IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-TS-00193

USF&G INSURANCE COMPANY OF MISSISSIPPI — APPELLANT

VS.

DEBBIE MARTIN
D/B/A CARTMELL GALLERY — APPELLEE/CROSS APPELLANT

APPEAL FROM THE CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI

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BRIEF OF APPELLEE/CROSS APPELLANT DEBBIE MARTIN D/B/A CARTMELL GALLERY

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee/Cross Appellant, Debbie Martin d/b/a Cartmell Gallery, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or refusal:

COUNSEL FOR APPELLEE/CROSS APPELLANT

1. Honorable Charles W. Wright, Jr., CHARLES W. WRIGHT, JR., PLLC, 1208 22nd Avenue, Meridian, MS 39301.

APPELLEE/CROSS APPELLANT

1. Debbie Martin d/b/a Cartmell Gallery., Meridian, Mississippi 39301, Appellee/Cross Appellant.

TRIAL JUDGE

1. Honorable Robert W. Bailey, Circuit Judge for the 10th Circuit District of the State of Mississippi, Meridian, Mississippi.

COUNSEL FOR APPELLANT

1. Honorable Charles G. Copeland, Honorable J. Wade Sweat, Honorable Marisa C. Atkinson, COPELAND, COOK, TAYLOR AND BUSH, P.A., 200 Concourse. Suite 200, 1062 Highland Colony Parkway, Ridgeland, MS 39157.

APPELLANT

1. USF&G

RESPECTFULLY SUBMITTED, this the 31 day of October, 2007.

DEBBIE MARTIN D/B/A CARTMELL GALLERY., APPELLEE/CROSS APPELLANT

BY: Charles W. Wright

CHARLES W. WRIGHT, JR., ATTORNEY FOR DEBBIE MARTIN D/B/A CARTMELL GALLERY, APPELLEE/CROSS APPELLANT

REQUEST FOR ORAL ARGUMENT

Comes now, the Appellee/Cross Appellant, Debbie Martin d/b/a Cartmell Gallery, and requests oral argument. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the issues raised in this appeal.

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II. Whether or not the trial court erred in entering a Judgment in favor of Martin on October 3, 2006.

III. Whether or not the trial court erred in denying USF&G's Motion for Judgment Not Withstanding the Verdict.

IV. Whether or not the trial court erred in precluding USF&G from presenting evidence of Martin's subsequent flood claim.

CROSS APPEAL ISSUES

I. Whether or not the Court erred by granting a Remittitur.

II. Whether or not the Court erred by denying punitive damage claim.

STATEMENT OF THE CASE

I. Nature of the Case

Debbie Martin, d/b/a Cartmell Gallery purchased two (2) policies of insurance for her business, Cartmell Gallery, from The St. Paul Business Foundation Series, USF&G Insurance Company of Mississippi, insurance policy #BK01323946 effective February 6, 2003 through February 6, 2004. [R.9/183]

On or about April 7, 2003, Debbie Martin d/b/a Cartmell Gallery suffered a very substantial loss to the business and contents within her business, when water backed up or overflowed from sewer or drainage entered her Gallery, and she submitted a claim to USF&G Insurance Company of Mississippi for backup damage to the business premises. [R9/184]

On April 23, 2003, USF&G Insurance Company of Mississippi denied coverage. [R.9/187]

On December 23, 2003, Debbie Martin hired attorney Charles W. Wright, Jr. to contact USF&G Insurance Company of Mississippi concerning denial of coverage and appeal the decision.

On December 23, 2003, attorney Charles W. Wright, Jr. contacted insurance expert Elam Consulting, Inc. and requested an opinion concerning coverage of said policy. On January 7, 2004, Elam Consulting, Inc., submitted it's opinion to attorney Charles W. Wright, Jr., and Elam Consulting, Inc. determined that based on coverage afforded by the Additional Coverage benefit of the policy and having found no specific exclusions or definitions within the policy defeating that coverage. Coverage for this claim should be provided. [R.4/470-472]

On February 18, 2004, attorney Charles W. Wright, Jr. submitted a demand letter to USF&G Insurance Company of Mississippi, based on the opinion of Elam Consulting, Inc. demanding full coverage for the property damage and damage to artwork, paperwork, and other contents of Debbie Martin's business under her insurance policy. [R.E. 3] [R.4/473]

As a result of the water damage to my business and its contents, Debbie Martin suffered a loss of approximately $45,000.00. [R.E. 18] [R.9/188]

On March 2, 2004, USF&G Insurance Company of Mississippi again denied coverage.

Debbie Martin was advised by the initial investigator that her insurance policy with USF&G provided for the coverage. [R.4/542]

II. Course of Proceedings and Disposition in the Court Below

On April 7, 2004, Martin sued USF&G seeking compensatory and punitive damages. [R.1/ 2-102]. Martin filed an Amended Complaint on August 16, 2005. [R.2/265-289]

USF&G filed its answer to the Complaint and the Amended Complaint on May 12, 2004, and September 6, 2005, respectively, denying Martin's allegations. [R.1/105-111] [R.3/319-325]

USF&G filed its Motion for Summary Judgment on September 14, 2005. [R.2,3 290-354]

Martin filed a response to Motion for Summary Judgment. [R.3,4/374-552]

On March 23, 2006, the Circuit Court, Honorable Robert Bailey presiding, issued its Memorandum Opinion denying in part and granting in part USF&G's Motion for Summary Judgment. [R.E. 18-31; R 630-643]. The Circuit Court, ruling against USF&G, found that the water exclusion when analyzed with the entire policy was contradictory and ambiguous. [R.E. 6] [R.5/630-643]

The Circuit Court granted USF&G's Motion for Summary Judgment as to Martin's claim for bad faith denial. [R.E. 6] [R. 5/642]

On April 3, 2006, USF&G requested that the Circuit Court alter or clarify its Memorandum Opinion. [R.5/644-648] The Circuit Court sustained USF&G's Motion to Alter and/or Clarify on May 22, 2006.

The case proceeded to trial on September 27, 2006. [R.5/686]

On September 29, 2006 the jury returned a verdict in favor of Martin in the amount of $39,329.00 on Count I related to the claim for coverage under the Sewer and Drain Backup provision; in favor of Martin in the amount of $2,215 on Count II for coverage under the fine arts provision; and in favor of Martin in the amount of $3,084 on Court III regarding coverage on the electronic data processing system provision. [R.6/818] USF&G has not paid Martin the $3,084, with 8% interest from October 3, 2006, on Count III related to her coverage claim for Electronic Data Processing Systems. The Electronic Data Processing Systems coverage is an additional coverage offered through the policy which is not subject to the water exclusion. Prior to the trial, this claim was not paid despite Martin's claim and itemization of costs. This issue is subject to cross-appeal. [R.7/988-989]

On October 3, 2006, the Court entered a Judgment against USF&G on the jury's verdicts on Counts I, II and III.

On October 3, 2006, USF&G filed its Motion for Remittitur on the basis that the jury verdict in favor of Martin in the amount of $39,329.00, on Count I related to the claim of sewer and drain backup was excessive because the maximum amount Martin could recover under the Sewer or Drain Backup Additional Coverage provision was $25,000.00. [R.6/ 820-929]

On October 12, 2006, USF&G filed it Motion for Judgment Not Withstanding the Verdict. [R.7/ 932-948]

The Circuit Court sustained USF&G's Motion for Remittitur on December 20,2 006, remitting the verdict for Martin on Count I to $25,000.00 resulting in a total remitted Judgment against USF&G of $30,299. [R.7/981-982].

On December 20, 2006, the Circuit Court denied USF&G's Motion for Judgment Not Withstanding the Verdict. [R.7/ 983-984]

On January 19, 2007, USF&G appealed.

On January 26, 2007, Martin filed a cross-appeal. [R.7/988-989]

III. Statement of the Facts

Debbie Martin, d/b/a Cartmell Gallery purchased two (2) policies of insurance for her business, Cartmell Gallery, from The St. Paul Business Foundation Series, USF&G Insurance Company of Mississippi, insurance policy #BK01323946 effective February 6, 2003 through February 6, 2004. [R.E. 10, 11A, 11B] [R.9/183]

The insurance policy that Debbie Martin bought from St. Paul had coverage for two premises with amount of coverage for each of $26,523.00 with a total of over $52,000.00. Each premise coverage #1 and #2 had a $25,000.00 cap for additional sewer or drain backup coverage for a total of $50,000.00. [R.E. 11A, 11B, 13]

On or about April 7, 2003, Plaintiffs, Debbie Martin d/b/a Cartmell Gallery, suffered a very substantial loss to the business and contents within her business, when sewer water or drain backup entered her Gallery, and Plaintiffs submitted a claim to Defendant for damages to the business premises.

On April 23, 2003, Defendant denied coverage. [R.4/83-87]

On December 23, 2003, attorney Charles W. Wright, Jr. contacted insurance expert Elam

Consulting, Inc. and requested an opinion concerning coverage of said policy. On January 7, 2004, Elam Consulting, Inc., submitted it's opinion to attorney Charles W. Wright, Jr., and Elam Consulting, Inc. determined that based on coverage afforded by the Additional Coverage benefit of the policy and having found no specific exclusions or definitions within the policy defeating that coverage, coverage for this claim should be provided. [R.4/470-472]

On February 18, 2004, attorney Charles W. Wright, Jr. submitted a demand letter to Defendant, based on the opinion of Elam Consulting, Inc. demanding full coverage for the property damage and damage to artwork, paperwork, and other contents of her business under her insurance policy. [R.4/473]

As a result of the water damage to Plaintiffs' business and its contents, Plaintiffs suffered a loss of approximately $45,000.00. [R.E. 18]

On March 2, 2004, Defendant again denied coverage.

Defendant is liable under the terms of the Policy to pay for the damage to Plaintiffs business and for the damage to the contents of Plaintiffs business as provided by coverage herein stated unconditionally, the Defendant has refused to do so.

The aforesaid actions of Defendant constitutes a breach of its contractual obligation to pay insurance coverage under Plaintiffs insurance Policy.

At trial, Martin presented witnesses of Debbie Martin, Greg Cartmell, expert Monty Jackson, Mike Gordon, and USF&G Adjuster, Robert Hewitt adversely. The evidence presented that the water damage was caused by water that backed up through the sewer or drains. An itemization of the damages for coverage under the sewer or drain backup provision of the policy Count 1 and Count 2, coverage under the fine arts provisions, Count 3, coverage for electronic data processing systems provisions.

The Defendant presented no expert witness and Defendant only presented the adjuster, Robert Hewitt in the defense of the case.

On September 29, 2006 the jury returned a verdict in favor of Martin in the amount of $39,329.00 on Count 1 relating to claims of coverage under the Sewer and Drain Backup provision; in favor of Martin in the amount of $2,215 on Count II for coverage under the Fine Arts provision;

and in favor of Martin in the amount of $3,084 on Court III regarding coverage on the electronic data processing system provision. [R.6/818]

On September 29, 2006 the jury awarded the Plaintiffs a verdict in the amount of $39,329.00 on Count one, related to sewer and drain backup. [R.6/818]

The jury award of $39,329 is not excessive and is within additional coverage for sewer or drain backup pursuant to the policy that is shown in Trial Exhibit P-1 and P-2. [R.E. 10, 11A, 11B] Plaintiff called Defendant's Representative and claims the adjuster Robert Hewitt specifically examined and identified Exhibit P-4, claim coverage detail. Mr. Hewitt circled the building limit insurance on page two, $26,523.00 twice and testified that the insurance on the premises covered Premise number one: 609 22nd Avenue for $26,523.00 and Premise number two, 609 22nd Avenue for $26,523.00 for a total of over $53,000.00. [R.E. 13] [R.8/129-131]

Exhibit P-4 also indicates Premise number one: 609 22nd Avenue with a sewer and or drain backup coverage of $25,000.00, and Premise number two: 609 22nd Avenue with a sewer or drain backup coverage of $25,000.00. [R.E. 13]

Pursuant to Exhibits P-1 and P- 4 and the testimony of Mr. Hewitt, USF&G lists a property limit doubles and therefore also the sewer or drain backup limit doubles for a total of $50,000.00. [R.E. 10, 11A, 11B, 13]

SUMMARY OF THE ARGUMENT

On March 28, 2006, the Circuit Court of Lauderdale County, Mississippi, the Honorable Robert W. Bailey presiding, issued its Memorandum Opinion denying in part and granting in part USF&G's Motion for Summary Judgment. [R.E. 6] [R.5/630-643] The Circuit Court was correct in ruling against USF&G in finding that the water exclusion when analyzed with the entire policy was contradictory and ambiguous. [R.5/642] The Circuit Court Judge Robert Bailey correctly analyzed the Motion for Summary Judgment and Exhibits and issued a factually correct and legally reported opinion as to the issue of the insurance policies' ambiguity.

The Court's opinion succinctly analyzes the USF&G Motion for Summary Judgment [R.E. 6] [R.5/630-643] and Martin's Response to USF&G's Motion for Summary Judgment [R.E. 2]

[R. 3/374-552] and the Court found as follows:

> ... Taking the affidavit of Monty Jackson into account, which includes his opinion that the water backed up through the sewers and drains, and reading the language of the policy which does not limit coverage to the back up of the sewer or drainage systems through the plumbing of a building, the Court is of the opinion that the language of the policy is ambiguous and should be construed against the insurer. As such, the Court finds that the language of the policy provides for coverage in the Additional Coverage Section thereof. Having so found, the Court finds that the Motion for Summary Judgment is not well taken and shall be denied. [R.5/640]

The case proceeded to trial on September 27, 2006. [R.5/686]

On September 29, 2006 the jury returned a verdict in favor of Martin in the amount of $39,329.00 on Count I related to the claim for coverage under the Sewer and Drain Backup provision; in favor of Martin in the amount of $2,215 on Count II for coverage under the fine arts provision; and in favor of Martin in the amount of $3,084 on Court III regarding coverage on the electronic data processing system provision. [R.6/818]

USF&G has not paid Martin the $3,084, with 8% interest from October 3, 2006, on Count III related to her coverage claim for Electronic Data Processing Systems. The Electronic Data Processing Systems coverage is an additional coverage offered through the policy which is not subject to the water exclusion. Prior to the trial, this claim was not paid despite Martin's claim and itemization of costs. This issue is subject to cross-appeal.

On October 3, 2006, the Court entered a Judgment against USF&G on the jury's verdicts on Counts I, II and III. [R.7/930-931]

On October 3, 2006, USF&G filed its Motion for Remittitur on the basis that the jury verdict in favor of Martin in the amount of $39,329.00, on Count I related to the claim of sewer and drain backup was excessive because the maximum amount Martin could recover under the Sewer or Drain Backup Additional Coverage provision was $25,000.00. [R.6/820-929]

On October 12, 2006, USF&G filed it Motion for Judgment Not Withstanding the Verdict. [R.7/ 932-948]

The Circuit Court sustained USF&G's Motion for Remittitur on December 20, 2006, remitting the verdict for Martin on Count I to $25,000.00 resulting in a total remitted Judgment against USF&G

of $30,299. [R.7/981-982].

On December 20, 2006, the Circuit Court denied USF&G's Motion for Judgment Not Withstanding the Verdict. [R.7/983-984]

The Court erred in granting a Remittitur and did not consider the following:

1. On September 29, 2006 the jury awarded the Plaintiffs a verdict in the amount of $39,329.00 on Count one, related to sewer and drain backup.
2. The amount is not excessive and is within sewer and drain coverage pursuant to the policy that is shown in Exhibit P-1 and P-2. Plaintiff called Defendant's Representative and claims the adjuster Robert Hewitt specifically examined and identified Exhibit P-4, claim coverage detail. Mr. Hewitt circled the building limit insurance on page two, $26,523.00 twice and testified that the insurance on the premises covered Premise number one: 609 22nd Avenue for $26,523.00 and Premise number two, 609 22nd Avenue for $26,523.00 for a total of over $53,000.00. [R.8/129-131]
3. Exhibit P-4 also indicates Premise number one: 609 22nd Avenue with a sewer or drain backup of $25,000.00, and Premise number two: 609 22nd Avenue with a $25,000.00 sewer or drain backup. [R.E. 13]
4. Pursuant to Exhibits P-1 and P- 4 and the testimony of Mr. Hewitt, USF&G lists a property limit double and therefore also the sewer or drain backup for a total of $50,000.00. [R.E. 10, 11A, 11B, 13]

Martin paid for two policies for coverage of $26,523.00 on each for a total of $53,046.00 with a $25,000.00 sewer or drain backup on each for a total of $50,000.00 and therefore is entitled to the entire $39,329.00 judgment.

The Court erred in granting USF&G's Motion for Summary Judgment as it pertains to Martin's claim for bad faith denial and punitive damages on the claim for electronic data processing equipment.

USF&G has admitted that on Count III related to related to Martin's coverage claim for electronic data processing systems is an additional coverage offered through the policies which is not subject to water exclusion. Prior to the trial, this claim was not paid and has not been paid.

ARGUMENT

I. The Judgment on Court I related to the sewer or drain backup should be affirmed because Martin presented evidence that water damage to Cartmell Gallery was caused by water that backed up through the sewer and drain.

This argument relates to the Statement of Issues II "Whether or not the trial court erred in entering a judgment in favor of Martin on October 3, 2006" and Statement of Issues III, "Whether or not the trial court erred in denying USF&G's Motion for Judgment Not Withstanding the Verdict."

At the trial Martin presented witnesses of Debbie Martin, Greg Cartmell, Monty Jackson, Mike Gardner and USF&G adjuster, Robert Hewitt. The Defendant, USF&G only called Mr. Hewitt in their defense. USF&G presented no expert testimony.

A review of the testimony and exhibits presented at trial showed that Martin proved her claim under the coverage of the policy through the testimony and exhibits.

Debbie Martin testified to the following:

Debbie Martin, d/b/a Cartmell Gallery purchased two (2) policies of insurance for her business, Cartmell Gallery, from The St. Paul Business Foundation Series, USF&G Insurance Company of Mississippi, insurance policy #BK01323946 effective February 6, 2003 through February 6, 2004. [R.9/183]

On or about April 7, 2003, Debbie Martin d/b/a Cartmell Gallery, suffered a very substantial loss to the business and contents within her business, when water backed up or overflowed from sewer or drainage entered her Gallery, and she submitted a claim to USF&G Insurance Company of Mississippi for backup damage to the business premises. [R.9/183]

On April 23, 2003, USF&G Insurance Company of Mississippi denied coverage.

On December 23, 2003, Debbie Martin hired attorney Charles W. Wright, Jr. to contact USF&G Insurance Company of Mississippi concerning denial of coverage and appeal the decision.

On December 23, 2003, attorney Charles W. Wright, Jr. contacted insurance expert Elam Consulting, Inc. and requested an opinion concerning coverage of said policy. On January 7, 2004, Elam Consulting, Inc., submitted it's opinion to attorney Charles W. Wright, Jr., and Elam Consulting,

Inc. determined that based on coverage afforded by the Additional Coverage benefit of the policy and having found no specific exclusions or definitions within the policy defeating that coverage. Coverage for this claim should be provided. [R.4/495]

On February 18, 2004, attorney Charles W. Wright, Jr. submitted a demand letter to USF&G Insurance Company of Mississippi, based on the opinion of Elam Consulting, Inc. demanding full coverage for the property damage and damage to artwork, paperwork, and other contents of Debbie Martin's business under her insurance policy. [R.4/498]

As a result of the water damage to my business and its contents, Debbie Martin suffered a loss of approximately $45,000.00. [R.E. 18]

On March 2, 2004, USF&G Insurance Company of Mississippi again denied coverage.

Debbie Martin testified that there were two policies that covered Cartmell Gallery located at 609 22nd Avenue. [R.9/183]. After the purchase she had an expectation that her business was covered for losses. [R.9/183].

On April 7, 2003 there was a heavy rain. There was no flood in the City of Meridian. She arrived at Cartmell Gallery and water was standing up to her ankles. There was water all the way to the back of the store. The water had an odor, a prominent smell like urine. She contacted her insurance company and Mr. Hewitt arrived the next day. [R.9/185]

When Mr. Hewitt did his inspection there was a strong odor like someone goes to the bathroom. All the property was in disarray. [R.9/186]

On April 23, 2003 USF&G denied her claim. [R.9/187]

Ms. Martin submitted a demand letter outlining her claim. [R.9/188]

Ms. Martin identified her losses on Exhibit P-10 [R.E. 16] [R.9/188]

Ms. Martin identified on Exhibit P-10 [R.E. 16] a picture valued at $4,800.00 which was not stock. [R.9/188,189] In addition Ms. Martin has previously submitted a photo of the damaged non-stock picture. Ms. Martin testified as to her losses including fine art and electronics. [R.E. 18]

Mike Gardner testified that he was called on April 7, 2003 to assist Debbie Martin in cleanup of Cartmell Galleries. Gardner owns and operates a carpet/floor janitorial cleanup service. That he has 25 years of experience in this type of work. [R.8/71] That he had worked in Cartmell Galleries

before the rain and there was no odor. On April 7, 2003 Mr. Gardner went to Debbie Martin's Cartmell Gallery at 609 22nd Avenue, Meridian early in the morning there was a different odor and he smelled urine. [R.8/73] Water was above the curbs and the street drains were not draining in the early morning hours at daybreak. Cartmell Galleries had pulp at the front door and water was standing several inches all the way to the back of the building. [R.8/74] Rugs were standing or floating in water; computers had water in them; paintings were wet. [R.8/74-76] Gardner cleaned up the building [R.8/78] and the next day when came into the building there was a strong odor [R.8/78,79] and the smell of urine which was not consistent to normal water damage to carpet and rugs and it appeared that it had some type of strong odor of sewer in the carpet and rugs. [R.8/79] Gardner did a black light test to determine if any bacteria was present to determine where he needed to clean with chemicals to remove the sewer odor. The black light showed bacteria which is consist with sewerage being present. [R.8/80,81] The bacteria was consistent with sewerage being present in the carpet and rugs. [R.8/81] Gardner gave a bill for his services for $895.00.

Greg Cartmell is an artist that takes care of the artistic and creation of most of the products in the galleries and Debbie Martin manages the business part. [R.8/102] Greg Cartmell testified that on April 7, 2003 in the early morning hours that he found water about ankle deep in the building. The water had a foul odor to it, an odor of raw sewerage. [R.8/112] Mr. Cartmell contacted Gardner's Cleanup Service to pump out the water. Mr. Cartmell continued to clean up the building and noticed the odor of urine and sewerage. [R.8/112]

Monty Jackson, is the Public Works Director for the City of Meridian and was designated as an expert in the field of engineering and water and sewer works infrastructures of a city [R.8/93] Mr. Jackson testified that he inspected the two storm water sewer drains located on public right of way of 9th Street on the block between 22nd Avenue and 23rd Avenue, Meridian, Mississippi. The drain assists in protecting the buildings positioned immediately South of their location. As an expert Mr. Jackson gave an opinion that as a result of the extremely heavy rainfall which occurred on April 7, 2003, that the system was either overloaded or stopped up to the point that it could not get underground and therefore was flowing on top of the ground in that particular area. Mr. Jackson also gave an opinion as to the excess water backup through the sewer and drains and that effect was as very obvious that

those drain lids or inlets or grates were stopped up due to debris from the street (i.e. paper cups, bottles, leaves and small vegetative growth) which caused excess water to back up through the sewers and drains [R.8/96-98] That the drains are designed to collect the rain runoff from the street and adjacent property as it travels down the gutters. As a result of extremely heavy rainfall, the drains could not remove all the water from the streets on April 7, 2003, allowing the excess water to backup through the sewers and drains. Mr. Jackson also testified that the Cartmell property was part of the area affected by backup through the sewer and drains. Mr. Jackson further testified that storm water and sanitary sewer are in two different pipes. That because of the rain pressure on 8th Street is going to be a lot higher than it is in other places so that when it comes out there is no way to tell the difference in the mediums. Basically, this means that both waters are comingled. [R.8/101]

Plaintiff called Defendant's Representative and the claims adjuster Robert Hewitt. [R.8/119] Mr. Hewitt examined Cartmell Gallery for approximately 30 minutes on about April 8, 2003. He saw substantial water damage throughout the gallery and was aware of the artwork in the gallery but made no valuation. [R.8/124] Mrs. Martin gave Mr. Hewitt a list of the inventory of the claim. USF&G did not furnish a loss of claim form. [R.8/125] Mr. Hewitt did not give USF&G proof of claim form to Ms. Martin, did not talk to the clean up man, Mr. Gardner nor did he talk to the Director of Public Works of the City of Meridian. [R.8/126] Based on less than a 30 minute tour of Cartmell Gallery, Hewitt gave a written denial of the claim on about April 23, 2003. In actuality, Mr. Hewitt did not investigate the claim. Mr. Hewitt specifically examined and identified Exhibit P-4, claim coverage detail. Mr. Hewitt circled the building limit insurance on page two, $26,523.00 twice and testified that the insurance on the premises covered Premise number one: 609 22nd Avenue for $26,523.00 and Premise number two, 609 22nd Avenue for $26,523.00 for a total of over $53,000.00. [R.8/130] Mr. Hewitt testified that he was aware that there was art gallery was damaged. That he saw artwork that was damaged. [R.8/143] That Mr. Hewitt did not inventory of what was stock and what was not stock. On April 8, 2003 in Hewitt's inspection he made a note that he found wet carpet and a lot of artwork which was on the floor and got wet; table legs, computers, etc. [R.8/145]

Exhibit P-4 also indicates Premise number one: 609 22nd Avenue with a sewer or drain backup of $25,000.00, and Premise number two: 609 22nd Avenue with a $25,000.00 sewer or drain backup.

[R.E. 13]

Pursuant to Exhibits P-1 and P- 4 and the testimony of Mr. Hewitt, USF&G lists a property limit double and therefore also the sewer or drain backup for a total of $50,000.00. [R.E. 10, 11A, 11B, 13]

Martin paid for two policies for coverage of $26,523.00 on each for a total of $53,046.00 with a $25,000.00 sewer or drain backup on each for a total of $50,000.00 and therefore is entitled to the entire $39,329.00 judgment.

The standard of review for the denial of a motion for JNOV and a motion for directed verdict are identical. *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So2d. 1077, 1083 (¶16) (Miss.2000) (citing *Steele v. Inn of Vicksburg, Inc.* 697 So.2d 373, 376 (Miss.1997)). "This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence." *General Motors Acceptance Corp. V. Baymon,* 732 So.2d 262, 268 (¶17) (Miss. 1999) (citing *Steele,* 697 So2d. At 376).

There is substantial evident in supporting the verdict. The trial court committed no error during the trial proceedings and overruling USF&G's Motion for JNOV.

II. The Judgment on Count I should be affirmed because the water exclusion did not apply.

This argument relates to the Statement of Issues I, "Whether or not the trial court erred in denying USF&G's Motion for Summary Judgment as to Martin's coverage claims for compensatory damages finding that the water exclusion was inconsistent and ambiguous."

The insurance policy is ambiguous. A review of the insurance policy and a specific review of Additional Coverage 4.v. Sewer and Drain Backup and a review of the policy Section Exclusions 1.a. Water, no specific or general language whatsoever support the Defendants' position of denial of coverage. [R.E. 10, 11A, 11B, 12, 13]

Plaintiffs' expert opinion in which Elam Consulting, Inc. specifically states that the insurance policy is ambiguous, no specific exclusion applies, and that the Plaintiffs are entitled to coverage afforded by the Addition Coverage benefit of the policy. [R.4/473]

Under Mississippi law, insurance policy is ambiguous if it can be interpreted to have two or

more reasonable meanings, *In Re Biloxi Casino Belle Inc.*, 368 F.3d 491, C.A.5 (Miss. 2004); Also, under Mississippi law, court must construe policy as whole and review language of policy giving terms their generally prevailing meaning, unless words have acquired technical meaning, in which case that meaning must be ascribed to them; if after review policy can be interpreted to have two or more reasonable meanings, then policy is ambiguous and court must necessarily find in favor of coverage. *ACS Const. Co., Inc. of Mississippi v. CGU*, 332 F.3d 885, C.A. 5 (Miss. 2003); There is an ambiguity in an insurance contract when the policy can be interpreted as having two or more reasonable meanings. *Mississippi Farm Bureau Cas. Ins. Co. v. Britt*, 826 So.2d 1261 (Miss. 2002).

Also, under Mississippi law, court must interpret exclusion clauses of insurance policy narrowly. *Reliance Nat. Ins. Co. v. Estate of Tomlinson*, 171 F.3d 1033, C.A. 5 (Miss. 1999), rehearing denied, certiorari denied *Tucker v. Reliance National Ins. Co.*, 120 S.Ct. 402, 528 U.S. 966, 145 L.Ed.2d 313, C.A. 5 (Miss. 1999); Where clause of insurance policy subject to dispute involves exceptions or limitations on insurer's liability, Supreme Court construes policy even more stringently than ambiguous policy. *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So.2d 550, (Miss. 1998), rehearing denied."

Also, under Mississippi law, provisions of an insurance contract are construed strongly against the drafter. *Liberty Mut. Fire Ins. Co. v. Canal Ins. Co.*, 177 F.3d 326, C.A. 5 (Miss. 1999); Insurance contracts are liberally construed in favor of the insured and strictly construed against the insurer. *Mississippi Farm Bureau Mut. Ins. Co. v. Jones*, 754 So.2d 1203, (Miss. 2000); Where there is doubt as to the meaning of an insurance contract, it is universally construed most strongly against the insurer, and in favor of the insured and a finding of coverage. *Universal Underwriters Ins. Co. v. Ford*, 734 So.2d 173, (Miss. 1999); Supreme Court interprets and construes insurance policies liberally in favor of insured, especially when interpreting exceptions and limitations. *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So.2d 550, (Miss. 1998), rehearing denied; Language in insurance contracts, especially exclusionary clauses, must be construed strongly against the drafter. *Burton v. Choctaw County*, 730 So.2d I, (Miss. 1997), rehearing denied. Insurance policy should be strictly construed against insurer, who has burden of phrasing the terms in clear language. *Id.* Under Mississippi law, if terms of insurance policy are ambiguous, then any doubts are resolved against

drafter and in favor of coverage. *In Re Biloxi Casino Belle Inc.*, 368 F.3d 491, C.A.5 (Miss. 2004); Mississippi courts strictly construe any ambiguity in an insurance policy against the insurer. *Provident Life and Acc. Ins. Co. v. Goel*, 374 F.3d 984, C.A.5 (Miss. 2001), rehearing denied, *31 Fed. Appx. 837*, C.A.5 (Miss. 2001); Under Mississippi law, court must give insurance policy language its plain and ordinary meaning, and resolve any ambiguities or equivocal expressions in favor of insured, but not create ambiguities where non exist. *American Guarantee and Liability Ins. Co. v. 1906 Co.*, 273 F.3d 605, C.A.5 (Miss. 2001).

The Court correctly and succinctly analyzed USF&G's Motion for Summary Judgment and Martin's Response to USF&G's Motion for Summary Judgment and correctly ruled as follows:

> . . . *Rule 56(c), MRCP,* provides for summary judgment where "there is no genuine issue as to any material fact. . . and the moving party is entitled to judgment as a matter of law." Summary Judgment may be granted by the trial Court only where, viewing the evidence before the Court in the light most favorable to the non-movant, the movant establishes that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss. 1983). The moving party has the burden of establishing the absence of a material fact through "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any." *56(c), MRCP; Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So.2d 182, 186 (Miss. 1989). The burden of showing the absence of material fact is one of production and persuasion, not of proof. *Ales v. Ales,* 650 So.2d 482,484 (Miss. 1995). To prevent summary judgment, the non-moving party must establish the existence of a genuine issue of material fact by the means allowable under *56(c), MRCP. Id.* The nonmoving party wishing to avoid summary judgment must be diligent in opposing motion for summary judgment and he may not rely upon mere unsworn allegations in his pleadings. *Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So.2d 182, 186 (Miss. 1989). A motion for summary judgment should be overruled unless the trial Court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim. *Rule 56(c), MRCP; Ales v. Ales,* 650 So.2d 482,484 (Miss. 1995); *McFadden v. Slate,* 580 So.2d 1210 (Miss.1991).
>
> The issue before the Court is whether coverage exists under the policy issued by USF &G to the Plaintiff for the loss she sustained on April 7, 3003 to her business, Cartmell Gallery. "The trial Court, not the jury, must determine the meaning and effect of an insurance contract if the contract is clear and unambiguous." *Jackson v. Daley,* 739 So.2d 1031, 1041 (Miss. 1999), citing *Overstreet V. Allstate Ins. Co.,* 474 So.2d 572, 575 (Miss.1985). When analyzing the language in an insurance policy that is "clear and unambiguous, it is not construed in favor of the insured but is construed as written." *Lowery v. Guaranty Bank & Trust Co.,* 592 So.2d 79,82 (Miss.1991). "The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 419 (Miss. 1987), citing, *Union Planters Leasing v. , Woods,* 687 F.2d 117, 119 (5th Cir.1982).
>
> "The construction of an insurance contract is limited to an examination of the 'written terms' of the policy itself." *Great Northern Nekoosa Corp. v. Aetna Cas. and Sur. Co.,*

921 F.Supp. 401, 406 (N.D. Miss. 1996), citing *Employers Mut. Casualty Co. v. Nosser,* 250 Miss. 542, 553, 164 So.2d 426, 430 (1964). "The policy itself is the sole manifestation of the parties' intent, and no extrinsic evidence is permitted absent a finding by a Court that the language is ambiguous and cannot be understood from a reading of the policy as a whole." *Id.,* citing *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d at 419. If the language in the insurance contract is clear and unambiguous, it must be given its plain meaning and enforced according to its terms as written. *Gulf National Bank v. United States Fire Ins. Co.,* 713 F .ld 1106, 1109 (5th Cir.1983). Thus, a Court must construe the terms of the policy to reflect the intentions of the parties. *Delta Pride Catfish, Inc. v. Home Ins. Co.,* 697 So.2d 400, 404 (Miss. 1997), citing *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d at 419.

As the Mississippi Supreme Court succinctly stated in *State Farm Mutual Automobile Ins.Co. v. Scitzs,* 394 So.2d 1371, 1372-1373 (Miss.1981), the rules of construction of insurance contracts are as follows:

> 1. Where an insurance contract is plain and unambiguous, it should be construed as written, like other contracts.
> 2. Insurance Contracts are construed most strongly against party drafting contract, and most favorably to the policyholder.
> 3. Where terms of insurance contracts are ambiguous or doubtful, contract must be construed most favorably to insured and against insurer.
> 4. Insurance contracts must be given a reasonable and sensible interpretation, and where policy is subject to two interpretations equally reasonable, that which gives the greater indemnity to the insured should be adopted.
> 5. Where there is no practical difficulty in making the language of an insurance contract free from doubt, any doubtful provision in the policy should be construed against the insurer.
> 6. Terms of insurance policies are construed favorably to insured wherever reasonably possible, particularly exclusion clauses.
> 7. Although ambiguities of insurance contract should be construed against insurer, Court cannot alter or change contract where terms are not ambiguous, despite resulting hardship on insured.

Thus, if the Court finds that terms and/or clauses of the insurance contract are ambiguous, then the language used is to be construed most favorably for the insured and against the insurer, especially in the interpretation of exclusion clauses. *Cherry,* 501 So.2d at 419.

The Plaintiff, Debbie Martin d/b/a Cartmell Gallery, obtained an insurance policy for the Gallery, through USF&G which provides additional coverage for a loss sustained as follows:

> Section I-Coverage
> A. Coverage Provided.
> 4. Additional Coverage.
> Coverage provided by these Additional Coverages is in addition to the Limits of Insurance shown in the Property Coverage Part Declarations.

However, we will pay only for loss or damage you sustained through covered causes of loss which occur during the policy period. Regardless of the number of years these Additional Coverages remain in force or the number of premiums paid, no Limit of Insurance is accumulated from policy period to policy period.

v. Sewer or Drain Backup.

We will pay for direct physical loss to Covered Property at the premises described in the Schedule of Premises if the loss is caused by water that:

(1) Backs up through sewers or drains, or

(2) Enters into and overflows from within:

(a) A sump pump,

(b) A sump pump well, or

(c) any other system,

designed to remove subsurface water from the foundation area.

The most we will pay for this Additional Coverage is $25,000 or the Limit of Insurance shown in the Property Coverage Part Declarations for Sewer or Drain Backup, whichever is greater.

The policy also provides for exclusions from coverage as follows:

C. Exclusions.

1. We will not pay for loss to Covered Property caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. Unless otherwise stated, the following exclusions apply to all Section I-Coverages.

a. Water.

(1) Flood, surface water, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.

If electrical "covered equipment" requires drying out because of the above, we will pay for the direct expenses of such drying out subject to the applicable Limit of insurance and deductible.

The Mississippi Supreme Court has not addressed the issue of whether such a water exclusion clause is unambiguous when analyzed with the language of the entire policy. In support of its argument that the damage to the Gallery is not covered under the policy, the Defendant cites *Eaker v. State Farm Fire and Casualty Insurance Co.*, 216 F.Supp.2d 606, 622 (S.D. Miss. 2001). In*Eaker,* the Court held that a water exclusion clause was clear and unambiguous and entered Summary Judgment in favor of the

insurance company. *Id.* at 622. However, in that case, the language of the exclusionary clause contained terms that defined "water" as follows:

1. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, all whether driven by wind or not;

2. **water from outside the plumbing** system **that enters through** sewers **or drains,** or water which enters into and overflows tram within a sump pump, sump pump well or any other system designed to remove subsurface water which is drained from the foundation area; or

3. natural water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure. (Emphasis added.) *Id.* at 622.

In this case, the exclusionary clause contains language similar to the first paragraph of the clause in *Eaker.* However, the second clause in *Eaker* clearly and specifically excluded water that enters from outside the plumbing system that enters through sewers or drains. *Id.* Here the policy contains an Additional Coverage clause which provides coverage for water damage in some situations and which contains language similar to paragraphs two and three of the *Eaker* exclusionary clause, as follows:

> v. Sewer or Drain Backup.
>
> We will pay for direct physical loss to Covered Property at the premises described in the Schedule of Premises if the loss is caused by water that:
>
> (1) Backs up through sewers or drains, or
>
> (2) Enters into and overflows from within:
>
> (a) A sump pump,
>
> (b) A sump pump well, or
>
> (c) any other system,
>
> designed to remove subsurface water from the foundation area.
>
> The most we will pay for this Additional Coverage is $25,000 or the Limit of Insurance shown in the Property Coverage Part Declarations for Sewer or Drain Backup, whichever is greater.

Thus, the language of the policy in this case is not as clear cut as the language that provided for exclusion in the *Eaker* case. At the best, the language in this policy is contradictory in the language it uses. It provides an exclusion for water damage, then provides an Additional Coverage section which provides coverage for water backing up in sewers and drains. Unlike *Eaker,* this policy does not specifically exclude water from outside of the plumbing system. Taking the affidavit of Monty Jackson into account, which includes his opinion that the water backed up through the sewers and drains, and reading the language of the policy which does not limit coverage to the

> back up of the sewer or drainage systems through the plumbing of a building, the Court is of the opinion that the language of the policy is ambiguous and should be construed against the insurer. As such, the Court finds that the language of the policy provides for coverage in the Additional Coverage section thereof. Having so found, the Court finds that the Motion for Summary Judgment is not well taken and shall be denied. [R.5/630-643]

Appellant's brief cites out of state cases wherein the policy language and the facts established at trial are different, therefore not applicable to Martin's claim.

It was noted that USF&G's attorney announced to the Court his mistaken and incorrect belief that the water exclusion applied to fine arts coverage but corrected his position. [R.8/14] [R.9/214]

What better proof of ambiguity of USF&G's policy than USF&G's lawyer having a mistaken belief as to the meaning of the insurance policy and having to correct his position.

The trial Court was correct in its ruling and Martin is entitled to the entire judgment.

III. The Judgment on Count II related to fine arts claim should be affirmed because Martin did prove facts sufficient to support coverage according to the fine arts coverage.

The standard of review for the denial of a motion for JNOV and a motion for directed verdict are identical. *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So2d. 1077, 1083 (¶16) (Miss.2000) (citing *Steele v. Inn of Vicksburg, Inc.* 697 So.2d 373, 376 (Miss.1997)). "This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence." *General Motors Acceptance Corp. V. Baymon,* 732 So.2d 262, 268 (¶17) (Miss. 1999) (citing *Steele,* 697 So2d. At 376).

Debbie Martin testified as follows:

Debbie Martin, d/b/a Cartmell Gallerypurchased two (2) policies of insurance for her business, Cartmell Gallery, from The St. Paul Business Foundation Series, USF&G Insurance Company of Mississippi, insurance policy #BK01323946 effective February 6, 2003 through February 6, 2004. [R.9/183]

On or about April 7, 2003, Debbie Martin d/b/a Cartmell Gallery, suffered a very substantial loss to the business and contents within her business, when water backed up or overflowed from sewer or drainage entered her Gallery, and she submitted a claim to USF&G Insurance Company of Mississippi for backup damage to the business premises. [R.9/183]

that there were two policies that covered Cartmell Galleries located at 609 22nd Avenue. [R.9/183]. After the purchase she had an expectation that her business was covered for losses. [R.9/183].

On April 7, 2003 there was a heavy rain. There was no flood in the City of Meridian. She arrived at Cartmell Galleries and water was standing up to her ankles. There was water all the way to the back of the store. The water had an odor, a prominent smell like urine. She contacted her insurance company and Mr. Hewitt arrived the next day. [R.9/185]

When Mr. Hewitt did his inspection there was a strong odor like someone goes to the bathroom. All the property was in disarray. [R.9/186]

On April 23, 2003 USF&G denied her claim. [R.9/187]

Ms. Martin submitted a demand letter outlining her claim. [R.9/188]

Ms. Martin identified her losses on Exhibit P-10 [R.E. 16] [R.9/188]

Ms. Martin identified on Exhibit P-10 [R.E. 16] a picture valued at $4,800.00 which was not stock. [R.9/188,189] In addition Ms. Martin has previously submitted a photo of the damaged non-stock picture. Ms. Martin testified as to her losses including fine art and electronics. [R.E. 18]

The trial Court submitted Defendant's instructions as to fine arts coverage. The jury heard the testimony and instructions as to law and found for Martin and awarded a verdict of $2,215 on Count II for coverage of the fine arts provision. [R.6/818]

It was noted that USF&G's attorney announced to the Court his mistaken and incorrect belief that the water exclusion applied to fine arts coverage but corrected his position. [R.8/14] [R.9/214]

What better proof of ambiguity of USF&G's policy than USF&G's lawyer having a mistaken belief as to the meaning of the insurance policy and having to correct his position.

The trial Court was correct in its ruling and Martin is entitled to the entire judgment.

IV. The Court correctly ruled in limiting USF&G from presenting evidence of Martin's June 2004 claim.

The well-established standard of review for the admission or suppression of evidence is an abuse of discretion. *Miss. Transp. Comm'n v. McLemore,* 863 So2d. 31, 34 (¶4) (Miss. 2003) (citing *Haggerty v. Foster,* 838 So.2d 948, 958(¶25) (Miss.2002). This means that the "[a]dmission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an

abuse of that discretion." *Haggerty,*, 838 So.2d at 958(¶25) (quoting *Broadhead v. Bonita Lakes Mall, Ltd. P'ship,* 702 So.2d 92, 102(¶34) (Miss.1997)). Furthermore, when an error is made by the trial court regarding the admission or suppression of evidence, this Court "will not reverse unless the error adversely affects a substantial right of a party. *Id.* (Quoting *In re Estate of Mask*, 703 So.2d 852 859(¶35) (Miss. 1997)).

The trial court was correct in sustaining objection to subsequent actions of Martin. The fact Martin made another claim after the April 3, 2003 claim with a different company is irrelevant. [R.8/5] Any prudent business person would take additional safeguards to prevent the same unfounded denial by an insurance company. The redaction of the Gardner bill as it refers to the June, 2004 claim is also irrelevant and consistent with the ruling.

USF&G has not presented an authority to support this position nor any meaningful argument. As stated in *Brown v. Houston Sch. Dist.*, 704 So.2d 1325, 1327(¶12) (Miss.1997), "In the absence of meaningful argument or citation of authority, this Court generally will not consider the assignment of error."

CROSS APPEAL ISSUES AND ARGUMENT

I. Whether or not the Court erred by granting a Remittitur.

On September 29, 2006 the jury awarded the Plaintiffs a verdict in the amount of $39,329.00 on Count one, related to sewer and drain backup. [R.6/818]

The amount is not excessive and is within sewer and drain coverage pursuant to the policy that is shown in Exhibit P-1 and P-2. Plaintiff called Defendant's Representative and the claims adjuster Robert Hewitt specifically examined and identified Exhibit P-4, claim coverage detail. Mr. Hewitt circled the building limit insurance on page two, $26,523.00 twice and testified that the insurance on the premises covered Premise number one: 609 22nd Avenue for $26,523.00 and Premise number two, 609 22nd Avenue for $26,523.00 for a total of over $53,000.00. [R.8/129-131]

Exhibit P-4 also indicates Premise number one: 609 22nd Avenue with a sewer and sewer and drain backup of $25,000.00, and Premise number two: 609 22nd Avenue with a $25,000.00 sewer and drain backup. [R.E. 13]

Pursuant to Exhibits P-1 and P- 4 and the testimony of Mr. Hewitt, USF&G lists a property

limit double and therefore also the sewer and drain backup for a total of $50,000.00. [R.E. 10, 11A, 11B, 13]

The Defendant has waived any claim of limits pursuant to Pre-trial Order. [R.E. 7] [R.6/770-773]

Martin paid for two policies for coverage of $26,523.00 on each for a total of $53,046.00 with a $25,000.00 sewer or drain backup on each for a total of $50,000.00 and therefore is entitled to the entire $39,329.00 judgment.

II. Whether the Court erred by denying punitive damage claim.

The Court erred in granting USF&G's Motion for Summary Judgment Martin's claim for bad faith. [R.E. 6] [R.5/630-643]

We employ a de novo standard of review when examining the grant or denial of summary judgment. *Heigle v. Heigle,* 771 So.2d 341, 345 (Miss.2000). The evidence will always be viewed in the light most favorable to the party against whom the motion has been made, with the moving party bearing the burden of demonstrating that no genuine issue of fact exists. *Id.*

On September 29, 2006 the jury returned a verdict in favor of Martin in the amount of $39,329.00 on Count 1 relating to claims of coverage under the Sewer and Drain Backup provision; in favor of Martin in the amount of $2,215 on Count II for coverage under the Fine Arts provision; and in favor of Martin in the amount of $3,084 on Court III regarding coverage on the electronic data processing system provision. [R.6/818]

As admitted by USF&G in their brief and pursuant to the contracts, USF&G has not paid Martin $3,884.00 with eight (8%) percent interest from October 3, 2006 on Count III related to her coverage claim for electronic data processing systems. [Appellant Br/3,4] The electronic data processing system coverage is an additional coverage offered through the policy which is not subject to water exclusion. Prior to this trial, the claim was not paid despite Martin's claim and itemization of costs.

USF&G does not have a legitimate or arguable reason to deny payment of the claim and Plaintiff has showed prior requests. Martin's claim for punitive damages should have been submitted to the jury. The Court erred in granting the Motion Denying Summary Judgment as it pertains to the

claim under the electronic data processing coverage.

Under Mississippi law, if there is no arguable reason found for denying an insurance claim the issue of punitive damages on a bad faith denial of coverage claim should not automatically be submitted to the jury; rather, absent an arguable reason for denying the claim, the trial court must still determine whether there is a jury issue as to the insurer's having committed a willful or malicious wrong, or acted with gross or reckless disregard for the insured's rights. *Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, C.A.5 (Miss. 2002), rehearing and rehearing denied 48 Fed. Appx. 919, C.A.5 (Miss. 2002).

If the trial judge determines that, as a matter of law, it cannot hold that the insurer had a legitimate and arguable defensive position for denying claim, but that the evidence constituted disputed facts as to whether such situation existed, the trial judge should submit the arguable basis and punitive damages issues to the jury. *Stewart v. Gulf Guar. Life Ins. Co.*, 846 So.2d 192, rehearing denied.

If the insurer had a legitimate or arguable reason to deny payment of the claim, then the trial judge, after reviewing all the evidence, should refuse to grant a punitive damage instruction. *Id.*

The lack of a legitimate or arguable reason for an insurer to deny a claim does not automatically lead to the conclusion that the issue of punitive damages should be submitted to the jury; rather, the trial court still must determine whether there is a jury issue as to a willful or malicious wrong or gross or reckless disregard for the insured's rights. *Id.*

The issue of an insurer's liability for punitive damages may be submitted to the jury, notwithstanding the presence of an arguable basis for denying the claim, where there is a question that the mishandling of a claim or the breach of an implied covenant of good faith and fair dealing may have reached the level of an independent tort. *Id.*

Claim for punitive damages against an insurer will not go to the jury unless (1) there is a finding that the insurance company had no legitimate or arguable reason to deny payment of the claim and (2) the plaintiff has made a showing of malice, gross negligence, or wanton disregard of the rights of the insured. *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So.2d 954.

Based on the foregoing there are genuine issues of material fact existing and Defendants are not entitled to judgment as a matter of law on the issue of punitive damage claim.

CONCLUSION

After a substantial rain Ms. Martin's gallery was damaged when water backed up through the sewers and drains. There was no flood .

The Court ruled correctly as to the ambiguity within the insurance policy, therefore providing Ms. Martin with coverages. The jury correctly ruled in assessing damages concerning Ms. Martin's property. Ms. Martin had purchased two insurance policies and is entitled to the benefits of both policies which would provide coverage $50,000.00 to pay the damages of $39,329.00 Count I as related to the claim for coverages under the Sewer and Drain Back Up provision. Ms. Martin presented evidence concerning the fine arts coverage which she is entitled to $2,215.00 judgment. Ms. Martin was entitled to a punitive damage instruction for the failure of USF&G to pay the $3,084.00 claim for electronic data processing systems in which USF&G admitted that there was no exclusion applicable and did not pay.

Based on the foregoing, this Court should affirm the original judgment of $39,329.00 Count I as it relates to the claim of coverage under the Sewer and Back Up provision in favor of Martin; in favor of Martin in the amount of $2,215 on Count II for coverage under the Fine Arts provision; and in favor of Martin in the amount of $3,084 on Court III regarding coverage on the electronic data processing system provision and remand the case to Circuit Court for the trial on the issue of punitive damages.

RESPECTFULLY SUBMITTED, this the 31 day of October, 2007.

DEBBIE MARTIN D/B/A CARTMELL GALLERY

BY: Charles W. Wright

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CERTIFICATE OF FILING

I, Charles W. Wright, Jr., do hereby certify that I have this day caused to be delivered, the original and three true and correct paper copies of the Brief of Appellee/Cross Appellant, Debbie Martin, d/b/a Cartmell Gallery, to:

Betty Sephton, Clerk
Supreme Court of the State of Mississippi
Office of the Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Jackson, MS 39201

This the 31 day of October, 2007.

Charles W. Wright

CHARLES W. WRIGHT, JR.

CERTIFICATE OF SERVICE

I, Charles W. Wright, Jr., do hereby certify that I have this date mailed, postage prepaid, by United States mail a true and correct copy of the foregoing Brief of Appellee/Cross Appellant to the following:

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SO CERTIFIED, this the 31 day of October, 2007.

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