

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

MICHAEL PAYMENT, M.D.

PLAINTIFF

VS.

**CIVIL ACTION NO.
1.07CV01003-LTS-RHW**

**STATE FARM FIRE AND CASUALTY
COMPANY**

DEFENDANT

**PLAINTIFF MICHAEL PAYMENT, M.D.'S RESPONSES TO
DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S
MOTIONS IN LIMINE NOS. 9 AND 10**

INTRODUCTION

In Defendant's Motion in Limine No. 10, Defendant moves this court to rule that Dr. Payment's acceptance of flood insurance benefits constitutes a judicial admission that at least that amount of destruction was caused by flood damage. Building on this motion, Defendant moves in its Motion in Limine No. 9 to preclude any evidence, including the expert testimony of Dr. Neil Hall, that Dr. Payment's home was completely destroyed by wind. Under the guise of an evidentiary motion, Defendant seeks a judicial declaration on the central issue of causation without regard to the facts and to thereby remove this contested issue of fact from the province of the jury. As Defendant's Motion in Limine No. 9 is inextricably predicated on a favorable ruling with regard to Defendant's Motion in Limine No. 10, Dr. Payment responds to both motions concurrently. For the reasons set forth herein, both motions should be denied.

ARGUMENT

I. DEFENDANT'S MOTIONS IN LIMINE NOS. 9 AND 10 SHOULD BE DENIED BECAUSE DEFENDANT FAILED TO PLEAD ESTOPPEL AS AN AFFIRMATIVE DEFENSE IN ITS ANSWER IN ACCORDANCE WITH FRCP 8(c).

Defendant is attempting to advance estoppel as a defense through these motions. Under FRCP 8(c), a defendant must plead the affirmative defense of estoppel in its answer. Fed. R. Civ. P. 8(c). The defendant's failure to raise the affirmative defense of judicial estoppel in conformity with FRCP 8(c) constitutes a waiver. *See U.S. ex rel. Am. Bank v. C.I.T. Constr. Inc. of Tex.*, 944 F.2d 253, 258 (5th Cir. 1991). Where the plaintiff is prejudiced by the defendant's belated raising of the defense, no exception to this rule can lie. *See Lucas v. U.S.*, 807 F.2d 414, 418 (5th Cir. 1986). *See also RCSH Operations, L.L.C. v. Third Crystal Park Assocs., L.P.*, 115 Fed. Appx. 621, 631 n.10 (4th Cir. 2004) (affirming district court's finding under FRCP 8(c) that plaintiff was prejudiced by defendant's belated raising of an affirmative defense).

Defendant did not plead the affirmative defenses of judicial estoppel/judicial admission in its answer as required by FRCP 8(c), yet it now wishes to raise these defenses for the first time after sixteen months of litigation and the completion of discovery. As the discovery and motion deadlines have come and gone, Defendant's belated assertion of these defenses little more than a week prior to the pretrial conference is not only untimely but severely prejudices Dr. Payment. A central issue in the compensatory phase of this case is whether and to what extent Dr. Payment's loss was caused by wind damage, a covered peril under his homeowner's policy. Central to Dr. Payment's proof as to this issue is the expert testimony of Dr. Neil Hall, whom Dr. Payment has relied on in this litigation to render his expert opinion as to the causal factors precipitating the destruction of his home. Defendant seeks to employ judicial estoppel principles

as a means of precluding Dr. Hall's testimony and the presentation of contested issues of fact at trial.

Defendant's tack in this regard is further evidence of its bad faith handling of the claim and dealing with its insured. Following Hurricane Katrina, Dr. Payment called his State Farm agent, Kay Venable, for help. She initiated the claim. *See Venable Deposition*, pp. 96-99, attached as Exhibit C. Thereafter, on its own volition, and not by request of Dr. Payment, Defendant dispatched Brady Hyde, a flood claim adjustor, to inspect the property. Before seeing Dr. Payment's house, Defendant's agent declared that a flood payment would issue. *See Payment Deposition*, pp. 76-79, attached as Exhibit A. Unbeknownst to Dr. Payment, whose property was completely destroyed, Defendant's plan, as now unveiled, was to place its insured in an untenable position. Simply, Defendant has/is attempting to seize on its unequal bargaining strength against its particularly distressed insured. The courts in Mississippi have and continue to punish such conduct. *E.g., United Am. Ins. Co. v. Merrill*, 978 So. 2d 613, 636-37 (Miss. 2007).

To give this effect to Defendant's belated assertion of defenses sounding in estoppel at this late stage of the litigation will gravely prejudice, if not utterly undermine, Dr. Payment's ability to pursue his coverage claim in the initial phase of this trial. The severity of the prejudice that will result if Defendant is permitted to belatedly assert these defenses demands enforcement of FRCP 8(c) in this case. For these reasons, Defendant's Motions in Limine Nos. 9 and 10 should be denied.

II. IN THE ALTERNATIVE, DEFENDANT'S MOTIONS IN LIMINE NOS. 9 AND 10 SHOULD BE DENIED BECAUSE DEFENDANT EFFECTIVELY SEEKS A RULE 56 SUMMARY JUDGMENT RULING ON ITS ESTOPPEL DEFENSES BEYOND THE DEADLINE FOR DISPOSITIVE MOTIONS.

Even if the court were to determine that Defendant's estoppel defenses were timely raised, the court should decline to rule on them at this late date. Although Defendant styles its requested relief as "motions in limine," such relief in substance has the effect of a dispositive Rule 56 summary judgment determination as to affirmative defenses sounding in estoppel. The deadline for dispositive motions passed on November 13, 2008. In light of the deadline imposed by the court, even if Defendant is deemed to have timely raised its estoppel defenses, it cannot seek a ruling on them at this late date. For these reasons, Defendant's Motions in Limine Nos. 9 and 10 should be denied.

III. DEFENDANT'S MOTIONS IN LIMINE NOS. 9 AND 10 SHOULD BE DENIED BECAUSE PLAINTIFF'S ACCEPTANCE OF FLOOD POLICY BENEFITS (1) DOES NOT CONSTITUTE A JUDICIAL ADMISSION, (2) DOES NOT SUPPORT JUDICIAL ESTOPPEL, AND (3) AT BEST CONSTITUTES A NON-BINDING EVIDENTIARY ADMISSION SUBJECT TO CONVTRVERSION BY DR. PAYMENT.

A. Dr. Payment's acceptance of flood policy benefits cannot constitute a judicial admission because such acceptance did not occur during the course of a judicial proceeding. Furthermore, under the circumstances, such acceptance was not deliberately, clearly, and unequivocally assertive of a particular amount of flood damage.

It is well settled that a "judicial admission" is a "*formal concession in the pleadings or stipulations by a party or counsel.*" *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001) (emphasis added). See KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 254 (6th ed. 2006). Under established Mississippi and Fifth Circuit precedent, to qualify as a "judicial admission," a statement must be "*made during the course of a judicial proceeding.*" *Thomas v. Prewitt*, 355 So. 2d 657, 661 (Miss. 1978) (emphasis added). *Accord Heritage Bank*

v. Redcom Labs., Inc., 250 F.3d 319, 329 (5th Cir. 2001). Furthermore, it must be “*deliberate, clear, and unequivocal.*” *Thomas*, 355 So. 2d at 661 (emphasis added). *Accord Heritage Bank*, 250 F.3d at 329; *In re Corland Corp.*, 967 F.2d 1069, 1074 (5th Cir. 1992).

Dr. Payment’s acceptance of flood policy benefits does not constitute a judicial admission. First, Dr. Payment’s acceptance of flood policy benefits was not a statement made during the course of a judicial proceeding. Dr. Payment received flood policy benefits on or about September 12, 2005. The instant action was not filed until August 9, 2007. Because Dr. Payment’s acceptance of flood policy benefits occurred well before any judicial proceedings were initiated in this matter, such acceptance simply cannot be construed as a statement made during the course of a judicial proceeding and therefore is not a judicial admission.

Secondly, even if one were to somehow construe Dr. Payment’s acceptance of flood policy benefits as a statement made during the course of a judicial proceeding, such acceptance *still* does not constitute a judicial admission because it does not represent a formal concession in the pleadings, nor has Dr. Payment or his counsel ever stipulated that such acceptance is conclusively representative of anything. Furthermore, at the time Dr. Payment accepted the flood policy benefits, he did so under great duress in the aftermath of Hurricane Katrina. At that time, he did not believe such acceptance to be an admission regarding the cause of the home’s destruction. *See* Payment Deposition, p. 88, attached as Exhibit A. Consequently, even if it *had* occurred during the course of a judicial proceeding, the act of accepting the flood policy benefits did *not* represent the sort of “deliberate, clear, and unequivocal” assertion required to render Dr. Payment’s acceptance a judicial admission.¹

¹ Indeed, even testimonial admissions are not binding on the declarant when in the nature of an opinion or conclusion to which the declarant may honestly be mistaken, or when such testimony is disputed by the physical facts. *See Bradshaw v. R.H. Stieffel*, 92 So. 2d 565, 567 (Miss. 1957); *Green v. Middleton*, 171 So. 2d 500, 502 (Miss. 1965); *Shearron v. Shearron*, 68 So. 2d 71, 75-76 (Miss. 1953).

As a final point, Defendant's argument on this issue is quite disingenuous in light of its own contradictory assertions as to the relative degree to which wind and water destroyed Dr. Payment's home. In his April 1, 2008, letter to Dr. Payment, Defendant's attorney, well after the initiation of judicial proceedings in this matter, admitted that Dr. Payment's home "may have suffered wind damage." Perkins Letter, p. 1, attached as Exhibit D. Further, the Katrina resolution form contained in Defendant's claim file, dated July 17, 2007, reflects Defendant's acknowledgement of at least \$240,000 in wind-related damage. See Re-Evaluation Re-Cap Form, attached as Exhibit E. As the court has already observed, Defendant's failure and refusal to tender uncontested benefits is the subject of proof for the jury's consideration. Only sixteen days after defense counsel's admission, in a sworn answer to Dr. Payment's interrogatories, Defendant stated its contention that all of the damage was caused by water. Defendant's Interrogatory Answer # 7, attached as Exhibit F. As a result of these contradictory assertions, both made in the course of this proceeding, Defendant can hardly be heard to argue that extrajudicial conduct of Dr. Payment conclusively bound him to a position relative to the causal factors precipitating his loss. Indeed, defendant's own admission serves as grounds to deny the present motions.

In support of its contention that a policyholder's acceptance of flood policy benefits constitutes a judicial admission of flood damage at least equal to the amount of benefits accepted, Defendant cites other Hurricane Katrina cases wherein this court has so held. However, in light of controlling precedent discussed *supra* which clearly excludes extrajudicial statements from the ambit of judicial admissions, these cases should not be extended to mandate the finding of a judicial admission in the case at bar. In addition to these cases, Defendant cites

Mayton v. Auto-Owners Ins. Co., No. Civ.A.3:05CV667, 2006 WL 1214831, at *3 (E.D. Va. May 2, 2006), for the proposition that a claim on a flood policy constitutes an “admission against interest” by the policyholder. An “admission against interest” is not a binding judicial admission; rather, it constitutes nothing more than a non-conclusive and rebuttable evidentiary admission which is subject to contradiction and explanation by the declarant. See MCCORMICK ON EVIDENCE § 254. See also discussion in Part C., *infra*. As such, citation to *Mayton* does nothing to advance Defendant’s argument that acceptance of flood policy benefits should be deemed a *judicial* admission binding on the policyholder in the manner asserted.

Dr. Payment’s acceptance of flood policy benefits does not constitute a judicial admission of flood damage because such acceptance does not satisfy the legal requirements for a “judicial admission.” Specifically, Dr. Payment’s acceptance of flood policy benefits was not made during the course of a judicial proceeding and therefore *at best* can constitute nothing more than a non-conclusive and rebuttable evidentiary admission. Furthermore, in the context in which Dr. Payment accepted flood policy benefits in the aftermath of Hurricane Katrina, his acceptance did not constitute a deliberate, unequivocal assertion that flood damage occurred. For all these reasons, Dr. Payment’s acceptance of flood policy benefits should not be deemed a judicial admission of flood damage equal to the amount of the benefits accepted and Defendant’s motions should be denied.

B. Dr. Payment’s acceptance of flood policy benefits cannot support judicial estoppel because such acceptance occurred outside the context of a judicial proceeding. Furthermore, it was never advanced as an argument ultimately relied upon by the court in any phase of this case.

In addition to the Hurricane Katrina cases alluded to *supra*, Defendant cites a prior decision of this court which held that acceptance of flood policy benefits “judicially estopped” the policyholder from denying that some flood damage occurred. See *Mills v. State Farm Fire &*

Cas. Co., No. 1:07CV73 LTS-RHW, 2007 WL 1514021, at *5 (S.D. Miss. May 21, 2007). For the reasons discussed *infra*, judicial estoppel should not be applied in the case at bar to preclude Dr. Payment from introducing evidence that wind alone caused the loss.

As a general rule, judicial estoppel prevents a party from *prevailing on a given argument in one phase of the case* and then relying on a contradictory argument to prevail in a later phase. *Harrell v. CheckAGAIN, LLC*, 248 F.R.D. 199, 203 (S.D. Miss. 2006). The Fifth Circuit has repeatedly held that judicial estoppel may only be applied where the party to be estopped *succeeded in convincing the court of its previous position*. *Id.* at 204; *Galloway v. Stinger Wellhead Prot., Inc.*, 446 F. Supp. 2d 655, 657 (S.D. Miss. 2006). This requirement is met “when a court has ‘*necessarily accepted and relied on*’ a party’s position” in “*expressly decid[ing]*” an issue. *GP Plastics Corp. v. Interboro Packaging Corp.*, 108 Fed. Appx. 832, 835 (5th Cir. 2004) (emphasis added). When at no point in a judicial proceeding did a party ever “clearly convince[.]” the court to accept its previous position, the party was *not judicially estopped* from claiming that position. *Goldman v. Halliburton Energy Servs.*, 224 Fed. Appx. 317, 319 (5th Cir. 2007).

Moreover, judicial estoppel does not apply when a party makes admissions or statements *without full knowledge of the facts*. See *Walker v. Am. Motorists Ins. Co.*, 529 F.2d 1163, 1164 (5th Cir. 1976); *Thomas v. Bailey*, 375 So. 2d 1049, 1053 (Miss. 1979). See also 31 C.J.S. *Estoppel and Waiver* § 186 (2008). In *Walker*, the defendant-insurer argued that the plaintiff-insureds were judicially estopped from claiming coverage under an automobile policy given their position in a prior lawsuit that coverage did not exist. *Walker*, 529 F.2d at 1164. On appeal, the Fifth Circuit held that the doctrine of judicial estoppel was inapplicable because the insureds adopted the no-coverage position in the first lawsuit based on the representations of the insurer.

Id. (favorably noting insureds' assertion that existence of coverage for physical damage was not established until second lawsuit).

Judicial estoppel is inapplicable in the case at bar because Dr. Payment's acceptance of flood policy benefits occurred *prior to* the initiation of any judicial proceeding and thus cannot constitute an argument advanced by him in *any* phase of this case. Furthermore, at no point in this litigation has Dr. Payment "clearly convinced" the court to accept the position that a portion of his losses were caused by flooding, nor has this court ever "accepted or relied" on such a position in "expressly deciding" any issue in this case. These reasons notwithstanding, judicial estoppel would not apply in any event because Dr. Payment did not have full knowledge of the facts at the time he accepted the flood policy benefits. Moreover, analogous to the situation in *Walker*, Dr. Payment's acceptance of the flood policy benefits was predicated on Defendant's own representations that the loss was caused by flooding. *See Hyde Deposition*, pp. 56-62, attached as Exhibit B. *See Payment Deposition*, pp. 87-89, attached as Exhibit A.

Judicial estoppel is wholly inapplicable in this case. Dr. Payment's acceptance of flood policy benefits occurred well before the initiation of any judicial proceeding. At no point did Dr. Payment attempt to convince or succeed in convincing this court that a portion of his losses were caused by flooding, nor has this court ever relied on such an assertion by Dr. Payment in deciding any issue in this case. Furthermore, Dr. Payment was not present during the hurricane and did not have full knowledge of the facts surrounding causation at the time he accepted the flood policy benefits. For all of these reasons, judicial estoppel cannot be applied to preclude Dr. Payment from now asserting that wind alone caused his loss.

C. If an admission at all, Dr. Payment's acceptance of flood policy benefits constitutes nothing more than a non-binding evidentiary admission subject to controversion by Dr. Payment. Consequently, Dr. Payment should not be precluded from offering the testimony of Dr. Neil Hall to prove that wind, not water, caused his loss.

Because Dr. Payment's acceptance of flood policy benefits does not constitute a judicial admission (for reasons discussed *supra*), then if it be an admission at all, it must by default constitute an extrajudicial, evidentiary admission. *See Martinez*, 244 F.3d at 476. *See also* MCCORMICK ON EVIDENCE § 254. As a general rule, evidentiary admissions are not conclusive and may be retracted, controverted, or explained by the party who made them. *Martinez*, 244 F.3d at 476-77; *Brown & Root, Inc. v. Am. Home Assurance Corp.*, 353 F.2d 113, 116 (5th Cir. 1965); *Callicott v. Gresham*, 161 So. 2d 183, 188 (Miss. 1964); *Matthews v. Carpenter*, 97 So. 2d 522, 526 (Miss. 1957). Once this occurs, it is for the trier of fact to evaluate the admission in light of all the evidence. *Brown & Root*, 353 F.2d at 116; *Matthews*, 97 So. 2d at 526. Accordingly, the party making the admission may "proceed with his proof in denial of its correctness." *Callicott*, 161 So. 2d at 188.

Only when some ground for estoppel exists may an extrajudicial admission be deemed conclusive against the party who made it. *See Callicott*, 161 So. 2d at 188; *Atl. Life Ins. Co. v. Serio*, 157 So. 474, 475 (Miss. 1934). It is well settled that estoppel will not lie absent the asserting party's reliance to his damage on the representation at issue. *E.g., McCrary v. City of Biloxi*, 757 So. 2d 978, 981 (Miss. 2000). Moreover, under Mississippi law, where the parties were "equally informed as to the essential facts" or where the "means of knowledge were equally open to them," Mississippi courts will not give effect to estoppel. *Barnett v. Getty Oil Co.*, 266 So. 2d 581, 587 (Miss. 1972). *See Crooker v. Hollingsworth*, 46 So. 2d 541, 544 (Miss. 1950). *See also* 31 C.J.S. *Estoppel and Waiver* § 111 (2008).

In the case at bar, Dr. Payment's acceptance of flood policy benefits constitutes, at best, an extrajudicial evidentiary admission; therefore, it is not conclusive and cannot preclude Dr. Payment from presenting the expert testimony of Dr. Neil Hall and other evidence to prove that his loss was caused by wind.

There can be no estoppel here for at least two reasons. First, because on Defendant's own accord it presented benefits to Dr. Payment which it attributed to his flood policy, Defendant did not rely to its detriment as required to assert the defense of estoppel. In recommending such payment under the flood policy, Defendant functioned only as a third-party adjustor in the administration of federal flood funds. Because Defendant had no proprietary interest in the funds disbursed to Dr. Payment, Defendant indisputably suffered no damage, pecuniary or otherwise, in Dr. Payment's acceptance of these funds. On this ground alone, the facts of this case do not support estoppel.

Secondly, estoppel cannot lie in this case because Defendant had equal access to any and all information accessible to Dr. Payment prior to and upon Dr. Payment's acceptance of benefits under his flood policy. Pursuant to his homeowner's policy, shortly after the storm Dr. Payment timely notified his agent, Kay Venable, that his home had been destroyed by Hurricane Katrina. Venable Deposition, pp. 98-100, attached as Exhibit C. On September 11, 2005, Defendant dispatched Brady Hyde, a flood adjustor, to the Payment property to assess the damage and adjust any losses which he deemed were caused by flooding. Hyde Deposition, pp. 49-56, attached as Exhibit B. On the basis of his visit to the Payment property, Mr. Hyde recommended payment under the flood policy. See Hyde Deposition, p. 62, attached as Exhibit B. At the time Dr. Payment accepted the flood policy benefits, he had no greater knowledge of the degree to which the causal factors of wind and water precipitated his loss than did Defendant. Dr.

Payment was not present on the property when Hurricane Katrina made landfall. Furthermore, Dr. Payment took no action to preclude Defendant from performing additional site assessments of his property following Mr. Hyde's visit. Indeed, Defendant initially denied Dr. Payment's claim based upon its inspection of Dr. Payment's uncle's house, then changed its position when it realized his uncle did not have flood insurance. *See* post-Katrina photographs of Ted's house, attached as Exhibit G. In short, at all times relevant to this issue, Defendant knew every pertinent fact and was thereby equally informed as to the essential facts. Furthermore, the means of determining the cause of Dr. Payment's loss were "equally open" to both parties at the time flood benefits were paid. For both of these reasons, there can be no estoppel predicated on Dr. Payment's acceptance of such benefits.

Absent estoppel, Dr. Payment's acceptance of flood policy benefits at best constitutes nothing more than a non-binding, extrajudicial evidentiary admission that is conclusive of nothing. Under well-settled principles of evidence law, Dr. Payment has every right to "proceed with his proof in denial of its correctness." Consequently, Dr. Payment cannot be precluded from offering evidence, including Dr. Neil Hall's testimony, to show that wind, not water, caused the loss of his home and contents. Defendant will have the opportunity to cross-examine witnesses on the acceptance of flood policy benefits. However, the central issues of causation and Defendant's handling of this claim are matters squarely within the province of the jury, and Dr. Payment's acceptance of flood policy benefits and his subsequent claims regarding wind damage must be weighed by the jury in light of all the evidence. There is no basis for striking or precluding Neil Hall's expert testimony or granting what would be a preemptory finding before the evidence is presented.

D. Defendant's motion to exclude Dr. Neil Hall's testimony under FRE 403 should be denied because his testimony is probative of facts bearing on a central issue.

Defendant moves in the alternative for a ruling to preclude Dr. Neil Hall's testimony under FRE 403. Defendant argues that Dr. Hall's testimony, if admitted concurrent with a finding that Dr. Payment has judicially admitted \$250,000 in flood damage, would have "minimal probative value," resulting in unfair prejudice, confusion of the issues, and the misleading of the jury. This proposition cannot withstand analysis. The issue of coverage turns on whether and to what extent wind caused the destruction of Dr. Payment's home. The testimony of Dr. Hall, a building damage assessment expert, is highly probative of this issue because it increases the probability that the home was destroyed by wind. *See United States v. Duncan*, 919 F.2d 981, 987 (5th Cir. 1990). Hence, Defendant's claim that Dr. Hall's testimony has "minimal probative value" is simply untenable. Furthermore, because Dr. Hall's testimony substantiates a central issue in this case, its probative value should not be deemed to be outweighed by the concerns articulated in FRE 403. *See U.S. v. Wilson*, 355 F.3d 358, 361 (5th Cir. 2003) (affirming district court's determination that probative value was not substantially outweighed by danger of unfair prejudice when evidence in question "substantiated a central issue in the case"). For these reasons, the court should deny Defendant's motion to exclude Dr. Hall's testimony under FRE 403.

E. From an equity standpoint alone, the court should not permit an extrajudicial act undertaken in the wake of Hurricane Katrina to foreclose any subsequent judicial determination of coverage under Dr. Payment's homeowner's policy.

In moving to preclude Dr. Neil Hall's expert testimony, Defendant seeks to exclude Dr. Payment's primary proof of the extent to which the loss of his home fell within the coverage of his homeowner's policy. Defendant seeks to remove from the province of the jury evidence going to the issue which lies at the core of the compensatory phase of the trial: whether and to

what extent wind, not water, caused the destruction of Dr. Payment's home. Defendant seeks to accomplish this result solely on the ground that Dr. Payment, in the wake of an extraordinary hurricane which destroyed his home, accepted payment of benefits under his flood policy. Legal impediments aside, it smacks of unconscionability to permit the extrajudicial act of a policyholder under such duress to foreclose any subsequent judicial determination of coverage under his homeowner's policy. This is particularly so when the insurer may, if at all only, be entitled to offset any recovery under Dr. Payment's homeowner's policy by the amount of the flood insurance payment, such that the maximum amount recoverable does not exceed the total loss sustained. For this reason alone, the court should deny the contested motions and decline to countenance such a harsh and inequitable result.

IV. IN THE FURTHER ALTERNATIVE, DEFENDANT'S MOTIONS IN LIMINE NOS. 9 AND 10 SHOULD BE DENIED BECAUSE DEFENDANT CONCEALED ITS PLAN TO URGE ESTOPPEL AND THERE WAS NO MEETING OF THE MINDS.

In furtherance of its estoppel theory, Defendant essentially asks this court to affirm an accord and satisfaction. Such is plainly evident from Defendant's asserted position that acceptance of an insurance benefit precludes (or estops) a party from presenting proof without regard to the facts.

The method by which Defendant seeks to invoke estoppel is through the application of accord and satisfaction. Indeed, Defendant urges that, having accepted flood benefits, despite not knowing at the time (see Payment Deposition, pp. 87-89, 202, attached as Exhibit A) what forces destroyed his property, Dr. Payment should be precluded from presenting his case since apparently he "agreed" with Defendant's determination of flood as the cause of the loss.

Accord and satisfaction consists of four basic elements: (1) something of value must be offered in full satisfaction of demand; (2) the offer must be accompanied by acts and a

declaration which amount to a condition that if the thing offered is accepted, it is accepted in satisfaction; (3) the party offered the thing of value is bound to understand that if he takes it, he takes it subject to the conditions; and (4) the party must actually accept the item offered. *Scott v. Gammons*, 985 So. 2d 872, 876 (Miss. Ct. App. 2008).

Dr. Payment had made no demand under any particular coverage, rather he merely called his agent for help. Defendant decided to dispatch its flood adjustor.

There was no act or declaration by anyone that the tender of \$250,000 (which actually was paid by the National Flood Insurance Program) would settle all or any part of the claim and certainly was no absolution of Defendant's liability under its homeowner's policy.

Lastly, there were no conditions or terms of acceptance and certainly Dr. Payment did not accept subject to any terms. Indeed, based on Defendant's current position, it now appears that Defendant engaged in fraud and deceit in tendering funds without disclosing to Dr. Payment the position that it would later take. Not only was/is there no accord and satisfaction (or estoppel), the reprehensible conduct of Defendant in this regard is further evidence of its misdeeds in the handling of this claim. These facts should be fully developed for the jury as it weighs all of the evidence in this case.

CONCLUSION

Under well-settled, controlling principles of procedure and evidence law, Defendant's Motions in Limine Nos. 9 and 10 should be denied. By failing to plead estoppel in its answer to the extreme prejudice of Dr. Payment, Defendant has waived this defense and cannot raise it now. Alternatively, even if the court were to deem Defendant's estoppel defenses to be timely raised, Defendant cannot now seek the effective equivalent of a Rule 56 determination on such defenses beyond the dispositive motion deadline. In the further alternative, Dr. Payment's

acceptance of benefits under his flood policy cannot constitute a judicial admission because such acceptance did not occur during the course of a judicial proceeding, nor was it sufficiently deliberate and unequivocal under the circumstances as an assertion of Dr. Payment. Similarly, Dr. Payment's acceptance of flood benefits does not support judicial estoppel. Such acceptance occurred outside the context of a judicial proceeding and was never advanced as an argument ultimately relied upon by the court in any phase of this case. If Dr. Payment's acceptance of flood policy benefits constituted an admission at all, it must be deemed a non-binding evidentiary admission subject to controversion by Dr. Payment. Consequently, Dr. Payment now has every right to offer evidence, including the expert testimony of Dr. Neil Hall, to prove that wind, not water, caused the loss of his home. Furthermore, because the testimony of Dr. Neil Hall to that effect is undeniably relevant to the central issue in this case, such testimony is not substantially outweighed by any of the concerns articulated in FRE 403 and is squarely within the province of the jury. Finally, Defendant concealed its plan to urge estoppel and there was no meeting of the minds. For all these reasons, the court should deny Defendant's Motions in Limine Nos. 9 and 10 and admit the testimony of Dr. Neil Hall.

WHEREFORE, PREMISES CONSIDERED, plaintiff requests that the court make and enter its order denying Defendant's Motion in Limine No. 9 and Motion in Limine No. 10 in their entirety.

Respectfully submitted,

MICHAEL PAYMENT, M.D.

BY: /s/ Eugene R. Naylor

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CERTIFICATE OF SERVICE

I, Eugene R. Naylor, one of the attorneys for Michael Payment, M.D., hereby certify that I have this day caused to be served via electronic filing, a true and correct copy of the above and foregoing document to the following:

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This the 15th day of December, 2008.

/s/ Eugene R. Naylor

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
3 SOUTHERN DIVISION

4 MICHAEL PAYMENT, M. D. PLAINTIFF

5 VERSUS NO. 1:07CV1003LTS-RHW

6 STATE FARM AND CASUALTY COMPANY DEFENDANT

7
8 **DEPOSITION OF MICHAEL PAYMENT, M. D.**

9 Taken at the instance of the Defendant on
10 Tuesday, September 9, 2008, at the offices of
11 Wise, Carter, Child & Caraway,
12 401 East Capitol Street, Jackson, Mississippi,
beginning at approximately 9:00 a.m.

13 APPEARANCES:

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COPY

EXHIBIT

A

tabbles

1 you have any contact or --

2 A. Yes.

3 Q. -- interaction from Mr. Hyde? Tell me
4 about your interaction with Brady Hyde.

5 A. Well, Brady Hyde, after I filed my claim,
6 he -- he called me, I believe, and we set up a time
7 to meet, and it was approximately two weeks after
8 the storm. We met at my front gate and we went --
9 we went and examined the property.

10 Q. How long were you with Mr. Hyde that day,
11 approximately?

12 A. A few hours.

13 **MR. NAYLOR:** How long? I didn't hear you.

14 A. I think a few hours. Two or three.

15 Q. **(By Mr. Banahan)** And what did Mr. Hyde
16 examine or look at?

17 A. He examined the drive and the -- and
18 the -- and the house. I don't know if he examined
19 the boathouse and the summerhouse. I just don't
20 recall.

21 Q. Do you recall any conversations, any
22 specific conversations that stick out?

23 A. Yeah. Vividly.

24 Q. Tell me about that if you will.

25 A. When we met at the end of the driveway,

1 the driveway was completely covered. It was
2 impassable due to the numerous trees, and the
3 driveway is about three-quarters of a mile in
4 length, so we had to hike down the driveway,
5 climbing over trees, et cetera. We were down
6 approximately just a third of the way down the
7 driveway when he looked at me, and as he observed
8 the surroundings he said, "It looks like a tornado
9 came through here."

10 And, so, we went on down further and as we
11 were making conversation, to -- to my recollection
12 we were about two-thirds of the way down the
13 driveway, when he said to me that he could get me
14 flood -- he could get me flood coverage, but he
15 said, "I don't know what the company is going to do
16 about the wind."

17 When we got down to the house and we were
18 able to inspect it, he confirmed the fact that he
19 would be able to get me flood monies. He may have
20 taken pictures. I don't recall. I don't recall him
21 taking notes, per se. I -- I really let him do his
22 own job as I probably picked -- picked around and
23 looked at the debris.

24 Q. Okay. In the course of conversation, did
25 he give you any indication as to how long he had

1 been on the ground or if he'd been working in the
2 area, looking at any other losses or anything like
3 that?

4 A. No, I don't recall.

5 Q. Okay. Did you get any impression one way
6 or the other as to where your home was in the
7 progression of his work on the cost? For example,
8 did you get an impression as to whether or not he
9 had looked at other losses before he got to yours,
10 or --

11 A. No, I didn't.

12 Q. Do you remember anything else specifically
13 in the way of conversations you had with him other
14 than what you've just described to me? And you told
15 me about the comment he made a third of the way down
16 the drive. I assume from that you're saying from
17 Arcadian --

18 A. Arcadia.

19 Q. -- Arcadia, I'm sorry, moving towards your
20 house about a third of the way down the drive, he
21 made the comment about, "it looks like a tornado
22 came through here." And then you said about
23 two-thirds of the way down he said he thought he
24 could get you flood coverage but didn't know what
25 the company would do on wind. And then when you got

1 to the house, he confirmed that he could get you
2 flood coverage.

3 Did you ask him what he meant by that or
4 was there any further discussion to follow-up that
5 comment?

6 A. We did have a little brief -- and this is
7 talk -- this is -- as I recall, in my mind we were
8 at that point at the two-thirds down the driveway
9 when you're not yet able to see the -- the house.
10 We did speak about -- when he said, "I don't know
11 what the company is going to do about water" --
12 I mean, "about wind," I think we did have a little
13 conversation at that point, but I really don't
14 recall any specifics.

15 Q. When he said -- at any point when he said
16 he thought he could get you flood coverage either
17 walking down the drive or at the house, did you take
18 issue with that?

19 A. I think that's where I -- I'm -- I'm
20 trying to remember in that -- that point where we
21 did discuss it. I -- I thought I was trying to tell
22 him that, yes, this is going to be one of those wind
23 versus water arguments and they obviously thought
24 that there was wind damage and that he would soon
25 see it.

1 **MR. NAYLOR:** Yeah.

2 **THE WITNESS:** I had?

3 Q. **(By Mr. Banahan)** You don't need to tell
4 me about visiting with Gene or anything here.

5 A. I don't -- I don't recall.

6 **MR. NAYLOR:** Let me clarify, too. Because
7 Matt, in your office, did send us a portion of -- a
8 small portion of a payment, the details of which
9 I don't have right in front of me, but it was based
10 on some reconsideration by State Farm sent to us
11 without prejudice. So just to correct that,
12 I received it. He didn't receive it.

13 Q. **(By Mr. Banahan)** There's been some tender
14 of some monies after, and I recall but I don't
15 remember how much, but there was some small tender
16 made after you had an attorney. Is that the
17 consensus here?

18 A. Much after. I think at the time of our --
19 around the time that we first met that was the first
20 time I had been made aware that they had sent a
21 check and that was around the time of that --

22 Q. Mediation?

23 A. Mediation.

24 Q. All right. Then you said you
25 questioned -- I guess questioned yourself about the

1 \$250,000 flood payment. Did you ever question
2 anyone else about it?

3 A. I don't recall. I -- I would have to --
4 I don't think so. The reason I questioned it is:
5 Do I cash this check? Does that mean I accept
6 State Farm's evaluation and determination that this
7 was all flood; and by accepting it and cashing it,
8 I have -- I have now agreed to it; that, yeah,
9 I agree with their findings, you know. As opposed
10 to if it was 50 percent wind and 50 percent water,
11 you know, I -- I knew that then some of that flood
12 money would -- I might have to give back.

13 Q. What was -- at the time you received the
14 check for the flood coverage, the \$250,000, was it
15 your opinion, your own personal opinion at that time
16 that there had been some flood damage and some wind
17 damage to your home?

18 A. I wasn't there to know, quite frankly.
19 The -- it's -- it's -- I wasn't going to turn away
20 \$250,000. But I knew by accepting it I wasn't
21 admitting, you know, that, yeah, yes, indeed, that
22 house was destroyed by water. So it was a selfish
23 thing to accept the money, but it was hard not to
24 accept it.

25 Q. I'm not asking you if you were of the

1 opinion that it was all-or-nothing, all wind, all
2 water. I'm asking was it your opinion, when you
3 received the \$250,000 from the flood money, that
4 your house had sustained some damage from the flood
5 and some damage from wind?

6 A. Yes.

7 Q. Did you have any way of knowing how much
8 of either when you received that check?

9 A. Only my personal belief or feeling from
10 what I had observed.

11 Q. Was anybody on the ground, Uncle Ted's
12 house or anywhere, that stayed there during the
13 storm that saw what happened to your house during
14 the storm to know what the sequence of events was or
15 know whether the roof blew off or the house washed
16 out from under the roof?

17 A. No one was there. I was the last person
18 on the property and I vacated around 12:30, just
19 after midnight.

20 Q. That brings up a question. Were you --
21 how much time were you spending in Bay Saint Louis
22 versus Jackson in 2005, before the storm, before
23 August 29th, 2005?

24 A. From -- from June -- June 1st of 2005,
25 I was there a hundred percent of the time. I had

1 requires 21 feet, something about a foot of
2 baseboard or having -- but 21 feet, I think, by FEMA
3 standards. That's not the requirement though.

4 Q. What are you going -- what is your plan?

5 A. My plan is to go to 21 feet.

6 Q. 21 feet. So you're going 11 feet higher
7 than you were before?

8 A. Correct.

9 Q. I've asked you about everything I wanted
10 to ask you about the house. Is there -- and the
11 damage to the house, and I think you told me
12 everything that you say transpired between you and
13 State Farm either in procurement of your coverage or
14 in the handling of your claim; is that right? Have
15 we covered everything as far as communication that
16 you can remember, or is there anything I have
17 missed?

18 A. Well, we didn't -- we didn't talk about
19 George Dale, did we? I just mentioned his name.
20 He was not -- he's not part of State Farm or
21 anything, but he -- I did discuss it with him and
22 it's something I will bring up, you know, later is
23 that when -- when he talked to me I had went out --
24 well, I -- I had reflected that I had gotten my
25 policy from Kay Venable and it included the

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

MICHAEL PAYMENT, M. D. PLAINTIFF

vs CIVIL ACTION NO. 1:07cv1003-LTS-RHW

STATE FARM FIRE AND CASUALTY
COMPANY DEFENDANT

DEPOSITION OF BRADY HYDE

Taken at the instance of the Plaintiff on
Thursday, October 2, 2008, at the offices of
McGlinchey Stafford, 200 South Lamar Street,
Suite 1100, Jackson, Mississippi,
beginning at approximately 8:30 a.m.

APPEARANCES:

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Jackson, Mississippi 39205-0651

COUNSEL FOR THE PLAINTIFF

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COUNSEL FOR E. A. RENFROE COMPANY

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1 so, obviously, you were on the Mississippi Gulf
 2 Coast by September 6th?
 3 A. Yes.
 4 Q. Okay. And that's at night. Let me ask
 5 you. Do you remember how you would have gotten the
 6 claim information?
 7 A. When we went to our Gulfport office, they
 8 would printout a -- I guess they called it a CSR
 9 claims service record which has the insured's basic
 10 information, you know, phone numbers, address,
 11 policy coverage, stuff like that.
 12 Q. Okay. And then beneath it, that entry
 13 beneath it on this --
 14 **MR. JELLIFFE:** Let's just go ahead and
 15 mark that as Exhibit 1.
 16 (Exhibit No. 1, Activity Log, marked for
 17 identification.)
 18 Q. (By Mr. Jelliffe) On Exhibit 1 the entry
 19 for -- that says September 1, 2005 by somebody named
 20 Barlow, something Barlow.
 21 A. Yes.
 22 Q. Do you know who that person is?
 23 A. No.
 24 Q. Okay. Beneath it says, Flood Number
 25 24-RC-2252-0. Do you see that?

1 A. Yes.
 2 Q. Is that the flood claim number for this
 3 claim, this flood claim?
 4 A. I believe so.
 5 Q. Is that how -- is that part of the
 6 information you would have gotten when the claim was
 7 assigned to you, the claim number?
 8 A. Yes.
 9 Q. Okay. Then we've already talked about the
 10 activity that you did on September 6th, 2005. And
 11 then the next date that shows -- go ahead.
 12 A. That may be the policy number.
 13 Q. That may be the policy number?
 14 A. That may be the policy number, that
 15 24-RC-2252-0.
 16 Q. Okay. But there would be separate claims
 17 versus --
 18 A. Yes.
 19 Q. -- homeowners?
 20 A. Yes. Yes.
 21 Q. Okay. So --
 22 **MS. SERAFIN:** Let him finish the question.
 23 Try to let him finish the answer.
 24 **MR. JELLIFFE:** I know. I know.
 25 Q. (By Mr. Jelliffe) Okay. Back up then to

1 the next entry that you have in the activity log
 2 which is dated September 7th, 2005. Do you see
 3 that?
 4 A. Yes.
 5 Q. All right. Read that for the record,
 6 please.
 7 A. "Called and spoke with insured. Has wind
 8 damage as well as flood damage to risk. Structure
 9 is still standing. Has begun making list of damaged
 10 contents. Reviewed coverages with Mr. Insured.
 11 He understood. Will inspect 9-11 at 9:00 o'clock."
 12 Q. All right. Now, what do you remember
 13 about making this entry and getting the information
 14 that -- based upon what you made in that entry?
 15 A. Specifically, I can't remember. But
 16 usually when we would call the policyholders, they
 17 would say, you know, I have water damage, wind
 18 damage. They would tell you flood, wind. They
 19 would give us, whether we were doing both claims,
 20 one claim. They would give us a complete rundown of
 21 the damage that they thought they would have. This
 22 is kind of a condensed -- I wasn't real specific
 23 here. This was just, you know, a condensed entry
 24 saying that I had made contact with the insured, the
 25 insured's general concerns and then when I was going

1 to go out and inspect the risk.
 2 Q. At the time that you made this entry on
 3 September 7th, 2005, you had not been out to the
 4 property?
 5 A. That's correct.
 6 Q. So the entry that you made for that date,
 7 am I correct in saying that that's based on what the
 8 insured told you?
 9 A. Yes. That was over the phone.
 10 Q. Okay. Now, it says you were going to go
 11 out there on September 11th, but I don't see an
 12 entry from you for September 11th.
 13 **MR. HERKINS:** These pages are not in
 14 order.
 15 **MR. JELLIFFE:** I know. But they're in
 16 chronological order. They weren't produced in
 17 chronological order.
 18 Q. (By Mr. Jelliffe) Look at the second page
 19 of Exhibit 1, which is Bates Number 0541-HD. We
 20 talked about that entry of September 1, 2005 by
 21 Barlow. Then there's your entry of September 6th of
 22 2005. We talked about it. Then your entry is
 23 September 7th, 2005. We just talked about it. Then
 24 the next entry is September, 11, 2005 by Janice
 25 Chidester about recording a green draft, and there's

1 no other entry on September 11th, 2005.

2 A. Is this the log for the wind claim?

3 MR. BERKINS: I think I might could clear

4 this up a little bit. HO stands for "homeowner"

5 or the wind claim. There are also documents labeled

6 FL for "flood claim" that were produced.

7 MR. JELLIFFE: Where is the HO on this?

8 MR. BERKINS: The —

9 MS. SERAFIN: The Bates number.

10 MR. BERKINS: — Bates number.

11 MR. JELLIFFE: Oh, the Bates number. Oh,

12 okay.

13 MR. BERKINS: So there are Bates numbers.

14 MR. JELLIFFE: So there's a separate

15 activity —

16 MR. BERKINS: Yes.

17 MR. JELLIFFE: — log for the flood —

18 MR. BERKINS: For the flood —

19 MS. SERAFIN: Yes.

20 MR. BERKINS: — that was produced as a

21 part of the claim file, so that might clear up where

22 his follow-up entries are.

23 MR. JELLIFFE: That may be. All right.

24 Let's go off real quick.

25 (Off the record.)

1 (On the record.)

2 Q. (By Mr. Jelliffe) Okay. Brady, I want to

3 show you some documents that have been produced by

4 State Farm bearing Bates Numbers 0047-FL through

5 0066-FL, which State Farm's counsel has been kind

6 enough to provide me, and it appears to be the

7 activity log for the flood damage claim, and I want

8 you to just look through that and identify for me

9 your entries, okay.

10 A. Okay. (Reviewing document.) My entries

11 are Log Number 4, Log Number 5, and Log Number 6.

12 Q. Okay. And those are the only entries you

13 made on the flood claim for Dr. Payment?

14 A. Yes.

15 Q. Okay. And, for the record, those are

16 found on Bates Number 0060-FL, correct?

17 A. Yes.

18 MR. JELLIFFE: Okay. I've got that one

19 page only and I'm going to mark that as the next

20 exhibit.

21 (Exhibit No. 2, Flood Claim Activity Log,

22 marked for identification.)

23 Q. (By Mr. Jelliffe) Okay. Brady, let's

24 look at that real quick.

25 A. (Reviewing document.)

Brady Hyde - 10/2/08

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1 Q. We talked about the homeowners, the entry

2 on homeowners activity log where you had two

3 entries, and those same entries are here on the

4 flood claim log, activity log, the ones for

5 September 6th and September 7th of 2005.

6 A. Yes.

7 Q. Those are the same?

8 A. One of them is a little different.

9 Q. Let's look at it. Which one is a little

10 different?

11 A. Log Number 3 on the homeowners claim and

12 Log Number 4 on the flood claim are — were made at

13 the same — are pertaining to the same call made on

14 September the 6th. The wording is just a little

15 different. It's not word for word.

16 Q. Okay. Let me ask you. How is it that

17 both of those entries got entered on both the

18 homeowners activity log and flood claim activity

19 log?

20 A. They may have had this claim under the

21 homeowners assigned to me because I was a flood

22 adjustor. There was a lot of that that went on the

23 first few days, maybe the first few weeks or two,

24 it's hard to remember, but where they were assigning

25 by mistake. They still assigned flood adjustor the

Brady Hyde - 10/2/08

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1 homeowner's claim or vice versa, the homeowner's

2 claim — the homeowner's adjustor, the flood claim.

3 So — because I had — I had called and at least

4 made contact, and I had this file, I — I went ahead

5 and put it in there because at that — at the time

6 the — the homeowner's claim for wind damage was

7 assigned to me. It had not been assigned to someone

8 else so I went ahead and made that log entry to show

9 that —

10 Q. Okay. Okay. But am I accurate in saying

11 that by the time you went out to the property and

12 met with the insured you were strictly looking at

13 the flood claim?

14 A. Yes.

15 Q. Okay. And, so, that's why your next entry

16 of September 12, 2005, only appears on the flood

17 claim activity log?

18 A. That is correct.

19 Q. Okay. Let's talk about that next entry

20 then. So you went out and met with the insured,

21 Dr. Payment, on September 12th?

22 A. September 11th.

23 Q. September 11th. Okay. But it was entered

24 on September 12?

25 A. Yes.

1 Q. Okay. So you met with him on
 2 September 11th, and take me through — well, number
 3 one, do you remember that meeting?
 4 A. I remember it. I don't remember the
 5 specifics. I remember he lived — the house was
 6 down a long lane. I had to walk down from, I guess,
 7 a county road. It wasn't — it wasn't a major
 8 highway, a county road down to the house.
 9 I remember the house. The first floor was
 10 completely destroyed. There was a couple of little
 11 outbuildings, sheds, toolsheds, different things,
 12 something with a porch on it that were destroyed, a
 13 bunch of debris everywhere.
 14 Q. Okay. And do you remember — did you have
 15 a conversation with Dr. Payment about —
 16 A. Yes.
 17 Q. — about what happened?
 18 A. Yes.
 19 Q. Did — did you — now, as I understand it,
 20 the trees were knocked over and covering the long
 21 driveway?
 22 A. Yes.
 23 Q. Do you remember that?
 24 A. Yes. Yes, I do. I had to crawl over them
 25 and maybe even under one or two.

1 Q. To make your way —
 2 A. Yes.
 3 Q. — down to the house?
 4 A. Yes. Yes.
 5 Q. And about how long did that take? Do you
 6 remember?
 7 A. I'm going to say it took a good — a good
 8 10 minutes or so. It was probably only a quarter of
 9 a mile. But, you know, to — to kind of weave your
 10 way in and out of the trees and stuff, it took — it
 11 took a good 10 minutes.
 12 Q. Do you remember making the comment to
 13 Dr. Payment that it looked like a tornado had come
 14 through there?
 15 A. I don't remember that comment
 16 specifically. I'm not going to say I didn't make
 17 it. I — I — I — I'm not going to say —
 18 I just -- I don't remember.
 19 Q. Okay. All right. And when you got down
 20 to the property, to the actual house, you talked a
 21 little bit about what you saw. Take me through how
 22 you went about adjusting his flood claim.
 23 A. I started off, basically did a survey of
 24 the property; went, you know, just walked around it,
 25 took pictures, looked at the — the amount of

1 damage, not only to the house but then all of the
 2 debris that had been tossed up in the yard. I think
 3 there was a boat or two that was tossed up or — or
 4 upside down, on its side or — most of the toolsheds
 5 were gone; the trees around the house; there
 6 appeared to be a pretty visible water line 10 to 12
 7 feet up with — where they had been stripped, even,
 8 I mean, even the bark had been stripped off of the
 9 trees from — from, I guess, the tidal surge coming
 10 in.
 11 Q. Okay.
 12 A. Then just kind of, you — you know, you
 13 take pictures, then you start to do, you know, write
 14 up an estimate, based on what I saw, to — to — to
 15 repair or replace the risk, write up an estimate for
 16 flood damage.
 17 Q. Okay. And in looking at this claim, I'm
 18 correct in saying that as a flood claim adjustor you
 19 were not looking for any wind damage?
 20 A. No.
 21 Q. And made no attempt to determine what
 22 damage, if any, below the flood line was caused —
 23 A. No.
 24 Q. — by wind?
 25 A. No.

1 Q. Do you remember making a comment to
 2 Dr. Payment that you knew or were confident you
 3 could get him flood coverage but you weren't sure
 4 what the company was going to do about the wind?
 5 A. I may have. I don't remember it
 6 specifically. But, you know, I reviewed the flood
 7 coverage. It was pretty obvious that he did have
 8 major flood damage, and, you know, reviewed those
 9 coverages.
 10 But as far as the wind, what was going to
 11 go -- what was going to happen on the wind claim,
 12 I didn't -- because that wasn't -- another adjustor
 13 was handling that so I couldn't speak for the other
 14 adjustor.
 15 Q. When you were looking at Dr. Payment's
 16 property, did you see any damage caused by wind,
 17 that you thought was caused by wind?
 18 A. No. But I really wasn't looking either,
 19 so —
 20 Q. Okay. After — and about how long were
 21 you there with Dr. Payment looking at this property?
 22 A. I'm going to say probably an hour to an
 23 hour-and-a-half, the best I can remember. I mean,
 24 I -- I -- I can't see where it would have taken
 25 longer than an hour-and-a-half to -- to get what

1 I needed.

2 Q. Do you know how many claims you had looked

3 at that day before you got to Dr. Payment's?

4 A. His probably would have been — at

5 9:00 o'clock in the morning, it probably would have

6 been the first one that day.

7 Q. And how do you know it was 9:00 o'clock in

8 the morning? Based on your September 7th entry —

9 A. Yes.

10 Q. — that you'd —

11 A. Yes.

12 Q. — meet him at 9:00 —

13 A. Yes.

14 Q. — on the 11th?

15 A. Yes. Yes.

16 Q. Okay. So he was probably the first?

17 A. Yes. I mean, I — it may have been 10, 15

18 late. I remember his place was a little hard to

19 find, but he was probably the first one that

20 morning.

21 Q. Okay. So it was probably an

22 hour-and-a-half, an hour to an hour-and-a-half?

23 A. Yes.

24 Q. All right. Then after that you would have

25 had a few more claims to look at that day, I assume;

1 is that right?

2 A. Yes.

3 Q. And you would have gone back then to the

4 command central area in Gulfport, correct; after you

5 got done with all the claims for that day?

6 A. Normally, unless, you know, I had a lot of

7 claims or, you know, you may get to a claim at 5:00

8 but — or 6:00 or 7:00 that took a little longer

9 than expected, so you might not be able to get to

10 the office until the next morning.

11 Q. And is that what happened in this case?

12 A. Yes. Yeah. Because the next morning

13 at — the 12th, at 6:50 a.m. I must not have been

14 able to get to the office that afternoon of the 11th

15 so I just came in early the next morning.

16 Q. Okay. Now after you went out there and

17 reviewed the flood damage and you made a

18 recommendation for payment of the flood claim, did

19 you have any other involvement with Dr. Payment's

20 claims?

21 A. No.

22 Q. Did you have any conversations with

23 anybody having to do with the homeowners —

24 A. No.

25 Q. — claim adjusting?

1 A. No.

2 Q. You've got to wait until I finish.

3 A. Sorry.

4 Q. Do you know who Howard Crosby is?

5 A. I know the name, but I probably couldn't

6 identify him if he walked in the room. I mean, I —

7 I wouldn't know him by —

8 Q. And would it be accurate to say that he

9 did — you did not have any conversation with

10 Mr. Crosby about this claim?

11 A. That is correct.

12 Q. Do you know who Mark Drain is?

13 A. I know the name, but I — I don't —

14 I want to say he's a State Farm team manager, but

15 I'm not a hundred percent certain on that.

16 Q. Do you know whether or not he was your

17 team manager, State Farm's team manager on the

18 claim?

19 A. He was not my team manager.

20 Q. Who was your team manager?

21 A. Gary Clatterbuck.

22 Q. And that's because they had different —

23 different teams for the different claims —

24 A. Yes.

25 Q. — is that right?

1 A. That is correct.

2 **COURT REPORTER:** Could you spell that last

3 name?

4 A. C-L-A-T-T-E-R-B-U-C-K.

5 Q. **(By Mr. Jelliffe)** Gary?

6 A. Yes.

7 Q. So he was the claim team manager for flood

8 claims?

9 A. **(Nods head affirmatively.)**

10 Q. Your claim team —

11 A. Yes.

12 Q. — manager?

13 A. My team. There was more than one, but he

14 was — he was my team manager.

15 Q. Okay. And do you know who Mick Bergstrom

16 is?

17 A. I know the name, but — he's an adjustor,

18 but I — I don't know him personally. I don't know

19 him.

20 Q. Okay. Did you have any conversations with

21 him —

22 A. No.

23 Q. — about whether or not there was any wind

24 damage to this property?

25 A. No.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
3 SOUTHERN DIVISION

3 MICHAEL PAYMENT, M. D. PLAINTIFF
4 VERSUS NO. 1:07CV1003LTS-RHW
5 STATE FARM AND CASUALTY COMPANY DEFENDANT
6
7

8 **DEPOSITION OF KAY VENABLE**

9 Taken at the instance of the Defendant on
10 Tuesday, September 9, 2008, at the offices of
11 Wise, Carter, Child & Caraway,
12 401 East Capitol Street, Jackson, Mississippi,
beginning at approximately 2:30 p.m.

13 APPEARANCES:

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EXHIBIT

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Kay Venable 9/9/08

1 on the house. But I -- I kind of think it had
 2 something to do -- because I think he had a couple
 3 of accidents in a close period of time. I'm not
 4 positive about that, but I -- I remember something
 5 going on about -- and so Claims sometimes will send
 6 a letter inquiring, asking more information or else,
 7 you know, asking that you be real careful.

8 Q. So the things that may appear in the
 9 Comment, in this case a claim letter mailed, may
 10 involve an event that didn't necessarily even
 11 originate in your office?

12 A. That's right.

13 Q. So you wouldn't send a claims letter?

14 A. No, sir. We just notice.

15 Q. You claims letter?

16 A. Uh-huh. (Affirmative response.)

17 Q. So anyone can document on this?

18 A. Anyone in my office, yes, sir.

19 Q. Only your office?

20 A. Only my office.

21 Q. Okay. So why would you have noted a
 22 claims letter mailed on 8-15 of '05.

23 A. We may have got -- they -- at that time
 24 they may have sent it to our office to send or they
 25 may have sent us a notice that they were sending a

1 claims letter to Dr. Payment, and, so, we would have
 2 put that in there.

3 Q. All right. And then the next one is on
 4 January 30 of '06, "Mailed payment already," and
 5 that's C. J. Is that Christina?

6 A. Christina. Uh-huh. (Affirmative
 7 response.)

8 Q. And what is that reflecting, if you
 9 recall?

10 A. That's usually like his car payment is
 11 late or something like that or -- and she would have
 12 called -- made a call and he said, "I mailed it
 13 already." So, in other words, it's crossed in the
 14 mail. We usually call before it goes out of force
 15 so that a person -- we can make sure that it's --
 16 Q. That it was sent.

17 A. No lapsed coverage.

18 Q. All right. Now, Dr. Payment obviously
 19 called you at some point following Hurricane
 20 Katrina; is that correct?

21 A. (Nods head affirmatively.)

22 Q. Yes?

23 A. Yes. Yes. Yes.

24 Q. If you need to take a short break --
 25 A. No, no.

1 Q. -- or anything --

2 A. I might need some water.

3 Q. Let's take just a quick break here.

4 **MR. NAYLOR:** Let's go off the record for a
 5 second.

6 (Off the record.)
 7 (A short break was taken.)
 8 (On the record.)

9 Q. (By Mr. Naylor) You received a call from
 10 Dr. Payment following Hurricane Katrina?

11 A. Yes.

12 Q. How were you first contacted by
 13 Dr. Payment or --

14 A. I assume he called, you know. He called
 15 and I know I talked to him. I think we had more
 16 than one conversation after he reported his claim.
 17 It was so devastating. All of it. All claims. It
 18 was just so many things happening.

19 Q. I understand. And I note that you didn't
 20 make -- there are no comments regarding any
 21 conversations with Dr. Payment on Katrina issues.

22 A. No. Huh-uh. (Negative response.)

23 Q. Did you not make any notations?

24 A. Huh-uh. Huh-uh. (Negative response.)
 25 I turned the claims in to the claims office.

1 Q. So most likely Dr. Payment called you
 2 initially. Do you have any recollection in terms of
 3 an approximate time that you would have gotten that
 4 first call from Dr. Payment?

5 A. I assume it was in the first few days,
 6 I mean, after that. I don't know that it was that
 7 day or, you know, we -- it was just we were just
 8 taking one call after another.

9 Q. I understand. And the days probably run
 10 together?

11 A. They did. I mean, the rest of the year.

12 Q. I can only imagine. Did you have
 13 information at that time to give Dr. Payment -- in
 14 other words, who did he need to contact next to make
 15 a claim or were you going to carry the ball from
 16 there?

17 A. We made the claims electronically, you
 18 know. We made those claims in our office. We had
 19 -- we had CAT codes and things like that. All you
 20 do is pull the policy, make the claim. And I told
 21 him to be patient, that there would be, you know,
 22 that they were down there, all the adjustors and
 23 everyone and that someone would be in touch with him
 24 and I sympathize with him.

25 Q. Okay. And you mentioned a CAT code.

1 That's that --

2 A. Catastrophe code.

3 Q. Okay.

4 A. It's numbers or letters sometimes that

5 they give different storms.

6 Q. Is the form that you -- this was an

7 electronic form that you would simply bring up on

8 your screen and then hit send?

9 A. Uh-huh. (Affirmative response.)

10 Q. You didn't print it?

11 A. No, sir.

12 Q. Okay.

13 MR. BANAHAN: (Showing Mr. Naylor

14 computer.)

15 MR. NAYLOR: (Reviewing computer.)

16 Q. (By Mr. Naylor) And you're welcome to

17 look at that. This is not designed to be -- so this

18 is -- I'm showing you what was produced to me and

19 that's -- just for the record, it's just got a

20 Bate's number at the bottom, 477?

21 MR. BANAHAN: 427.

22 A. 427.

23 Q. (By Mr. Naylor) 427. Is this the

24 notation sheet that you're referring to?

25 A. Well, I mean, this is a different form

1 type that I -- than what I see, but, yes.

2 Q. Did you provide any of that information?

3 A. Yes, sir. The facts, you see.

4 Q. What did you provide?

5 A. That comes out of our -- 9-1. So that

6 must have been the day -- a couple of days later.

7 There's 31 days in August. That was August 29,

8 11:00 o'clock. You know, it came from my agency.

9 "House washed away by flood waters. Policyholder

10 will call back. Wasn't allowed to enter the

11 premises."

12 Q. How did you --

13 A. I guess he must have called and said that,

14 you know, that --

15 Q. That his house washed away?

16 A. Uh-huh. (Affirmative response.)

17 Q. So this would have been something -- did

18 you actually input this?

19 A. Yes, sir. Or our -- or either I or one of

20 the girls in the office.

21 Q. Okay. Now, this would have been the last

22 time that someone from your office assessed the

23 activity, the computer sheet or do -- I did not

24 notice any indication in here in looking at the

25 activity log that was provided that you had called

1 in again with anymore information?

2 A. I know that I spoke to the -- no, you

3 wouldn't have had a log or anything --

4 Q. Right.

5 A. -- like that. Is that what you're asking?

6 Q. Yes, ma'am.

7 A. I'm sorry. No, there wouldn't be any log.

8 Q. So, in other words, and just so that I'm

9 clear, once you logged in and made this entry --

10 A. Uh-huh. (Affirmative response.)

11 Q. -- this is actually where you made an

12 entry into the system; is that correct?

13 A. Yes, sir.

14 Q. Once you did that then that was the last

15 time you would have logged on, insofar as

16 Dr. Payment's Katrina claim was concerned?

17 A. I do recall at some point, since he had

18 the flood policy and the homeowner policy, going

19 back and add -- doing another claim to make sure

20 that both, or maybe Claims asked me to do that, you

21 know, to make a claim on both policies.

22 Q. Okay. And reading what it says, you --

23 "House washed away by flood waters," is that --

24 A. Uh-huh. (Affirmative response.)

25 Q. PH is policy?

1 A. Uh-huh. (Affirmative response.)

2 Q. "Will call back one" --

3 A. That probably means --

4 Q. One? When?

5 A. -- one -- once -- yeah, "once allowed to

6 enter premises."

7 Q. Okay. So he apparently called --

8 A. Right.

9 Q. -- and he hadn't even seen the house at

10 that --

11 A. Right.

12 Q. -- point in time?

13 A. Right.

14 Q. Okay. He was just calling, "Hurricane has

15 come?"

16 A. Right.

17 Q. Okay. So he didn't know if it had been

18 washed away or not?

19 A. Right.

20 Q. Okay. All right.

21 A. But that's what he indicated to me.

22 Q. Right. But he hadn't even entered his

23 premises, though?

24 A. Huh-uh. (Negative response.)

25 Q. Okay. All right. So you told Dr. Payment

**BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC**

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**Also Admitted in Alabama*

April 1, 2008

Dr. Michael Payment
c/o Charles H. Russell, III, Esq.
Wise, Carter, Child & Caraway
P.O. Box 651
Jackson, MS 39205

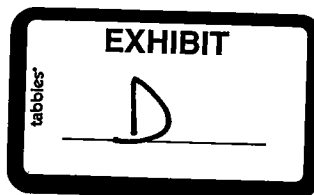
RE: Payment vs. State Farm
Cause No. 1:07cv1003LTS-RHW
Our File No: 07-20,537

Dear Dr. Payment:

This letter is in regard to the wind damage claim you have asserted as a result of Hurricane Katrina. As you are aware, upon completion of State Farm's initial investigation of your loss, it determined your home was destroyed by flooding brought ashore by the storm surge of Katrina. While our investigation and the physical evidence indicated that your home was destroyed by the storm surge, we have continued to review and investigate this matter.

Based on the opinions of the claim representative who reevaluated your claim as part of the Mississippi Department of Insurance Reevaluation Process, it was estimated that your home may have suffered wind damage which was not addressed in the initial investigation.

In light of this information, State Farm has enclosed two (2) drafts payable to you in the amounts of \$6,049.00 and \$19,693.00. State Farm is not seeking any type of release in consideration for this payment and further acknowledges that acceptance of



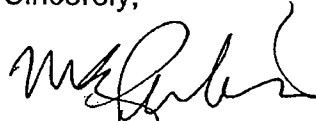
Dr. Michael Payment
April 1, 2008
Page Two

this payment does not prejudice your right to continue to pursue any claim you believe you can prove.

This payment is however made on a doubtful and disputed claim and by making this payment to you, State Farm does not waive any defenses it may now have or which may arise in the future. Further, this payment does not constitute an admission of any kind by State Farm. State Farm is only entitled to a credit for this payment should you prevail on your claims that the damages you sustained are covered under your State Farm Homeowners Policy and exceed the amount enclosed.

If you or any of your representatives have additional information you would like for State Farm to consider, please provide us with same.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew E. Perkins". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Matthew E. Perkins
Attorney for State Farm Fire and
Casualty Company

RE-EVALUATION RE-CAP

WORKSHEET

Total Claimed: \$ 792,849
 Cov A: \$ 451,938
 Cov B: \$ 258,423
 Cov C: \$ 82,488

CLAIM NUMBER: 24-2452-093
 INSURED NAME: PAYMENT
 POLICY TYPE: HO W

50% of Cov A 220,000

LIMITS	TOOL	PLACED IN FILE/RESOLUTION			Re-Eval Offer
		\$ Amount	State Farm Payments	Flood Payments	
Coverage A 440,000	154,000	0	154,000	250,000	154,000
Coverage B 330,000	28,011.00	0	28,011.00	0	28,011
Coverage C —	44,000.00	5,000	39,000	0	39,000

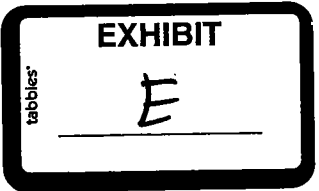
- SF FLOOD: 24-2452-106
- RES FORM HAS SBA AS ADDITIONAL INTEREST & TRUSTMARK NATIONAL
- IS ATTY. REP, LETTER OF PER INDICATES THAT DEMAND IS LIMITS. 50% min adjustment: 0 (If necessary)
- ANYTHING LESS & SUIT WILL BE FILED.

Limits Paced up?
 Mediation/Breakdown?
 Litigation?

Additional Consideration
 Uncompensated Wind Dmg 240,753.00
 SETTLEMENT OFFER: 240,753.00

Claim Representative: HIRAM ESPARZA Date: 07/17/2007
 Team Manager: [Signature] Date: 2/17

Updated 5/15/07



0483-HO

Will be working on this

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

MICHAEL PAYMENT, M.D.

PLAINTIFF

VERSUS

1:07CV1003LTS-RHW

STATE FARM FIRE AND CASUALTY
COMPANY

DEFENDANT

DEFENDANT'S ANSWERS TO FIRST SET
OF INTERROGATORIES PROPOUNDED BY PLAINTIFF

COMES NOW the Defendant, STATE FARM FIRE AND CASUALTY COMPANY,
by and through its counsel of record and files this its Answers to First Set of Interrogatories as
follows, to-wit:

INTERROGATORY NO. 1:

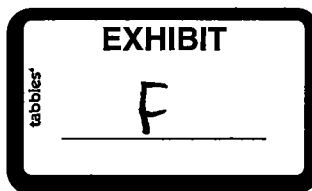
Please state the name, address, present whereabouts, telephone numbers and places of
employment of each and every person known or believed by you or by your attorneys to have
knowledge of the facts and circumstances alleged in Plaintiff's Complaint and/or Defendant's
answer and/or discoverable knowledge about any matter of issue related to this lawsuit.

ANSWER:

Kay Venable
State Farm Agent

Amy Palmer
State Farm Claim Representative
c/o Bryan, Nelson, et al.

Shannon McCuskey
State Farm Claim Representative
c/o Bryan, Nelson, et al.



Farm Fire and Casualty Company

- (d) Please see the claim file previously produced.

Mick Bergstrom

State Farm Claim Representative

- (a) Met with Plaintiff on November 21, 2005.
- (b) Please see Activity Log Entry No. 11 at Bates No. 0542-HO in the previously produced claim file.
- (c) Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC, Attorneys for State Farm Fire and Casualty Company
- (d) Please see the claim file previously produced.

Mark Drain

State Farm Team Leader

- (a) Reviewed file and sent denial letter on November 2, 2005.
- (b) Please see Activity Log Entry No. 9 at Bates No. 0542-HO in the previously produced claim file.
- (c) Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC, Attorneys for State Farm Fire and Casualty Company
- (d) Please see the claim file previously produced.

Hiram Esparza

State Farm Claim Representative

- (a) Reviewed claim file on July 17, 2007.
- (b) Please see Activity Log Entry No. 69 at Bates No. 0549-HO in the previously produced claim file.
- (c) Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC, Attorneys for State Farm Fire and Casualty Company
- (d) Please see the claim file previously produced.

Howard Crosby

E.A. Renfroe

- (a) Inspected the risk on October 27, 2005.
- (b) Please see Activity Log Entry Nos. 7 and 8 at Bates No. 0541-HO in the previously produced claim file.
- (c) Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC, Attorneys for State Farm Fire and Casualty Company
- (d) Please see the claim file previously produced.

INTERROGATORY NO. 7:

If you contend that Plaintiff's property was damaged by events which are not covered under the subject policy and/or endorsements, then please specifically identify each item of

damage which State Farm contends is/was not covered. Please state the factual basis for your contention, and identify all witnesses, documents and other tangible things relied on by you in support of this contention.

ANSWER:

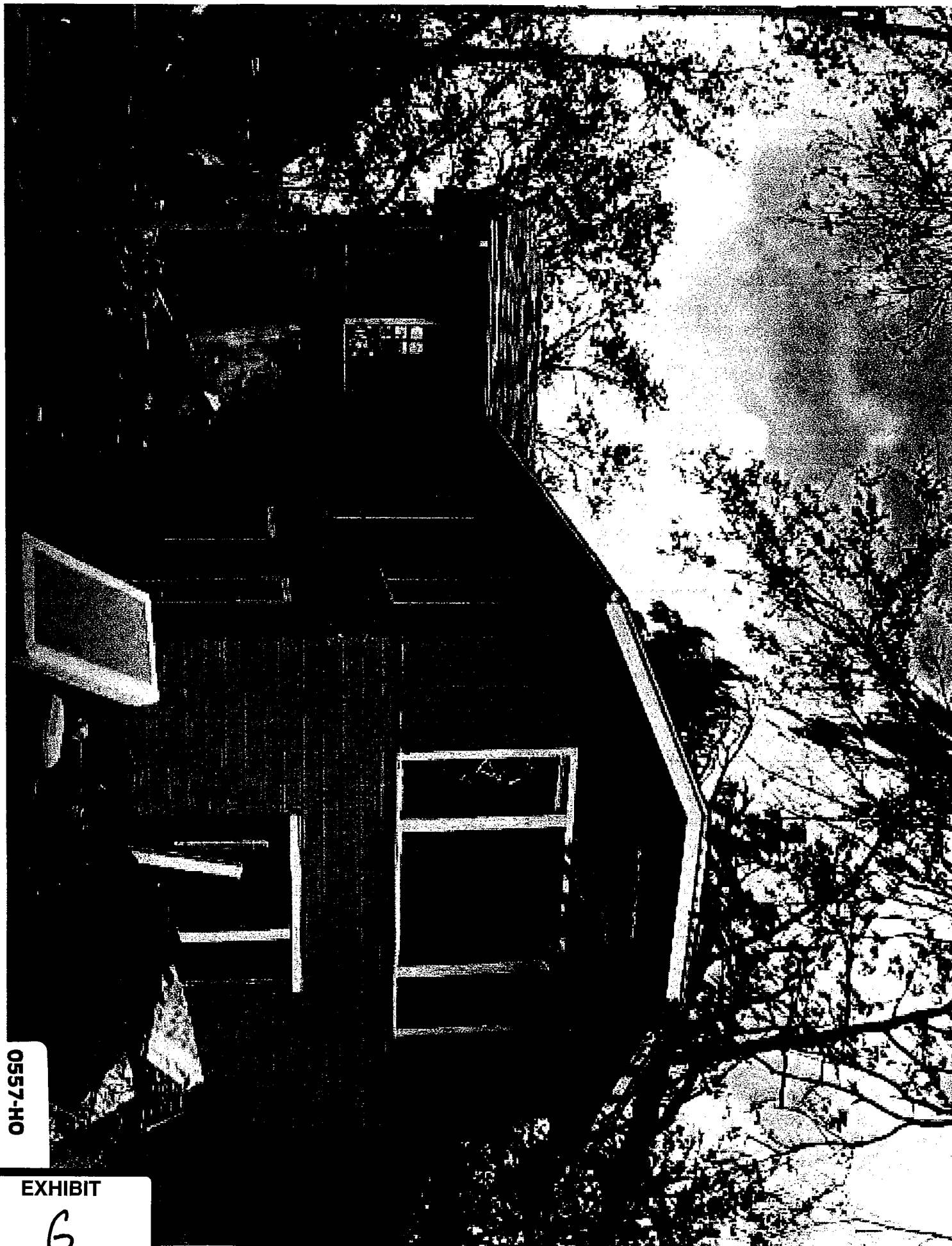
It is the contention of State Farm that all damage to the Plaintiff's property was caused by water damage, which is excluded under clear and unambiguous language of the policy at issue, which language speaks for itself. In support of this contention, please see the certified copy of the policy, the denial letter sent to Plaintiff from Mark Drain, the denial letter sent to Plaintiff from Shannon McCuskey, and the photographs in the claim file.

INTERROGATORY NO. 8:

Please identify the name/style and civil action/cause number/court number of all Rule 30(b)(6) depositions taken of State Farm or any of its corporate 30(b)(6) deponents or designees in connection with all civil action(s) filed in Mississippi arising out of or related to Hurricane Katrina.

ANSWER:

State Farm objects to this interrogatory because it seeks information that is not relevant to any issue in this suit and that is not reasonably calculated to lead to discovery of admissible evidence. State Farm objects to this interrogatory because it is overly broad in subject matter and scope and to the extent it seeks information that has no bearing on the handling of the claim made the basis of this suit. State Farm objects to this interrogatory because complete search and response is unduly burdensome and expensive. State Farm objects to this interrogatory because it seeks information that is confidential, proprietary, and trade secret privileged, and these privileges are asserted.

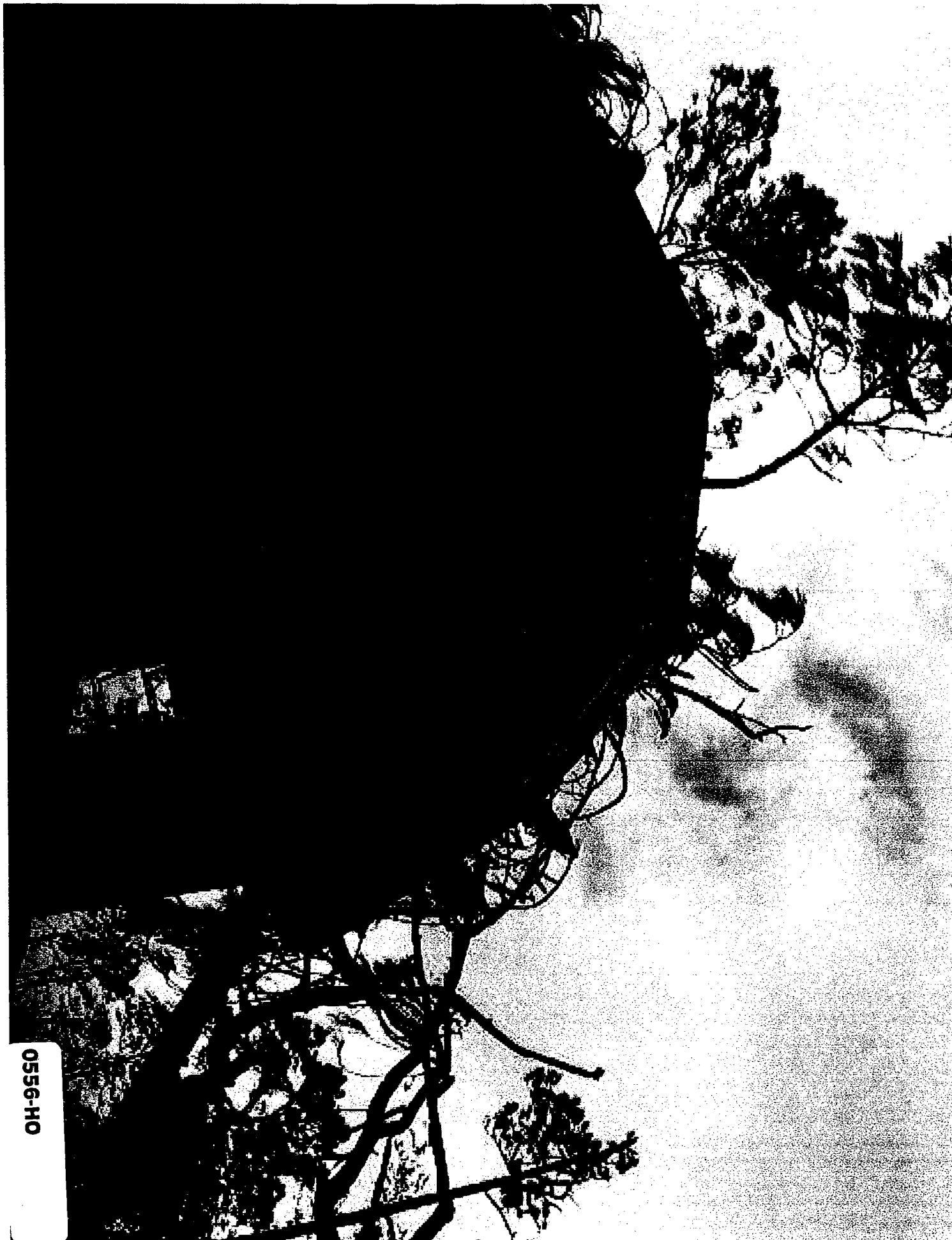


0557-HO

EXHIBIT

6

tabbles



0556-HO