

438 F.Supp.2d 684
(Cite as: 438 F.Supp.2d 684)



United States District Court,
S.D. Mississippi,
Southern Division.
Paul LEONARD and Julie Leonard, Plaintiffs,
v.
NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendant.
No. CIV.A. 1:05CV475 LTS-RHW.

Aug. 15, 2006.

Background: Insureds brought suit against homeowners' insurer to recover for damage to their residence caused by wind damage and storm surge from Hurricane Katrina.

Holdings: Following bench trial, the District Court, Senior, Senior District Judge, held that:

- (1) agent did not breach any duty owed to insureds by advising them that in his opinion they did not need flood insurance;
- (2) agent's statement was not a negligent misstatement of fact;
- (3) policy precluded coverage for damage during Hurricane Katrina caused by excluded peril of rising water, but did not affect coverage for damage caused by wind, a covered peril;
- (4) exclusion of coverage for damage resulting from "weather conditions" did not preclude coverage for covered peril of windstorm damage;
- (5) insureds were not entitled to coverage for damage to their residence that was attributable to incursion of water caused by storm surge; and
- (6) insureds were entitled to coverage for damage to exterior walls above high water mark of storm surge that was caused by wind-driven debris.

Judgment accordingly.

West Headnotes

[1] Insurance 217 1670

217 Insurance

- 217XI Agents and Agency
- 217XI(D) Agents for Applicants or Insureds
- 217k1668 Duties and Liabilities to Insureds or

Others

217k1670 k. Negligence in General. Most Cited Cases

Absent evidence of standard of care applicable to circumstances, insurance agent did not breach any duty owed to insured homeowner under Mississippi law by expressing opinion that homeowner did not need to purchase flood insurance, in response to insured's inquiry; agent did not advise insured that homeowners policy would cover hurricane damage or give any reason for his response.

[2] Insurance 217 1672

217 Insurance

- 217XI Agents and Agency
- 217XI(D) Agents for Applicants or Insureds
- 217k1668 Duties and Liabilities to Insureds or

Others

217k1672 k. Fraud or Misrepresentation. Most Cited Cases

Under Mississippi law, insurance agent's statement that insured did not need flood insurance was not as negligent misrepresentation of fact; statement incorporated agent's opinion, and although made under circumstances in which it was reasonably foreseeable that insured would rely on it, and insured in fact inferred from statement that hurricane damage would be covered under his homeowners' policy, any reliance on statement was not reasonable once insured received and had opportunity to read policy.

[3] Insurance 217 2142(5)

217 Insurance

- 217XVI Coverage--Property Insurance
- 217XVI(A) In General
- 217k2139 Risks or Losses Covered and Exclusions

Exclusions

217k2142 Water Damage
217k2142(5) k. Surface Water; Flood Exclusions. Most Cited Cases

Insurance 217 2145

217 Insurance

- 217XVI Coverage--Property Insurance
- 217XVI(A) In General

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[217k2139](#) Risks or Losses Covered and Exclusions

[217k2145](#) k. Wind. [Most Cited Cases](#)

Insurance 217  **2165(2)**

[217](#) Insurance

[217XVI](#) Coverage--Property Insurance

[217XVI\(A\)](#) In General

[217k2139](#) Risks or Losses Covered and Exclusions

[217k2165](#) Proximate Cause

[217k2165\(2\)](#) k. Combined or Concurrent

Causes. [Most Cited Cases](#)

Under Mississippi law, provisions of homeowners' insurance policy that purported to exclude coverage entirely for damage caused by a combination of the effects of water (an excluded loss) and damage caused by effects of wind (a covered peril) were ambiguous.

[4] **Insurance 217**  **2142(5)**

[217](#) Insurance

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[217k2142\(5\)](#) k. Surface Water; Flood

Exclusions. [Most Cited Cases](#)

Insurance 217  **2145**

[217](#) Insurance

[217XVI](#) Coverage--Property Insurance

[217XVI\(A\)](#) In General

[217k2139](#) Risks or Losses Covered and Exclusions

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[217k2165\(2\)](#) k. Combined or Concurrent

Causes. [Most Cited Cases](#)

Under Mississippi law, homeowners' insurance policy excluding loss to property resulting directly or indirectly from excluded peril, even if another peril or event contributed concurrently or sequentially to cause the loss, precluded coverage for damage during Hurricane Katrina caused by excluded peril of rising water, but did not affect coverage for different damage, the damage caused by wind, a covered peril, even if the wind damage occurred concurrently or in sequence with the excluded water damage; wind damage was covered, water damage was not.

[5] **Insurance 217**  **2142(5)**

[217](#) Insurance

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Insurance 217  **2145**

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[217](#) Insurance

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[217k2165\(2\)](#) k. Combined or Concurrent

Causes. [Most Cited Cases](#)

Under Mississippi law, exclusion in homeowners' insurance policy for loss resulting directly or indirectly from "weather conditions," if another excluded peril contributed to loss, was ambiguous; policy as a whole provided explicitly for windstorm coverage, and then purported to exclude same coverage if windstorm was viewed as a weather condition, and an excluded peril, such as a flood, occurred at approximately the same time, such that coverage would have been illusory for insureds who faced risk

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of flood damage.

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[217k2165](#) Proximate Cause
[217k2165\(2\)](#) k. Combined or Concurrent Causes. [Most Cited Cases](#)
 Under Mississippi law, homeowners' insurance policy, which covered loss caused by windstorm, but excluded loss resulting directly or indirectly from "weather conditions," if another excluded peril contributed to loss, would be interpreted as providing coverage for windstorm damage, in accordance with policy terms, and as not negating that coverage merely because an excluded peril (such as storm surge flooding) occurred at or near the same time.

[7] Insurance 217 2199

[217 Insurance](#)
[217XVI Coverage--Property Insurance](#)
[217XVI\(A\) In General](#)
[217k2196](#) Evidence
[217k2199](#) k. Burden of Proof. [Most Cited Cases](#)
[Cases](#)
 Under Mississippi law, insureds bore burden of proving

that insured property was damaged or destroyed by a cause within insuring language of homeowners' policy during the time the policy was in force.

[8] Insurance 217 2199

[217 Insurance](#)
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[217XVI\(A\) In General](#)
[217k2196](#) Evidence
[217k2199](#) k. Burden of Proof. [Most Cited Cases](#)

Under Mississippi law, homeowners' insurer had burden of providing what portion of total loss from Hurricane Katrina was attributable to water damage and thus within water damage exclusion.

[9] Insurance 217 2142(5)

[217 Insurance](#)
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[217k2196 Evidence](#)

[217k2199](#) k. Burden of Proof. [Most Cited](#)

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Under Mississippi law, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind.

[\[10\] Insurance 217](#)  [2142\(5\)](#)

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[217k2139](#) Risks or Losses Covered and Exclusions

[217k2142](#) Water Damage

Exclusions. [217k2142\(5\)](#) k. Surface Water; Flood [Most Cited Cases](#)

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[217k2139](#) Risks or Losses Covered and Exclusions

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Causes. [217k2165\(2\)](#) k. Combined or Concurrent [Most Cited Cases](#)

[Insurance 217](#)  [2199](#)

[217 Insurance](#)

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[217XVI\(A\) In General](#)

[217k2196 Evidence](#)

[217k2199](#) k. Burden of Proof. [Most Cited](#)

[Cases](#)

Under Mississippi law, to the extent property is damaged by covered peril of wind, and is thereafter also damaged by excluded peril of water, the insured can recover that portion of the loss which he can prove to have been caused by wind, but the insurer is not responsible for any additional loss it can prove to have been later caused by water.

[\[11\] Insurance 217](#)  [1801](#)

[217 Insurance](#)

[217XIII Contracts and Policies](#)

[217XIII\(E\) Estoppel and Waiver](#)

[217k1799](#) Estoppel of or Waiver by Insureds

[217k1801](#) k. Duty to Read Policies. [Most Cited Cases](#)

[Insurance 217](#)  [1887\(1\)](#)

[217 Insurance](#)

[217XIII Contracts and Policies](#)

[217XIII\(K\) Reformation](#)

[217k1884](#) Grounds

[217k1887](#) Mistake

[217k1887\(1\)](#) k. In General. [Most Cited Cases](#)

[Cases](#)

Under Mississippi law, insureds who were provided with copy of homeowners' insurance policy were bound by its express terms, and not entitled to reformation of policy, even if they incorrectly inferred from advice of insurer's agent, to effect that they did not need flood insurance, that water damage from storm surge would be covered by homeowners' policy.

[\[12\] Insurance 217](#)  [1808](#)

[217 Insurance](#)

[217XIII Contracts and Policies](#)

[217XIII\(G\) Rules of Construction](#)

[217k1808](#) k. Ambiguity in General. [Most Cited](#)

[Cases](#)

Under applicable Mississippi law, the construction of the terms of any insurance policy are subject to judicial review for ambiguity, notwithstanding the fact that they have been approved by the Mississippi Department of Insurance.

[\[13\] Insurance 217](#)  [2142\(5\)](#)

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[217k2165\(2\) k. Combined or Concurrent Causes.](#) [Most Cited Cases](#)
 Under Mississippi law, insureds were not entitled to coverage under homeowners' insurance policy for damage to portions of their residence, such as their garage, from Hurricane Katrina that was attributable to incursion of water caused by storm surge, absent showing that structural damage from wind occurred before rising waters reached residence.

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[217k2165 Proximate Cause](#)
[217k2165\(2\) k. Combined or Concurrent Causes.](#) [Most Cited Cases](#)
 Under Mississippi law, where storm surge, an excluded peril, had rendered garage doors a total loss before wind, a covered peril, caused additional damage, wind damage did not enhance or exacerbate damage as to result in coverage under homeowners' insurance policy.

[15] Insurance 217  **2145**

[217 Insurance](#)
[217XVI Coverage--Property Insurance](#)
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[217k2139 Risks or Losses Covered and Exclusions](#)
[217k2145 k. Wind.](#) [Most Cited Cases](#)
 Under Mississippi law, damage to interior of residence during Hurricane Katrina was not shown to be caused by wind, which was a covered peril under homeowners' insurance policy, where exterior doors were boarded up and boards were still in place after storm.

[16] Insurance 217  **2185**

[217 Insurance](#)
[217XVI Coverage--Property Insurance](#)
[217XVI\(A\) In General](#)
[217k2184 Repair or Replacement](#)
[217k2185 k. In General.](#) [Most Cited Cases](#)
 Under Mississippi law, where watertight integrity of roof was not compromised by Hurricane Katrina, insureds were entitled under homeowners' insurance policy to sums to repair damage to shingles, rather than to roof replacement.

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217k2139 Risks or Losses Covered and Exclusions

217k2145 k. Wind. [Most Cited Cases](#)

Insurance 217  2185

217 Insurance

217XVI Coverage--Property Insurance

217XVI(A) In General

217k2184 Repair or Replacement

217k2185 k. In General. [Most Cited Cases](#)

Under Mississippi law, insureds were entitled to coverage under homeowners' insurance policy to repair damage to exterior walls above high water mark of storm surge that was caused by wind-driven debris.

***687** David Zach Scruggs, [David W. Shelton](#), The Scruggs Law Firm, PA, Oxford, MS, [Derek A. Wyatt](#), [Don John W. Barrett](#), Barrett Law Offices, Lexington, MS, [James W. Backstrom](#), Denham, Backstrom & Hollingsworth, Ltd., Ocean Springs, MS, [John G. Jones](#), Jones, Funderburg, Sessums, Peterson & Lee, Jackson, MS, [Richard F. Scruggs](#), [Sidney A. Backstrom](#), The Scruggs Law Firm, PA, for Oxford, MS, [Steven H. Funderburg](#), Jones, Funderburg & Sessums, Jackson, MS, [Dewitt M. Lovelace](#), Lovelace Law Firm, PA, Destin, FL, [Marshall H. Smith, Jr.](#), Barrett Law Offices, Lexington, MS, for Paul Leonard, Julie Leonard.

Christian D.H. Schultz-PHV, Daniel F. Attridge-PHV, Kirkland & Ellis-Washington, Washington, DC, [H. Mitchell Cowan](#), Watkins Ludlam Winter & Stennis, PA, Jackson, MS, John C. O'Quinn-PHV, Thomas A. Clare-PHV, Kirkland & Ellis-Washington, Washington, DC, [Laura Limerick Gibbes](#), Watkins Ludlam Winter & Stennis, PA, Jackson, MS, for Nationwide Mut. Ins. Co.

[H. Mitchell Cowan](#), Watkins Ludlam Winter & Stennis, PA, Jackson, MS, John C. O'Quinn-PHV, Thomas A. Clare-PHV, Kirkland & Ellis-Washington, Washington, DC, [Laura Limerick Gibbes](#), Watkins Ludlam Winter & Stennis, PA, Jackson, MS, for Jay Fletcher Ins.

MEMORANDUM OPINION

[SENTER](#), Senior District Judge.

This cause came on for trial by the court, sitting without a jury. Having heard the evidence presented by the parties and having considered the arguments of counsel, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs Paul and Julie Leonard (the Leonards) reside at 1010 Washington Avenue, Pascagoula, Mississippi.

2. Defendant Nationwide Mutual Insurance Company (Nationwide) is a corporation organized under the laws of Ohio with its principal place of business there.

3. Jay Fletcher (Fletcher) is a local Nationwide representative who works in the Pascagoula, Mississippi, market. Fletcher was the Nationwide representative with whom the Leonards did business. Fletcher was a party defendant to this action when it was filed in the Chancery Court of Jackson County, Mississippi. After Nationwide removed the case from state court, all claims against Fletcher personally were dismissed.

4. It is undisputed that the Leonards' residence was extensively damaged during Hurricane Katrina, a powerful storm that made landfall on the Mississippi Gulf Coast on August 29, 2005. The primary disputes are the cause of the damage, the extent of the damage, and the question whether Nationwide is legally obligated to reimburse the Leonards for any or all of this damage.

***688** 5. At the time Hurricane Katrina damaged the Leonards' residence, their property was insured under a homeowners insurance policy issued by Nationwide. This policy has been identified in the record as policy number 63 23 MP 559938, form HO 23A. (the policy or the Nationwide policy)

6. The Leonards' residence was not covered by any policy of flood insurance at the time of the storm. Flood insurance was available prior to Hurricane Katrina under the National Flood Insurance Program. Under federal regulations that apply to this program, residential areas are classified according to the estimated risk of flooding. Areas most prone to flooding are designated Flood Zone A, those less susceptible to flooding are designated Flood Zone B, and those areas even less prone to flooding are designated Flood Zone C. Flood insurance is available to anyone, regardless of which flood zone their residence is situated in.

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7. The Nationwide policy in force at the time of Hurricane Katrina contains the following relevant provisions:

Insuring Agreement

We will provide the insurance described in this policy, which includes the Declarations and attached endorsements or schedules, in return for the premium and fees, and compliance with all the policy provisions.

* * *

Section I

Property Coverages

Coverage Agreement

Coverage A-Dwelling

We cover:

- 1. The dwelling on the residence premises used mainly as your private residence, including attached structures ...

* * *

Coverage B-Other Structures

We cover other structures on the residence premises. They must be separated from the dwelling by clear space ...

* * *

Coverage C-Personal Property

We cover personal property owned or used by an insured at the residence premises.

* * *

Perils Insured Against

(Section I)

Covered Causes of Loss

Coverage A-Dwelling and

Coverage B-Other Structures

We cover accidental direct physical loss to property described in Coverages A and B except for losses excluded under Section I - Property Exclusions. Coverage C - Personal Property

We cover accidental direct physical loss to property described in Coverage C caused by the following perils except for losses excluded under Section I-Property Exclusions:

* * *

- 2. Windstorm or hail.

Direct loss caused by rain, snow, sleet, sand or dust driven through roof or wall openings made by direct action of wind, hail, or other insured peril is covered.

* * *

Property Exclusions

(Section I)

- 1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event *689 contributed concurrently or in any sequence to cause the loss.

* * *

b) Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:

- (1) flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.

* * *

- n) Windstorm or hail to any:

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- (1) structure, other than a building, including the supports and screens, with a roof-like covering of cloth, metal, plastic or fiberglass, whether or not the structure is attached to a building.
 - (2) screens, including their supports, around a pool, patio or other areas.
 - (3) property lines and similar walls, including seawalls, greenhouses, hothouses, slathouses, trellis, pergolas, cabanas and outdoor equipment used to service the residence premises.
 - (4) structure, including property in or on the structure, which is in whole or part, in or over water.
2. We do not cover loss to any property resulting directly or indirectly from the following if another excluded peril contributes to the loss:

* * *

- c) Weather conditions, if contributing in any way with an exclusion listed in paragraph 1. of this Section.

8. The evidence presented at trial conclusively established that on August 29, 2005, the entire area surrounding Pascagoula, Mississippi, including the Leonard residence and its surrounding neighborhood, was subjected to violent winds in excess of 100 miles per hour. These winds increased gradually in the early morning hours and reached a peak of intensity between 9:00 a.m. and noon. Water from the Mississippi Sound was driven ashore by the storm, and the water level in the Leonard neighborhood rose to a peak level between 11:00 a.m. and noon. At its highest point, this water inundated the Leonard residence to a depth of approximately five feet.

9. The Leonard residence is approximately 12 feet above sea level. This property is 515 feet from the beachfront to the south.

10. The inundation of the ground floor of the Leonards' residence caused extensive damage to the floors, carpets, walls, and personal property situated therein. The second floor of the Leonards' property was not damaged. The physical damage to the roof of the Leonards' property consisted of a small number of broken shingles, and the water-tight integrity of the roof was not breached during

the storm. The attached garage on the Leonards' property was also extensively damaged during the storm.

11. The only wind damage on the ground floor of the Leonards' residence was a hole in one window that witnesses described as "golf-ball sized." The exterior of the Leonards' home and the attached garage were soiled by a combination of wind-driven materials and water-borne materials.

12. The doors of the garage were damaged by both wind and water. These doors face west.

13. Following an inspection of the Leonards' property, Nationwide made an *690 estimate of the wind damage sustained during the storm. The Nationwide adjuster found that the wind had caused damage to the shingles of the roof and that a tree was blown down across a fence. The adjuster authorized payment for these items of damage.

14. After applying the \$500 deductible, Nationwide tendered a check to the Leonards in the amount of \$1,661.17.

15. The Leonards estimated the total damages from the storm to be \$130,253.49. This figure included all of the damages to the Leonard residence, regardless of whether the cause of the damage was wind or water. The Leonards' experts identified \$47,365.41 in damages that they attribute to wind. This estimate includes the cost of replacing the roof and extensive structural repairs to the garage.

16. During 1989, when the Leonards' property was covered by a homeowners policy issued by Allstate Insurance Company (Allstate), Allstate decided to stop issuing homeowners policies for properties located south of United States Highway 90. The Leonards' policy was, therefore, not renewed by Allstate.

17. In seeking replacement coverage, the Leonards decided to do business with Nationwide through Fletcher. The Leonards purchased their first Nationwide homeowners policy from Fletcher in 1989. This policy was entitled a Deluxe Homeowners Policy, and it was written on a Nationwide Form entitled "Elite II." In 2003, the form of the Nationwide homeowners policy changed. The replacement policy form was designated Form No. HO-23. In 2004, the form changed once again. The new form was designated Form No. HO-23A, and it was this form of the

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Nationwide homeowners policy that was in force at the time of Hurricane Katrina.

18. During 1999, Paul Leonard met with Fletcher to discuss a proposed increase in the wind/hail deductible that was being instituted by Nationwide with respect to its existing homeowners policies. This was the only relevant conversation between Leonard and Fletcher established by the testimony at trial. I accept Leonard's recollection of this conversation. The proposed increase would have changed the Leonards' deductible for damage caused by wind and hail from \$500 to 2% of the insured value of the property. To avoid this change, the Leonards agreed to pay a higher insurance premium. During this conversation, the Leonards also increased their coverage for tools from \$2,000 to \$3,000, and they increased their coverage for guns from \$2,000 to \$3,000. During this same conversation, Paul Leonard, who had never experienced flooding to his home and who did not live in Flood Zone A, asked Fletcher whether he (Leonard) needed to purchase flood insurance coverage. Fletcher told Leonard that he (Leonard) did not need that type of coverage.

19. Fletcher did not carry flood insurance on his own property, and his office assistant, Cindy Byrd Collins, did not carry flood insurance on her property.

20. Fletcher sometimes discouraged his clients from purchasing flood insurance policies. That much is clear from the testimony of a variety of witnesses, including Fletcher's office assistant, Cindy Byrd Collins. There was enough evidence on this point to warrant the conclusion that Fletcher, as a matter of habit and routine, expressed his opinion, when he was asked, that customers should not purchase flood insurance unless they lived in a flood prone area (Flood Zone A) where flood insurance was required in connection with mortgage loans. But between 2001 and the time of Hurricane Katrina, Fletcher sold approximately 187 flood insurance policies in the Pascagoula area. Fletcher sold 12 flood insurance policies in the neighborhood*691 where the Leonards live. There was no testimony from which I can discern the reason Fletcher discouraged some of his clients from purchasing flood insurance policies, the reason Fletcher did not have flood insurance on his own property, or the reason he did sell 187 flood policies in the Pascagoula area and a dozen flood policies in the Leonard neighborhood.

21. Fletcher earns a commission of 15% of the premium for the sale of a homeowners policy and for the sale of a flood insurance policy.

22. Nationwide is among the privately-owned insurers who are qualified to write and sell flood insurance coverage. Nationwide and its agents earn a commission on the premiums for the flood insurance policies it sells, but the losses are ultimately paid by the taxpayers under the National Flood Insurance Program. The terms of the flood policies Nationwide and other private insurers sell are identical, as are the premiums these insurers charge. The premiums and policy terms are set by applicable federal regulations.

23. Applicable federal regulations require flood insurance in certain circumstances. When a federally-insured lender takes a security interest in improvements on real estate situated in an area that has been designated Flood Zone A, the lender must require the borrower to purchase flood insurance for the property. Outside the area designated as Flood Zone A, flood insurance is optional and relatively inexpensive. Maximum coverage of \$250,000 for structures and \$100,000 for contents is now available (and was available during 2005) for less than \$400 per year.

24. According to the testimony of Paul Leonard, his 1999 conversation with Fletcher concerning the question of whether he (Leonard) should purchase a flood insurance policy was prompted by the public discussion in the Pascagoula area that followed Hurricane Georges in 1998. These public discussions centered on the fact that standard homeowners insurance policies did not cover flood damage and that a separate flood insurance policy was necessary to protect against flood losses associated with hurricanes.

25. Fletcher was authorized by Nationwide to interpret and explain the coverages provided under Nationwide's policies. Nationwide consistently informed its policy holders that they should direct all questions concerning their coverage to its local agent, in this instance Fletcher.

[\[1\]\[2\]](#) 26. In its billing statements, sent at the time its policies were renewed, Nationwide notified its policy holders, including the Leonards, that the Nationwide homeowners policy did not cover flood loss and that a flood insurance policy was available through the National Flood Insurance Program. Nationwide also advised its policy holders to contact its local agents, in this instance Fletcher, concerning the purchase of flood insurance.

27. Paul Leonard made his inquiry to Fletcher seeking his advice whether it would be advisable for him (Leonard) to

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purchase a flood insurance policy, and when Fletcher ventured his opinion that the purchase of such a policy was not necessary, Leonard refrained from buying a flood policy. There was no discussion of the reason Fletcher did not believe Leonard needed to buy a flood insurance policy. Leonard apparently inferred that Fletcher's reason for advising him that he did not need a flood policy was that his homeowners policy would cover any and all water damage that might occur during a hurricane. This was an erroneous inference, and one that might have been avoided had either party to the conversation been more articulate in his inquiry or in his response.

28. Fletcher did not materially misrepresent the terms of the Nationwide homeowners*692 policy to the Leonards, and Fletcher did not make any statements which could be reasonably understood to alter the terms of the Nationwide policy. Fletcher did not tell Paul Leonard that he did not need a flood insurance policy because his homeowners policy would cover all water damage that might occur during a hurricane. Leonard apparently inferred that this was the reason Fletcher told him he did not need to buy a flood insurance policy, but Fletcher did not give any reason for his response to Leonard's inquiry.

29. There is no evidence in the record to establish the standard of care applicable to an insurance agent who is asked about the advisability of purchasing flood insurance. Absent proof of this standard of care, there is insufficient evidence to support a finding that Fletcher's statements to Paul Leonard indicating that he (Leonard) did not need to purchase a flood insurance policy breached a standard of care that governed Fletcher's conduct as an insurance agent in these particular circumstances. Fletcher's statement was advisory in nature, and the statement was made in circumstances in which it was reasonably foreseeable that Leonard would rely upon it. But there is no evidence to support the conclusion that this statement was made negligently. The statement embodied Fletcher's opinion, but it did not contain a reason for that opinion. In my view, Fletcher's statement was not a representation of existing fact, and it was not, in these particular circumstances, a misrepresentation of fact.

30. Paul Leonard inferred, according to my understanding of his testimony, that both wind damage and water damage would be covered under his Nationwide homeowners policy if the wind and water damage occurred during a hurricane. Fletcher did not tell Leonard that, but Leonard inferred as much. That inference was erroneous, and it was inconsistent with the policy exclusion for water dam-

age. Paul Leonard knew flood insurance was available and optional, and he testified that his inquiry to Fletcher was prompted by the public discussion of insurance coverages applicable to flooding associated with Hurricane Georges. Thus, Leonard had at least some reason to understand that the water damage exclusion in the Nationwide policy would exclude flooding during a hurricane, and after reading the policy, his reliance on the inference he drew from his conversation with Fletcher was no longer reasonable.

31. Paul Leonard received his Nationwide homeowners policy number 63 23 MP 559938 shortly after it was purchased. He read the policy, according to his own testimony. He did not ask Fletcher to clarify or otherwise explain the effect of the water damage exclusion in the Nationwide policy.

32. Storm surge is a phenomenon associated with hurricanes. Atmospheric conditions and wind forces combine to force tidal waters ashore and temporarily inundate areas of normally dry land. Storm surge is a type of flooding that is covered by flood policies sold under the National Flood Insurance Program and excluded under standard homeowners policies.

33. There was no testimony that established the standard of care for insurance agents in connection with the sale of flood insurance policies, and there was no testimony that established the standard of care for the training of insurance agents who are authorized to sell and interpret flood insurance policies.

34. The Leonards contend that Fletcher misled them by implying that their Nationwide homeowners policy would cover water damage caused by storm surge flooding. The evidence was insufficient to support this conclusion. Fletcher gave no explanation for his recommendation that Leonard not purchase a flood insurance *693 policy, and he made no representation that suggested that the water damage exclusion in the Nationwide homeowners policy did not apply in the context of a hurricane. In fact, Fletcher and Leonard never had any discussion of specific policy provisions and coverages.

35. The Leonards' Nationwide homeowners policy provides coverage for windstorm damage, but its terms specifically exclude coverage for damage caused by water (with the specific and limited exception of water damage caused by rain that enters an insured structure after its watertight integrity has been lost through the action of the

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wind). When he read his policy, this exclusion should have put Paul Leonard on notice that further inquiry was necessary concerning his understanding that the policy would cover the risk of rising water during a hurricane.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction of this action under its diversity jurisdiction, [28 U.S.C. §1332](#). The amount in controversy exceeds the jurisdictional minimum.

2. The provisions of the Nationwide policy that exclude coverage for damages caused by water are valid and enforceable terms of the insurance contract. Similar policy terms have been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions. [Home Insurance Co. v. Sherrill, 174 F.2d 945 \(5th Cir.1949\)](#); [Lunday v. Litz Mutual Insurance Co., 276 So.2d 696 \(Miss.1973\)](#); [Litz Mutual Insurance Co. v. Buckley, 261 So.2d 492 \(Miss.1972\)](#); [Grace v. Litz Mutual Insurance Co., 257 So.2d 217 \(Miss.1972\)](#); [Litz Mutual Insurance Co. v. Boatner, 254 So.2d 765 \(Miss.1971\)](#); [Commercial Union Ins. Co. v. Byrne, 248 So.2d 777 \(Miss.1971\)](#); [Firemen's Insurance Co. v. Schulte, 200 So.2d 440 \(Miss.1967\)](#).

3. The Nationwide policy provides coverage for damage caused by a windstorm, including damage caused by water that enters an insured building through a breach in the walls or roof caused by the wind.

[\[3\]](#) 4. The provisions of the Nationwide policy that purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damage caused by the effects of wind (a covered loss) are ambiguous.

[\[4\]](#) There are two provisions that purport to limit recoverable damages where concurrent causes contribute to damage the insured property. The first of these provisions reads:

Property Exclusions

(Section I)

1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed con-

currently or in any sequence to cause the loss. The "loss," "such a loss," and "the loss" referred to in this paragraph, is, in this instance, damage caused by rising water during Hurricane Katrina. These three terms refer to this particular excluded loss, i.e. damage caused by rising water, but this paragraph does not affect the coverage for other losses (covered losses), i.e. damage caused by wind, that occur at or near the same time. Thus, this language does not exclude coverage for different damage, the damage caused by wind, a covered peril, even if the wind damage occurred concurrently or in sequence with the excluded water damage. The wind damage is covered; the water damage is not.

[\[5\]\[6\]](#) The second of these provisions reads:

*694 2. We do not cover loss to any property resulting directly or indirectly from the following if another excluded peril contributes to the loss:

* * *

c) Weather conditions, if contributing in any way with an exclusion listed in paragraph 1. of this Section.

Read literally, this provision would exclude any otherwise covered loss, e.g. windstorm damage, in any circumstance where "weather conditions," i.e. the windstorm, combined with an excluded cause of loss, e.g. flooding, to damage the insured property. This reading of the policy would mean that an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing under his Nationwide policy. Read literally, this provision would exclude all coverage when a windstorm did damage to both an insured dwelling (a covered loss) and adjacent "screens, including their supports, around a pool, patio, or other areas." (an excluded loss). I do not believe this is a reasonable interpretation of the policy.

A windstorm is a weather condition that is specifically included in the coverage of this policy. When the policy is read as a whole, I find that this exclusionary provision is ambiguous-the policy as a whole providing explicitly for windstorm coverage in one section and purportedly excluding the same coverage on the grounds that a windstorm, a "weather condition," and an excluded peril, a flood, occurred at approximately the same time. The most reasonable interpretation for these conflicting policy provisions is that this policy provides

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coverage for windstorm damage, in accordance with its terms, and that coverage is not negated merely because an excluded peril (in this case storm surge flooding) occurs at or near the same time.

If this second provision were read to exclude wind damage that occurs at or near the time that any excluded water damage occurs, the result would be contrary to well-established Mississippi law. *Home Insurance Co. v. Sherrill*, 174 F.2d 945(5th Cir.1949); *Lunday v. Lititz Mutual Insurance Co.*, 276 So.2d 696 (Miss.1973); *Lititz Mutual Insurance Co. v. Buckley*, 261 So.2d 492 (Miss.1972); ; *Grace v. Lititz Mutual Insurance Co.*, 257 So.2d 217 (Miss.1972); *Lititz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss.1971); *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777 (Miss.1971); *Firemen's Insurance Co. v. Schulte*, 200 So.2d 440 (Miss.1967). This reading of the policy would make the windstorm protection illusory for those who live in areas where the risk of flooding is greatest.

Nationwide seems to recognize this to be the reasonable interpretation of its policy. Nationwide has not invoked this policy provision to deny coverage to the Leonards for what everyone recognizes to be wind damage.

[7] 5. The Leonards have the burden of proving that the insured property was damaged or destroyed by a cause within the insuring language of the policy during the time the policy was in force. For their structure, this requires the Leonards to prove that there was a direct accidental physical loss to the property. For their contents, this requires the Leonards to prove that there was a direct physical loss caused by one of the perils enumerated in the policy.

[8] 6. Nationwide has the burden of proving what portion of the total loss was attributable to water damage and was thus within the water damage exclusion. *695*Commercial Union Insurance Co. v. Byrne*, 248 So.2d 777 (Miss.1971).

[9][10] 7. Under applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind. *Grace v. Lititz Mutual Insurance Co.*, 257 So.2d 217 (Miss.1972). Nationwide is not responsible for that portion of the damage it can prove was caused by water. To the extent property is damaged by wind, and is thereafter

also damaged by water, the insured can recover that portion of the loss which he can prove to have been caused by wind, but the insurer is not responsible for any additional loss it can prove to have been later caused by water. *Lititz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss.1971).

[11] 8. There is no evidence to support a finding that this insurance contract should be reformed. Nationwide provided a copy of the policy to the Leonards, and Paul Leonard read the policy. Having done so, the plaintiffs are bound by the express terms of the policy, even if their interpretation of the policy was incorrect and even if the inferences they drew from the conversations they had with Fletcher were erroneous.

[12] 9. The Nationwide homeowners policy was approved by the Mississippi Department of Insurance, and Nationwide contends that this approval conclusively establishes that the terms of its policies are clear and unambiguous. Nationwide reasons that because the Department of Insurance is prohibited from approving any policy provision that is ambiguous, any provision the department approves must be unambiguous. Nationwide does not take into consideration that all human endeavors, including the approval of insurance policies, are subject to error. Under applicable Mississippi law, the construction of the terms of any insurance policy are subject to judicial review, notwithstanding the fact that they have been approved by the Mississippi Department of Insurance.

10. Almost all of the damage to the Leonard residence is attributable to the incursion of water.

[13][14] There was ample evidence that the storm surge waters severely damaged the walls of the garage and the overhead doors used to drive into and out of the garage. There was also evidence that later in the day, after the storm surge waters had receded and the wind had shifted and begun to come in from the west, the wind inflicted additional damage to these overhead doors. My review of the evidence leads me to the conclusion that these garage doors were damaged enough to be considered a total loss before the time the wind shifted and began to come in from the west. Accordingly, the wind damage to the overhead doors did not enhance or exacerbate the damage these doors had earlier sustained by the force of the storm surge water.

The structural damage to the walls of the garage was more likely than not also caused by the surging water that ac-

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companied the storm. There was no substantial evidence that the garage was structurally damaged before the rising water reached the Leonard property.

[15] None of the damage to the interior of the Leonard property was shown to have been caused by wind. The exterior doors on the first floor were boarded up before the Leonards left their home, and the boards were still in place after they returned. The most likely cause of the damage to these french doors was water, not wind.

There was evidence to support the conclusion that one of the windows on the *696 ground floor of the Leonard residence was damaged by some wind-driven object.

[16] Plaintiffs contended that wind damage to the roof on the Leonard property had voided the roof's warranty, but the evidence showed that the roof's warranty had expired before Hurricane Katrina. The Leonard roof was fifteen years old at the time of the storm, and its watertight integrity was not compromised by the storm. I find that the sum tendered by Nationwide to repair the

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|---|----------|
| window damage (replacement) | \$230.76 |
| expense of cleaning and repairing exterior walls above water line | \$997.40 |

The expense for exterior cleaning is based upon a total estimate of \$1,994.80. I have allowed one-half of this expense for the portions of the exterior above the water line. Most of the exterior of the Leonards' buildings is above the water line, but the smaller portion below the water line was more soiled and scuffed than the higher parts of these buildings, and this lower portion will require a disproportionate amount of time to clean. This conclusion is based upon the photographs that are part of the record.

12. Nationwide has met the burden of proving, by a preponderance of the evidence, that all other damage to the Leonards' property was caused by water and waterborne materials within provision 1(b) of the Property Exclusions section of the Nationwide policy.

An appropriate order will be entered, and this case will thereby be dismissed. Decided this 15th day of August, 2006.

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damage to the shingles of the Leonard roof was adequate to fairly compensate the Leonards for this damage. The evidence did not substantiate the Leonards' allegation that the damage inflicted by Hurricane Katrina to their roof was severe enough to require that the roof be replaced.

Likewise, I find that the sum tendered by Nationwide was sufficient to compensate the Leonards for damage to their fence.

[17] The evidence indicates that wind-driven debris soiled and scuffed the exterior walls of the Leonard residence and the exterior walls of the garage above the high water mark of five feet. The Leonards are entitled to compensation for cleaning and for the repairs to those portions of these exterior walls.

11. The Leonards have met the burden of proving, by a preponderance of the evidence, that the following items of damage to the Leonards' property were caused by wind:

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