

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

SHERRI ELENZ

PLAINTIFF

VS.

CIVIL ACTION NO. 3:24-cv-253-SA-RP

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR,
ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT**

The primary issue in this litigation is whether Plaintiff's rafters were damaged after a January 3, 2023, storm. Filed contemporaneously with this motion is Defendant's motion to prohibit the testimony of Plaintiff's engineer and Plaintiff's two contractors from Roof and Nail, LLC. Absent their testimony, Plaintiff cannot prove that there was additional covered damage to her property, other than that identified by State Farm, or the cost to repair that damage in a manner cognizable under her State Farm policy. If Plaintiff's experts are excluded, State Farm is entitled to summary judgment as to all of Plaintiff's claims. At a minimum, however, State Farm is entitled to partial summary judgment on plaintiff's claims for punitive damages, attorney fees, or other extra-contractual damages.

FACTS

The primary issue in this litigation is Plaintiff's contention that a January 3, 2023, windstorm damaged her roof and that the entire roof covering as well as the rafters need to be

replaced. Also at issue is Plaintiff's contention that she is entitled to recover depreciation for her wooden fence.¹

State Farm initially inspected the property on January 24, 2023. State Farm created an estimate after this first inspection and issued payments to the Plaintiff shortly thereafter. A few weeks later, State Farm received photographs of Plaintiff's rafters from Plaintiff's contractor that purportedly showed damage from the storm. After receiving these photographs, State Farm inspected the property twice before ultimately determining that an engineer needed to evaluate the alleged damage to the roof.

Luke Griffin, P.E. inspected the property on March 16, 2023, on State Farm's behalf. (Ex. "F" at p. 13). Mr. Griffin observed that many of the rafters were not plumb. (*Id.* at pp. 6-7). He also noted that in many places the rafters were not properly fastened

¹ In her interrogatory responses, Plaintiff outlines her various contract claims against State Farm. As for the roof, Plaintiff is seeking \$35,000. (Ex. "A" at p. 3). Plaintiff also contends she is entitled to \$5,000 for emergency repairs completed by her contractor, Roof and Nail. Those "emergency repairs" are already incorporated within Plaintiff's contractor's estimate. (Ex. "B" at p. 36; See Ex. "C" at p. 47, Ex. "D" at pp. 39-41). Plaintiff also alleged she was entitled to recover \$2,712.45 for eight wind damaged windows. (Ex. "A" at p. 3). State Farm has already included 2,998.69 for the eight windows in its estimate. (Ex. "E" at pp. 5-6). That issue is moot. Plaintiff also claimed she was owed \$1,000 for personal property. Plaintiff's daughter's sworn testimony is that State Farm already satisfied their personal property claim. (Ex. "D" at pp. 47-48). Finally, Plaintiff also referenced that she claimed damages for a sliding screen door and to refinish the area around a front porch column. (Ex. "A" at p. 3). The costs for these two items are listed as unknown. Plaintiff has failed to provide any estimate to identify what the costs for those two items would be. But State Farm included repairs to the column in its estimate and payment

to the roof decking. (*Id.* at pp. 6-7, 20-21). Mr. Griffin observed that many of the rafters were not cut evenly or cut at improper angles. (*Id.* at pp. 6-7). The problems with the rafters resulted in the actual exterior roof surface to be uneven. (*Id.* at pp. 6-7, 19-20). All of these issues existed even though there were no storm created openings on the windows, doors, or exterior of the property. (*Id.*). In addition, none of the walls of the property were displaced, nor were there any fractures to the rafters. (*Id.*). All of these observations are not consistent with wind damage but rather were issues with the original construction. (*Id.* at p. 5).² State Farm issued an additional estimate, which incorporated its findings from its subsequent inspections on April 26, 2023. State Farm additional actual cash value payments of \$21,470.70 that same day. (Ex. "E").³

As far as damage to the structure is concerned, State Farm's policy only covers "accidental direct physical loss" to the property. (Ex. "H" at p. 36). The policy provides, in relevant part, that State Farm will not pay for "defect, weakness, inadequacy, fault, or unsoundness in ... design, specifications,

² Without offering an opinion on whether such issues were covered under State Farm's policy, Mr. Griffin provided commentary on how to repair the rafters as well. (Ex. "F" at pp. 11-12).

³ During this claim, State Farm has already paid Plaintiff over \$30,000. (Ex. "G").

workmanship, repair, construction, renovation, remodeling, grading, or compaction." (*Id.* at p. 42). State Farm sent Plaintiff a copy of Mr. Griffin's report, before sending a letter explaining that the issues with the construction were not covered by the policy. (Ex. "I"; Ex. "J").

Plaintiff has designated an engineer, Jerry Montgomery, P.E., who, in a threadbare report, opines, without any analysis, that the rafters were damaged by the January 3, 2023, storm. Mr. Griffin issued a supplemental report that contains extensive commentary on the issues with the methodology, or lack thereof, in Mr. Montgomery's report. (Ex. "F" at pp. 31-38). A more detailed discussion of the problems with Mr. Montgomery's report is contained in State Farm's memorandum in support of its motion to strike. Worth pointing out here, however, is the fact that Mr. Montgomery's report contains absolutely no commentary about the strength of the wind event on January 3, 2023. As outlined by Mr. Griffin, the underlying wind event would not have had sufficient strength to cause structural damage. (*Id.* at p. 32). In addition, the Roof and Nail, LLC estimate attached to Plaintiff's designation of experts contains no determination of actual cash value. (Ex. "B" at pp. 35-42).

Turning to the issues surrounding Plaintiff's wooden fence. Plaintiff contends she is entitled to recover depreciation for the

fence, which is not allowed under the policy, on the basis that State Farm claim representatives told her she could do so (Ex. "C" at pp. 51-52). However, Plaintiff's daughter⁴ admitted in her deposition that they were told before they replaced the fence, that the depreciation was not recoverable. (Ex. "D" at pp. 34-35).

DISCUSSION

- I. If the Court grants State Farm's Motion to Exclude Plaintiff's sole causation expert, Jerry Montgomery, then it is also entitled to summary judgment on all of Plaintiff's claims for damage to the roof.**

It is of course the plaintiff's burden to prove that there was damage to her property caused by the January 3, 2023, storm beyond that identified by State Farm. Plaintiff's proof as to causation is entirely dependent upon the testimony of Jerry Montgomery. As is more fully discussed in the motion to exclude Montgomery's testimony, his opinions do not satisfy the requirements of Federal Rule of Evidence 702. If the court grants the motion to exclude Montgomery, it necessarily follows that Plaintiff's claims of additional structural damage to the roof must also fail. In the absence of admissible expert testimony that there was greater damage than that found by State Farm and Luke Griffin, the plaintiff cannot meet her burden of proof. *See Viterbo*

⁴ Plaintiff's daughter, Rachel Connor, helped her mother with her claim, and had extensive dealings with State Farm.

v. Dow Chemical Co., 826 F.Supp 420, 424 (5th Cir. 1987) (finding grant of summary judgment appropriate where testimony of claims expert on a critical issue was also properly excluded).

II. Without expert testimony to establish actual cash value, Plaintiff cannot prove her alleged contract damages.

Plaintiff's contractual measure of recovery under the terms of the policy is actual cash value. Concurrently with the filing of this memorandum, Defendant moved to exclude the plaintiff's contractors from testifying about damages as their estimate fails to include a determination of actual cash value. If the court prohibits this testimony, then Plaintiff cannot prove any contract damages in this case.

"In Mississippi, insurance policies are contracts, and as such, they are to be enforced according to their provisions." *Corban v. United Servs. Auto. Ass'n*, 20 So.3d 601, 609 (Miss. 2009). Furthermore, "[c]ontracts are solemn obligations and this Court is obligated to give them effect as written." *Ferrara v. Walters*, 919 So. 2d 876, 882 (Miss. 2005). "[A] plaintiff seeking monetary damages for breach of contract must put into evidence, with as much accuracy as possible, proof of the damages being sought." *Jackson v. State Farm Fire & Cas. Co.*, No. 1:23-CV-24-HSO-BWR, 2024 WL 965613, at *9 (S.D. Miss. Mar. 6, 2024)(quoting *Bus. Commc'ns, Inc. v. Banks*, 90 So.3d 1221, 1225 (Miss. 2012)).

As the Plaintiff seeks damages for the alleged breach of her insurance policy, the measure of any recovery is controlled by the terms of that policy.

In relevant part, State Farm's policy sets forth the plaintiff's measure of recovery where repairs have not been made: "until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property..." (Ex. "H" at p. 42). The policy defines actual cash value as the calculation of the estimated cost to repair or replace the damaged property, less a deduction for depreciation based on the age and condition of the property (among other factors). (*Id.* at p. 24).

Under Mississippi law, when an insurance policy only provides benefits for replacement after repair or replacement is completed, as is the case with State Farm's policy, an insured who has not replaced the allegedly damaged property is entitled only to actual cash value. *Est. of Minor v. United Servs. Auto. Ass'n*, 247 So.3d 1266, 1276 (Miss. Ct. App. 2017); JEFFREY JACKSON & D. JASON CHILDRESS, *Mississippi Insurance Law and Practice* § 15:28 2024 ed.; *Ferrara Land Mgmt. Mississippi, LLC v. Landmark Am. Ins. Co.*, No. 1:19CV956-HSO-JCG, 2021 WL 5055671, at *4 (S.D. Miss. July 19, 2021); *Flores v. State Farm Fire & Cas. Co.*, No. 1:08CV471 LTS-RHW, 2010 WL 3211148, at *1 (S.D. Miss. Aug. 12, 2010). It is

undisputed that Plaintiff has not completed the repairs their contractor claims are necessary in this case.⁵ As such, the plaintiff's contractual measure of recovery under the terms of the policy is actual cash value.

Both the replacement cost and depreciation components of the actual cash value determination necessarily require expert testimony under Federal Rule of Evidence 702. As for the replacement cost part of this equation, the Fifth Circuit has made it abundantly clear that an estimate to repair property damage requires "specialized knowledge of construction and repair work." *Pendarvis v. Am. Bankers Ins. Co. of Fla.*, 354 Fed. Appx. 866, 868-69 (5th Cir. 2009) (recognizing the forecast of repair costs required specialized, technical knowledge of construction and repair work); *See also Betzel v. State Farm Lloyds*, 480 F.3d 704, 707 (5th Cir. 2007) (observing that the plaintiff's experts were necessary to prove the cost to rebuild his house, and without those experts, the plaintiff could not prove damages).

Likewise, determining the depreciated value for the damaged parts of the property, in this case, different structural components of a home, necessarily requires expert testimony. *See Lee v. State Farm Fire and Cas. Co.*, No. 2:23-cv-98-KS-BWR at * 6

⁵ Plaintiff's contractor did some work to brace to the rafters but has not performed any of the extensive work that is allegedly required to repair them.

(S.D. Miss. August 12, 2024); *Jackson v. State Farm Fire & Cas. Co.*, No. 1:23- CV-24-HSO-BWR, 2024 WL 1183670, at *6 (S.D. Miss. Mar. 19, 2024); *Pace v. State Farm Fire & Cas. Co.*, No. 2:23CV19-KS-BWR (S.D. Miss. June 24, 2024); *Penthouse Owners Ass'n, Inc. v. Certain Underwriters at Lloyd's, London*, No. CIV.A1:07CV568LTSRHW, 2009 WL 94835 (S.D. Miss. Jan. 13, 2009). As was observed by the 10th Circuit in *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011), "[a]ccurately accounting for the interaction between depreciation and damage requires professional experience and is beyond the scope of lay opinion testimony."⁶ Calculating depreciation and actual cash value are "plainly necessary components of damages under the [State Farm's] insurance policy." *Jackson*, 2024 WL 1183670, at *6. Plaintiff has no admissible evidence of actual cash value. As such, Plaintiff cannot prove that she is entitled to any additional policy benefits.

III. There is no basis for Plaintiff's claims for punitive damages, or extracontractual damages of any type.

Even if some part of Plaintiff's claims for additional policy benefits can survive summary judgment, State Farm is at a minimum entitled to partial summary judgment on Plaintiff's claims for punitive damages and any other extracontractual claims. Under

⁶ This rule is also logical as determining the depreciated value of different structural components of a home is clearly outside of a lay person's expertise.

Mississippi law, a Plaintiff seeking punitive or extracontractual damages on an alleged bad faith insurance claim has the heavy burden of demonstrating two elements. First, the plaintiff must show that there was no arguable or legitimate basis for the insurance company's position. *Mitchell v. State Farm Fire & Casualty Co.*, 954 F.3d 700, 707-08 (5th Cir. 2020). Second, the plaintiff must show that her insurer committed a willful or malicious wrong or acted with gross and reckless disregard for her rights. *Id.* A failure of proof concerning either element warrants summary judgment for State Farm on the plaintiff's bad faith claim. Here, the plaintiff cannot satisfy either of the essential elements.

A. State Farm had an arguable basis for its claim decision.

In deciding whether an insurer had an arguable reason for its decision, the Fifth Circuit has recognized that Mississippi courts usually apply the directed verdict test. "Under this test, unless the insured would be entitled to a directed verdict on the underlying insurance claim, an arguable reason to deny the insurance claim exists in most instances." *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869 (5th Cir. 1991); *Nelson v. Allstate Prop. & Cas. Ins. Co.*, No. 5:23-CV-95-DCB-LGI, 2024 WL 965615, at *3 (S.D. Miss. Mar. 6, 2024); *Firehouse Church Ministries v. Church Mut. Ins. Co.*, No. 3:20-CV-354-KHJ-FKB, 2022 WL 895925, at *5 (S.D.

Miss. Mar. 25, 2022); *Walker v. State Farm Fire & Cas. Co.*, No. 2:23-CV-29-KS-MTP, 2024 WL 4907936, at *4 (S.D. Miss. July 1, 2024). Under no stretch of the imagination could the plaintiff be entitled to a directed verdict on their contract claim in light of the substantial evidence supporting State Farm's claim decision. State Farm retained an independent engineer, Luke Griffin, to inspect the property. Mr. Griffin determined that the roof structure was damaged not by any wind event, but rather by construction deficiencies.

But a finding of bad faith and an award of extracontractual damages is not possible in this case, even without resort to the directed verdict test. The first element of a bad faith insurance claim requires the plaintiff to prove that the defendant insurer lacked an arguable basis for its claim decision. *Mitchell*, 954 F.3d 700, 707-08. An insurer can have an arguable basis for its decision even if that decision may ultimately turn out to be incorrect. *Liberty Mut. Ins. Co. v. McKneely*, 862 So.2d 530, 533 (Miss. 2003).

If it were not already abundantly clear that State Farm had an arguable basis for its claim decision in this case: as a matter of law, when an insurer relies on an independent expert it has "at the very least, an arguable basis for denying [a] claim." *Hans Const. Co., Inc. v. Phoenix Assur. Co. of New York*, 995 F.2d 53,

55 (5th Cir. 1993) (an equipment insurer's hiring of an independent engineer to determine the cause of a crane's failure provided it with an arguable reason); *cf. Cas. Ins. Co. of Tennessee v. Bristow*, 529 So. 2d 620, 623 (Miss. 1988) (where an independent physician's statement provided an arguable reason for insurer's claim decision); *Branson v. State Farm Fire & Cas. Co.*, No. 3:23-CV-491-CWR-ASH, 2024 WL 4653181, at *3 (S.D. Miss. Nov. 1, 2024). It simply cannot be said in light of the substantial evidence to support State Farm's claim determination that it lacked an arguable basis. Even if a jury agrees with the plaintiff that she is entitled to additional policy benefits, State Farm still would have a legitimate basis for its claim decision.⁷

B. There is no evidence of malice nor of reckless disregard.

To succeed on the second element of her bad faith claim, the plaintiff must show that her insurer committed a willful or malicious wrong or acted with gross and reckless disregard for their rights. *Mitchell*, 954 F.3d 700, 707-08. The second element requires the plaintiff to demonstrate that her insurer's conduct reached the heightened level of an independent tort. *Coogan v.*

⁷ Plaintiff also alleged that emotional distress in response to interrogatories. (Ex. "A" at pp. 5-7). "Extracontractual damages, such as awards for emotional distress and attorneys' fees, are not warranted where the insurer can demonstrate an arguable, good-faith basis for denial of a claim." *United Servs. Auto. Ass'n (USAA) v. Lisanby*, 47 So. 3d 1172, 1178 (Miss. 2010).

Nationwide Prop. & Cas. Ins. Co., 376 So.3d 422, 428 (Miss. Ct. App. 2023). As noted previously, State Farm has already paid Plaintiff over \$30,000 on her claim. State Farm's determination that the rafters were not damaged by the storm was based on the findings of independent engineer. There is simply no evidence that State Farm's conduct was motivated by malice such as to rise to the heightened level of an independent tort.

C. Plaintiff cannot satisfy Mississippi's Punitive Damages Standard

In addition to the substantial hurdle the plaintiff must clear to prove a claim for bad faith, Mississippi law also does not allow the imposition of punitive damages unless the plaintiff shows by clear and convincing evidence that the defendant "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." *Illinois Cent. R. Co. v. Young*, 120 So.3d 992, 1014 (2012) cert. den. 121 So.3d 992 (Miss. 2013) (quoting Miss. Code Ann. § 11-1-65(1)(a)). There is certainly no evidence in this case of fraud or of "willful, wanton or reckless disregard for the safety of others" required to impose punitive damages. Thus, even if the plaintiff could prove the elements of her bad faith claim, she cannot clear the higher hurdle of satisfying Miss. Code Ann. § 11-1-65(1)(a) requirements for punitive damages.

IV. Plaintiff's estoppel claim cannot operate to create coverage.

Plaintiff alleged that State Farm represented that she could recover depreciation for her wooden fence. ([Doc. 1-1] at ¶ 4.5). Further, Plaintiff contends that State Farm is estopped from paying the depreciation for the fence. (*Id.* at ¶ 4.6). However, pursuant to the policy, "We will pay the *actual cash value* for loss or damage to wood fences[.]" (Ex. "H" at p. 42). The policy does not provide for the recovery of depreciation for wood fences. "[I]t is a long-settled rule of law in Mississippi that the doctrines of waiver and estoppel may not operate to create coverage or expand existing coverage to risks expressly excluded." *Am. Nat'l Prop. & Cas. Co. v. Est. of Farese*, 530 F. Supp. 3d 655, 670 (S.D. Miss. 2021). To the extent Plaintiff claims that representations were made regarding the wooden fence that extended the policy's terms to include the recovery of depreciation for the wooden fence, the doctrine of estoppel cannot operate to do so.

Regardless, Plaintiff's daughter's deposition testimony undermines the estoppel claim. Under Mississippi law, the elements for equitable estoppel are "(1) that [the claimant] has changed [her] position in reliance upon the conduct of another and (2) that [she] has suffered detriment caused by [her] change of [her] position in reliance upon such conduct." *SouthernCare, Inc. v.*

Hollingsworth, No. 3:24-CV-347-HTW-LGI, 2025 WL 969248, at *5 (S.D. Miss. Mar. 31, 2025). Significantly, the "reliance must be reasonable." *Id.* (citing *Trosclair v. Miss. Dep't of Transp.*, 757 So. 2d 178, 181 (¶13) (Miss. 2000)). The policy clearly provides that State Farm will only provide actual cash value for wooden fences. (See Ex. "H" at p. 42). Further, Plaintiff's daughter admitted in her deposition that they were told before they replaced the fence, that the depreciation was not recoverable. (Ex. "D" at pp. 34-35). As such, alleged reliance on any statement that Plaintiff could recover depreciation for the wooden fence is necessarily not reasonable.

CONCLUSION

For the foregoing reasons, the Defendant State Farm Fire and Casualty Company is entitled to summary judgment on all claims, or in the alternative partial summary judgment on Plaintiff's claims for bad faith, punitive damages, or any other extra-contractual damages of any type.

This the 19th day of May, 2025.

Respectfully submitted,

STATE FARM FIRE AND CASUALTY COMPANY

BY: /s/ Michael F. Myers
MICHAEL F. MYERS (MSB #3712)

OF COUNSEL:

CURRIE JOHNSON & MYERS, P.A.
1044 River Oaks Drive
Jackson, MS 39232
Telephone: (601) 969-1010
Fax: (601) 969-5120
mmyers@curriejohnson.com

CERTIFICATE OF SERVICE

I hereby certify that I have this date filed and sent a copy of the foregoing via the electronic filing system, a true and correct copy of the above and foregoing to the following:

Michael A. Heilman, Esq.
E. Taylor Polk, Esq.
HEILMAN NISBETT POLK, P.A.
4266 Interstate 55 North, Suite 106
Jackson, MS 39211

THIS, the 19th day of May, 2025.

/s/ Michael F. Myers
MICHAEL F. MYERS