different anti-concurrent cause policy language at issue in this case. Nothing in either decision authorizes courts applying Mississippi law to override or invalidate that policy language. Indeed, in the more than forty years since the Mississippi Supreme Court decided *Peerless*, it has not extended the *Peerless* and *Crenshaw* analysis to property insurance cases.

In any event, even if Mississippi were to adopt the efficient proximate cause doctrine that Plaintiffs attempt to invoke, that doctrine would not support invalidation of the water damage exclusion and anti-concurrent cause language in State Farm's policy, as Plaintiffs contend. The efficient proximate cause doctrine is simply a rule of contract interpretation to be used in the absence of policy language to the contrary. *See Chase*, 780 A.2d at 1130 ("'The efficient proximate cause doctrine is a default rule which gives way to the language of the contract.' The State Farm policy unambiguously dictates that proximate causation rules are not to be followed . . . .") (citation omitted); *accord Slade*, 747 So. 2d at 314; *Toumayan*, 970 S.W.2d at 826; *Alf*, 850 P.2d at 1277.

Consequently, Plaintiffs' contention that the efficient proximate cause doctrine is applicable to this case is without merit.

CONCLUSION

For all the foregoing reasons, State Farm respectfully requests that this Court reverse the District Court's rulings in its May 24, 2006, Memorandum Opinion insofar as the Opinion (i) holds that State Farm's anti-concurrent cause language is ambiguous and unenforceable and (ii) misstates the parties' respective burdens of proof. This Court should also affirm the District Court's holdings that State Farm's water damage exclusion is valid and enforceable and applies to damage caused by storm surge. In addition, the Court should reject Plaintiffs' contention that the efficient proximate cause doctrine is applicable to this case.

This, the 29th day of January 2007

Respectfully submitted,

W. Scott Welch III

W. SCOTT WELCH, III

John C. Henegan

JOHN C. HENEGAN

Douglas W. Dunham

DOUGLAS W. DUNHAM

Susan M. Popik

SUSAN M. POPIK

ATTORNEYS FOR APPELLANT/CROSS-APPELLEES/DEFENDANT
STATE FARM FIRE AND CASUALTY COMPANY

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Nos. 06-61075 & 06-61076

JOHN AND CLAIRE TUEPKER,	APPELLEES/CROSS-APPELLANTS/PLAINTIFFS
VERSUS	
STATE FARM FIRE AND CASUALTY COMPANY AND JOHN DOES 1 THROUGH 10,	APPELLANT/CROSS-APPELLEE/DEFENDANT

APPENDIX

Tab A. Excerpt from Policy's Coverage Provisions. 3R.818.

Tab B. Policy's Anti-Concurrent Cause Language and Water Damage Exclusion. 3R.821.

Tab C. Hurricane Deductible Endorsement. 3R.837.

Tab D. Per Curiam Opinion, *filed in Rhoden v. State Farm Fire and Casualty Insurance Company*, No. 99-60038 (5th Cir. Nov. 2, 1999) (unpublished and included as required by Fifth Circuit Local Rule 47.5.4; also available at 1999 WL 1095617).

Tab E. Memorandum Opinion and Order, *filed in Wallace v. City of Jackson*, No. 251-05-941 CIV (Hinds County Cir. Ct. Miss Sept. 15, 2006).

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. . . .

3R.818.

Tab B

Policy's Anti-Concurrent Cause 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[.]

3R.821.

Tab C

Hurricane Deductible Endorsement

Definitions

As used in this endorsement hurricane means a storm system that has been declared to be a hurricane by the National Hurricane Center of the National Weather Service.

* * *

The following Deductible language is added to the policy:

Deductible

The Hurricane deductible percentage (%) shown in the Declarations applies only for direct physical loss or damage to covered property caused by wind, wind gusts, hail, rain, tornadoes, or cyclones caused by or resulting from a hurricane as defined above. The deductible for loss caused by each hurricane occurrence is the amount determined by applying the deductible percentage (%) shown in the Declarations to the COVERAGE A - DWELLING limit shown in the Declarations.

In the event of a hurricane loss, this deductible will apply in place of any other deductible stated in the policy. In no event will this deductible be less than the Section I deductible amount shown in the Declarations.

All other policy provisions apply.

3R.837.

TAB D

Briefs and Other Related Documents
Rhoden v. State Farm Fire C.A.5 (Miss.), 1999. This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Fifth Circuit Rule 47.5.4. (FIND CTA5 Rule 47.)

United States Court of Appeals,Fifth Circuit.
Thomas RHODEN; Sharon Rhoden,
Plaintiffs-Appellants,
v.
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, Defendant-Appellee.
No. 99-60038.

Nov. 2, 1999.

Appeal from the United States District Court for the Southern District of Mississippi (3:98-CV-212-BN).

Before KING, Chief Judge, and REYNALDO G. GARZA and EMILIO M. GARZA, Circuit Judges.
PER CURIAM: FN*

FN* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

*1 The judgment of the district court is affirmed for essentially the reasons given by the district court in its Opinion and Order entered December 22, 1998.

AFFIRMED.

C.A.5 (Miss.),1999.
Rhoden v. State Farm Fire
200 F.3d 815, 1999 WL 1095617 (C.A.5 (Miss.))

Briefs and Other Related Documents (Back to top)

· 1999 WL 33728446 (Appellate Brief) Reply Brief of Appellants, Thomas Rhoden and Sharon Rhoden (Jun. 03, 1999) Original Image of this Document (PDF)
· 1999 WL 33841416 (Appellate Brief) Brief of Appellee, State Farm Fire & Casualty Company (May. 14, 1999) Original Image of this Document (PDF)
· 1999 WL 33728450 (Appellate Brief) Brief of Appellants, Thomas Rhoden and Sharon Rhoden (Mar. 24, 1999) Original Image of this Document (PDF)
· 99-60038 (Docket) (Jan. 25, 1999)
· 1999 WL 33728443 (Appellate Brief) Brief of Appellee, State Farm Fire & Casualty Company (Jan. 01, 1999) Original Image of this Document (PDF)

END OF DOCUMENT

TAB E

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MINUTES CIRCUIT COURT, 1ST DISTRICT, HINDS COUNTY SEP TERM, 20 06

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

FLYNN WALLACE, ET AL — PLAINTIFFS

VS. — NO. 251-05-941 CIV

CITY OF JACKSON, MISSISSIPPI, ET AL — DEFENDANTS

MEMORANDUM OPINION AND ORDER

Before the Court for its consideration is the renewed motion for summary judgment filed by defendant State Farm Fire and Casualty Company (hereinafter "State Farm").[1] Having considered the motion, plaintiffs' response, the authorities of law and other submissions of the parties, oral arguments on two occasions, and being otherwise fully advised in the premises, the Court is now rules.

On April 24, 2003, the plaintiffs' house was inundated with water and sewage. In this action, they sue the City of Jackson (hereinafter refered to as "The City") and State Farm to recover the resulting damages. State Farm is the insurer on the plaintiffs' homeowner's policy and seeks summary judgment on the grounds that the water and sewage inundation was caused, or contributed to, by blockage in the City's sewer line, and thereby excluded by the terms of the subject insurance policy.

The number of decisions of our appellate courts' decisions addressing summary judgment is legion. In this Court's opinion, the most comprehensive guide that the Mississippi Supreme Court has given the trial bench is found in *Grisham v. John Q. Long V.F.W. Post:*[2]

[1] State Farm previously sought summary judgment, which the Court denied without prejudice, specifically leaving open the possibility that State Farm would renew the motion after further discovery was conducted by the plaintiffs. That discovery has since been conducted.
[2] 519 So.2d 413, 415-416 (Miss. 1988)

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Miss. R. Civ. P. 56(c) provides, in pertinent part, that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The motion for summary judgment is the functional equivalent of the motion for directed verdict made at the close of all the evidence, the difference being that the motion for summary judgment occurs at an earlier stage In deciding the motion. the trial court should view all the evidence—pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any—in the light most favorable to the non-moving party. If, when the evidence is viewed in this light. it is apparent that the moving party is entitled to judgment as a matter of law, the motion should be granted. If not. it should be denied.

Summary judgments should be granted with great caution. The Comment to Rule 56 provides that: "the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. When there is doubt as to whether a genuine issue of material fact exists, the non-moving party should be given the benefit of that doubt, and the motion should be denied.

In spite of this requirement of caution in granting summary judgment, this Court has held that the non-moving party must be diligent in opposing the motion for summary judgment. Moreover. in order for summary judgment to be inappropriate, there must be genuine issues of ***material*** fact; the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material. A fact issue is material if it tends to resolve any of the issues properly raised by the parties.

We have addressed one particular procedural setting in which summary judgment is often an issue. Where a party opposes summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, and when the moving party can show ***a complete failure of proof*** on an essential element of the claim or defense, then all other issues become immaterial, and the moving party is entitled to judgment as a matter of law. [Citations contained therein are omitted].

See also, *Richardson v. Norfolk So. Railway Co.*, 923 So.2d 1002 (Miss. 2006).

The Mississippi Supreme Court recently expounded upon what is meant by judgments as a matter of law. "In essence,...judgments as a matter of law go to the very

heart of a litigant's case and test the legal sufficiency of that litigant's case. In this way, judgments as a matter of law put a party to its proof and are available through a motion at varying junctures of the judicial process before, during, and after trial."[3]

It is against this backdrop that the Court must view State Farm's motion, for the plaintiffs will bear the burden of proof at trial on the essential elements of their claim now being challenged.

Of course, as a contract, it is State Farm's policy that establishes the parameters of its responsibility. According to that policy, excluded from coverage is loss "caused by or resulting from water or sewage from outside the residence premises plumbing system that enters through sewers or drains..."[4] Additionally, and more importantly, is the section titled "Losses Not Insured:

> We do not insure *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 as a result of any combination of these... c. Water Damages, meaning...(2) water or sewage from *outside* the residence premises plumbing system that enters through the sewers or drains... [Emphasis added].[5]

The above provisions of State Farm's policy have been judicially determined to be clear and unambiguous,[6] and State Farm here asserts that there is no factual dispute that the plaintiffs' loss would not have occurred in the absence of "water damage" as defined in those provisions. For the reasons that follow, the Court agrees.

---

[3] *White v. Stewman*, ___So.2d___, No. 2005-IA-00022-SCT (Miss. June 15, 2006)
[4] *See* Policy, Section I, Coverage B-Personal Property, Subsection 12 c.
[5] *Id*, Section I, Losses Not Insured, Subsection 2 c. (2)
[6] *Boteler v. State Farm Cas. Ins. Co.*, [sic] 876 So.2d 1067, 1070 (Miss. 2004); *Rhoden v. State Farm Fire & Cas. Co.*, 32 F.Supp.2d 907, 914 (S.D. Miss. 1998)

In response to State Farm's previous motion, before further discovery was conducted, plaintiffs argued that a fact issue existed as to "whether the sewage flood was caused by the homeowner's service line or in the City's main line or a combination of the two..." That assertion was supported with an interrogatory answer from the City. That argument, however, is untenable for two reasons: first, that answer has been withdrawn and supplemented, and no longer stands for the proposition that the plaintiffs previously asserted; second, under the terms of the policy, it would not matter if there was also blockage in the residence service line, which combined with that in the City's main line, to cause the water damage. We examine these reasons in more detail.

In its Supplemental Response to Interrogatory No. 6,[7] the City states: "On the April 24, 2003 call to the residence of Mr. and Mrs. Flynn Wallace, at 1750 Northwood Circle, it was determined that a choke existed in the main line which was under the City's jurisdiction." David Willis, the City's Rule 30(b)(6) representative, testified:

> Q. And as I understand it, at least, there is no doubt that at least a blockage on the city main line, which is off outside the plumbing system of the residence, contributed to that sewer water getting into that house that day?
>
> A. That would be my assumption, yes, because the main line was choked.
>
> .....
>
> Q. In fact, that's your opinion to what happened?
>
> A. Right now, that, yes, that is the main line was choked and sewer did allegedly back up in Mr. Wallace's house.[8]

Terry Mayfield, Superintendent of the City's Sewer Maintenance Department, swore in his affidavit: "There was blockage on the City's main sewer line which caused

[7] Exhibit "F" to State Farm's motion
[8] p. 187, deposition attached as Exhibit "A" to State Farm's renewed motion for summary judgment

in part or contributed to the entry of water and sewage into the Wallace home..."[9] The deposition testimony of Charles King, the City's wastewater expert is in accord,[10] as is the following representation to the Court by the City's attorney:

> By Mr. Neville: Judge, may I make one point? The City did determine that there was, in fact, a choke in the main line, apparently a choke.
>
> By the Court: You confess cause but not responsibility.
>
> By Mr. Neville: Not responsibility, Your Honor.
>
> By the Court: I understand.[11]

"The attorney's statements constitute an admission under Rule 801(d)(1)(A) of the Mississippi Rules of Evidence."[12]

Plaintiffs, who bear the burden of proof, have failed to respond with any evidence to dispute these matters brought forward by State Farm. In fact, plaintiff Flynn Wallace's deposition supports State Farm's assertions,[13] and the liability reporting claim form signed by Mr. Wallace lists the description of the accident as "Sewer backup of main line into my house."[14]

Without repeating the applicable provisions of the controlling insurance policy, suffice it to say that they exclude coverage even if there were chokes in the main line and the service line. Such would be a concurrent cause, which is clearly excluded from a covered loss.

In a last-ditch effort to avoid summary judgment, plaintiffs argue that even if the cause was a choke in the City's main line, the first water/sewage to enter their house had

[9] Exhibit "C" to State Farm's motion for summary judgment
[10] Exhibit "B" to State Farm's Supplement to Renewed Motion for Summary Judgment
[11] Transcript attached as Exhibit "A" to State Farm's motion for summary judgment
[12] *Rogers v. Rogers*, 662 So.2d 1111, 1115 (Miss. 1995)
[13] Deposition attached as Exhibit "A" to State Farm's renewed motion for summary judgment
[14] Exhibit "N" to State Farm's motion for summary judgment

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MINUTES CIRCUIT COURT, 1ST DISTRICT, HINDS COUNTY _____ TERM, 20____

to have logically been that which was in the residence service line. No pun intended, but that position simply does not hold water, keeping in mind the policy's provision that excludes coverage "whether other causes acted concurrently *or in any sequence* with the excluded event to produce the loss..." [Emphasis added].

Recognizing the skepticism with which the Court is to view motions for summary judgment, it has given plaintiffs ample opportunity to develop some evidence upon which to base their claim against State Farm. It simply is not there and it would be manifestly unjust to require State Farm to further defend this action. While there may still be genuine issues of fact, none are *"material"* factual issues, and State Farm is entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED AND ADJUDGED that State Farm's renewed motion for summary judgment be, and the same is hereby, granted.

SO ORDERED AND ADJUDGED this the 18th day of September, 2006.

CIRCUIT JUDGE

STATE OF MISSISSIPPI, COUNTY OF HINDS
I, Barbara Dunn, Clerk of the Circuit Court in and for the said State and County do hereby certify that the above and foregoing is a true and correct copy of the original Order and the same is of record in this office in Minute Book No. 596 at page 687 - 692
Given under my hand and the seal of the Circuit Court at Jackson, this the 29 day of Jan 2007
BARBARA DUNN, Circuit Clerk
BY: D. Dunn D.C.

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CERTIFICATE OF SERVICE

I, John C. Henegan, an attorney for State Farm Fire and Casualty Company, hereby certify that this 29th day of January, 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.

Richard Scruggs, Esq.
The Scruggs Law Firm, PA
Post Office Box 1136
Oxford, Mississippi 38655
(By U.S. Mail, First Class, properly addressed and postage prepaid)

David Zachary Scruggs, Esq.
The Scruggs Law Firm, PA
Post Office Box 1136
Oxford, Mississippi 38655
(By U.S. Mail, First Class, properly addressed and postage prepaid)

Don Barrett, Esq.
Barrett Law Offices
Post Office Box 987
Lexington, Mississippi 39095-0987
(By U.S. Mail, First Class, properly addressed and postage prepaid)

John Jones, Esq.
Jones, Funderburg, Sessums,
Peterson & Lee
Post Office Box 13960
Jackson, Mississippi 39236-3960
(By U.S. Mail, First Class, properly addressed and postage prepaid)

Benjamin H. McGee, III, Esq.
The Scruggs Law Firm, PA
Post Office Box 1136
Oxford, Mississippi 38655
(By U.S. Mail, First Class, properly addressed and postage prepaid)

Dewitt M. Lovelace, Esq.
Lovelace Law Firm, P.A.
36474 Emerald Coast Parkway, Suite 4202
Destin, Florida 32541
(By U.S. Mail, First Class, properly addressed and postage prepaid)

Mary E. McAlister
Nutt & McAlister, PLLC
605 Crescent Blvd., Suite 200
Ridgeland, Mississippi 39157
(By U.S. Mail, First Class, properly addressed and postage prepaid)

THIS, the 29th day of January, 2007.

John C. Henegan

JOHN C. HENEGAN

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 13,992 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.

John C Henegan

JOHN C. HENEGAN

ATTORNEY FOR STATE FARM
FIRE AND CASUALTY COMPANY

Jackson 1856325v.2