IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-00193

UNITED STATES FIDELITY AND
GUARANTY COMPANY OF MISSISSIPPI — APPELLANT / CROSS-APPELLEE

VS.

DEBBIE MARTIN d/b/a CARTMELL GALLERY — APPELLEE / CROSS-APPELLANT

APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY

REPLY BRIEF OF APPELLANT / RESPONSE OF CROSS-APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT
NO. 2007-CA-00193

Mississippi law does not include a decision comparing and interpreting sewer or drain backup coverage in conjunction with a water exclusion. For that reason, Appellant/ Cross-Appellee, USF&G, requests oral argument for this appeal.

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INTRODUCTION

Martin's argument asks this Court to ignore the language in the policy. Martin's argument asks the Court to ignore a 100 year flood that caused her loss. Martin's argument asks the Court to hold that all she had to do to meet her burden to prove that she had a covered "Sewer or Drain Backup" claim is have witnesses testify that the flood water that entered her gallery smelled bad. But, the policy's words "backs up through" cannot be ignored and require more than mere testimony that the water smelled bad. Also, the policy's water exclusion and the fact Martin's loss was ultimately caused by a 100 year flood cannot be ignored.

Martin's testimony and all of her witnesses's testimony was that they did not know how the water entered the gallery. Martin's testimony and her witnesses' testimony was that they were not in or around the gallery at the time the water entered the gallery. Martin testified that she was not aware of any water coming out of drains in the interior of the gallery. Martin's expert Monty Jackson was asked "you don't know what water — whether the water in her gallery had ever passed through the sewer drain, do you?" He responded, "I do not know that. No." Martin presented no other evidence to establish that the water which damaged her gallery reversed flow and "backed up through sewers or drains." The only testimony about the water was that it had a foul odor.

Martin had ample time prior to the claim and during the proceedings below (nearly three and one-half years) to develop lay witnesses and experts who could establish (if it had actually happened) that the water entering her gallery "backed up through" a sewer or drain.

The only evidence she could present was witnesses who said the water had a bad odor but they each admitted they did not know the source of the water. As a result, the jury was left to simply speculate about whether the water that entered Martin's gallery ever entered a sewer or drain and reversed flow and entered Martin's gallery. However, the jury did not have to guess about the occurrence of a flood. Martin's own expert testified that the storm in question was a 100 year flood. Mike Gardner also confirmed when asked on cross-examination to confirm that he did not know the source of the water in the gallery. He said "[n]o sir. I do not, **other than rain.**"

If the Court affirms this outcome, any insured can circumvent the water exclusion and the necessity to buy flood insurance by simply buying "Sewer or Drain Backup" coverage and expand it to cover a flood loss such as this by simply saying the flood water smelled bad. Flood water that comes off the streets of any downtown area will smell bad. Martin wants to rewrite her policy to say she will be paid for a loss caused by "flood water that smells bad." The Court should enforce the policy language and reverse and render this result.

STATEMENT OF THE CASE

Martin's brief largely overlooks her responsibility to provide record citations for many of her representations about evidence in the trial because many are misrepresentations. Nevertheless, the indisputable truth is that:

- Martin's loss was caused by water. R.E. 142-166; R. 265-289.

- Martin's policy excluded coverage for a loss caused either "directly or indirectly" by a flood or surface water. R.E. 11; Trial Exhibit # P-1 (policy at pp. 20-23 of 38).
- Martin's policy also excluded a loss caused by flood or surface water regardless of any other cause or event that contributed concurrently or in any sequence to the loss. R.E. 11; Trial Exhibit # P-1 (policy at pp. 20-23 of 38).
- Martin's expert confirmed that the rain storm out of which Martin's loss arose was a 100 year rain event. R.E. 143, 385, 397; T.R. 99, 183; R. 266.
- Martin's policy provided an additional limited coverage for loss caused by "water that backs up through sewers or drains." R.E. 11; Trial Exhibit # P-1 (policy at pp. 20-23 of 38).
- Martin and her witnesses admitted they did not know whether the water which entered her gallery ever entered a sewer or drain. R.E. 387-389; T.R. 196-198; R.E. 398; T.R. 100; R.E. 395-396; T.R. 88-89.
- Martin's carpet cleaner admitted that the only source of the water that he knew was "rain." R.E. 395-396; T.R. 88-89.

USF&G and other insurers have the right to expect that the risks they assume will not be expanded. *See Arcon Corp. v. Liberty Mut. Ins. Co.,* 591 F.Supp. 15, 21 (D.C. Tenn. 1983). Martin did not suffer a covered Sewer or Drain Backup loss. Martin suffered a water loss caused by flood and surface water. Her attempt through assertion of

this claim and resulting lawsuit to expand her Sewer or Drain Backup coverage to cover losses caused by flood and surface water should not be allowed by this Court.

ARGUMENT

I. The policy's terms "water that backs up through sewers or drains" should not be expanded to cover losses where water never enters a sewer or drain such as here, therefore Count I should be reversed and rendered.

Martin had the burden to prove by a preponderance of the evidence that her water damage loss was covered under the Sewer or Drain Backup Additional Coverage. Martin failed to sustain her burden. Martin and her witnesses as outlined in USF&G's brief each admitted that they did not know whether the water that caused the damage to her gallery ever entered a sewer or drain. R.E. 387-389; T.R. 196-198; R.E. 398; T.R. 100; R.E. 395-396; T.R 88-89. Because Martin and her witnesses did not know whether the water ever entered a sewer or drain, they could also not provide any testimony that the water "backed up" by reversing flow. The jury was correctly instructed in Jury Instruction # C-11 that the "phrase 'to backup,' as used in the Sewer or Drain Backup provision of the policy, means water that flows in a direction opposite to the intended flow." R.E. 383; R. 785. Martin's evidence that the water smelled bad falls far short of meeting her burden to prove that the water entered a sewer or drain and then backed up by reversing flow and entered her gallery. Who is to say that the purported odor was not due to debris and substances in the water due to flowing on the surface of the street or caused by the gallery's carpet and adhesive?

Martin herself admits that the water never entered a sewer or drain by stating that the street surface drainage system was overwhelmed and unable to drain (*i.e.*, - never entered the

system) the surface water that accumulated due to the heavy rate of rainfall. Martin's brief at pp. 11-12 makes this admission more than once by stating as follows:

> **"Water was above the curbs and the street drains were not draining** in the early morning hours at daybreak." (*Emphasis added.*)
>
> ". . . the system [referring to street drains] was either **overloaded or stopped up** to the point that **it** [water] **could not get underground** [*i.e.*, - it could not enter the drain] and therefore was **flowing on top of the ground in that particular area.**" (*Emphasis added).*

If the rain water could not drain, the water never entered a drain or sewer and continued to simply be surface water. *See, Gammons v. Tenn. Farmers Mut. Ins. Co.*, 1986 WL 13039 at *3 (holding that phrase "water which backs up through sewers or drains" refers to water **in** sewer or drain that flows in opposite direction to intended and usual flow). Martin's description [referencing testimony of her expert] that the water was "[f]lowing on top of the ground in that particular area" makes it clear the water was "surface water" which the policy excludes coverage for any loss that surface water either "directly or indirectly" causes. The term "surface water" in the context of water exclusions has been interpreted to mean: "water which is derived from falling rain [like this case] or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground, while it remains in such diffused state, and which follows no defined course or channel, which does not gather into or form a natural body of water, and which is lost by evaporation, percolation, or natural drainage." *Hirschfield v. Continental Casualty Company*, 199 Ga. App. 654, 405 S.E.2d 737, 738 (1991). (Emphasis added). Martin's characterization of the water in this case in this manner and inclusion of this description by her expert in her brief illustrates that she either is simply advocating the Court ignore the policy language that one - states that a loss caused

directly or indirectly from surface water is excluded and two - there is only limited coverage for a loss caused by water that "backs up through a sewer or drain"; or if Martin is not advocating that the Court ignore this language, she simply fails to appreciate the meaning of and cases that interpret and define the words "surface water", "backs up" and "through."

The policy does not say "backs up from", rather it says, "backs up through"meaning that the water must enter the sewer or drain. *See, Gammons v. Tenn. Farmers Mut. Ins. Co.*, 1986 WL 13039 at *3. The distinction between these phrases was recognized in *Front Row Theatre Inc. v. American Mfr's Mut. Ins. Cas.*, 18 F.3d 1343, 1348 (6th Cir. 1994). Martin's argument asks this Court to expand the policy to cover water that never enters a sewer or drain where the water cannot enter the drainage system because the drainage system is either overloaded or clogged. If the policy provided coverage for water that "backs up from" as opposed to water that "backs up through", the water in this case would not have had to enter the sewer or drain. However, the policy in this case requires that the water "back up through" meaning water, to be covered, had to enter the sewer or drain and back up by reversing flow. Martin failed to provide this crucial evidence. Of course, even if Martin had witnesses to prove the water entered a sewer or drain, the water exclusion nevertheless still excludes coverage where flood or surface water either directly or indirectly causes the loss. In this case as will discussed more in detail below, it cannot be credibly contended that Martin's loss did not either directly or at the least indirectly result from flood and surface water.

Martin cited no case where a court affirmed a sewer or drain backup claim based only on odor evidence. If the Court allows the odor evidence alone in this case as sufficient proof of a covered Sewer or Drain Backup Coverage based on the language of the policy, the Court will be expanding the risks of insurers by allowing an insured suffering excluded flood damage to circumvent that exclusion through the purchase of Sewer or Drain Backup coverage.

Martin's argument that there is "substantial evident [sic] in supporting the verdict" is one example of her misrepresentations about the evidence. Her only evidence is the odor evidence which left the jury to speculate about whether her loss was caused by water that entered a sewer and drain and then backed up into her gallery. Mississippi law provides that "no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether or not the damages resulted from the act of which complaint is made, or some other cause, or where it is impossible to say what of any portion of the damages resulted from the fault of the defendant and what portion from the fault of the plaintiff himself." *Hudson v. Farrish Gravel Company, Inc.*, 279 So.2d 630, 636 (Miss. 1973) (citing *Chevron Oil Company v. Snellgrove*, 175 So.2d 471 (Miss. 1965)). Martin failed to meet her burden of proof under the Sewer or Drain Backup Coverage and the jury was left to speculate thus the Circuit Court's Judgment with regard to Count I should be reversed and rendered.

II. The policy excluded Martin's flood and surface water damage and therefore the Judgment on Count I should be reversed and rendered.

(a) The Court's finding of ambiguity as to the water exclusion was erroneous.

Martin failed to cite or discuss any cases comparing for purpose of determining ambiguity, a water exclusion versus sewer or drain backup coverage. Martin's analysis of this issue is simply to recite the general law in Mississippi concerning ambiguity and then cut and pastes the ruling by the Circuit Court.[1] USF&G's original brief and the brief submitted to the Circuit Court discussed numerous cases where other courts have looked at this issue and found virtually identical policy provisions were not ambiguous and that the water exclusion was enforceable. Martin's only comment on these cases is one sentence (a misrepresentation) that states that the policy language and the facts in this case were different. Martin however fails to even attempt to show how the policy language and facts were different.

The Circuit Court erroneously denied USF&G's Motion for Summary Judgment with regard to compensatory damages by finding that the water exclusion was ambiguous when compared with the sewer or drain backup provision. The Circuit Court found that the language of the policy was "not as clear as the language that provided for exclusion in the *Eaker* case." The Circuit Court stated the policy "is contradictory in the language it uses."

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[1] Martin briefly refers to the grossly inadequate analysis done by her purported expert Elam Consulting. The Circuit Court correctly disregarded the opinion of Elam Consulting who was not presented at trial because it addressed a question of law for the Court to decide, whether the policy was ambiguous. Further, the opinion of Elam Consulting was woefully inadequate since it failed to even provide an analysis of the water exclusion. Elam Consulting simply said "no exclusions" apply.

The Circuit Court's holding that the policy is not clear and contradictory was apparently based on two points. First, the Circuit Court noted that the policy excludes losses caused by water, but then provides coverage for water that backs up through a sewer or drain. Second, the Circuit Court noted that the policy does not specifically exclude water from outside of the plumbing system. Otherwise, the Circuit Court's opinion does not mention or address any other basis for the finding of ambiguity.

Regarding the first basis, insurance policies routinely exclude losses caused by a risk, such as water, but then grant back to an insured in a different part of the policy limited coverage through an additional coverage provision for water, such as a sewer or drain backup additional coverage just as is the case in the policy at issue. In *Hirschfield v. Continental Casualty Company*, 199 Ga. App. 654, 405 S.E.2d 737 (1991), the court recognized that an exclusion for water, including flood and surface water, combined in the same policy with a grant of sewer and drain backup coverage through an additional coverage provision and exclusion virtually identical to this case was not ambiguous. In fact, the *Hirshfield* court stated that, "[w]hen read together, the relevant insuring and exclusion provisions of the policy cover damage caused by water which backs up through sewers or drains, except flood and surface water;" and held the policy provided no coverage for the plaintiff's claim. *Id.* at 739. The policy provisions in this case which are at issue are virtually identical to the Continental Casualty policy provisions in *Hirschfield*. The fact that a policy is drafted in this manner, such as this policy, does not cause the policy to be contradictory. Rather, the policy should have been read as a whole. *See Holloman v. Holloman*, 691 So.2d 897, 899

(Miss. 1996); *Brown v. Hartford Ins. Co.*, 606 So.2d 122, 126 (Miss. 1992). Just like *Hirschfield*, the Circuit Court in this case should have read the exclusion for water and sewer and drain coverage together. Instead, the Circuit Court erroneously strained to find the policy contradictory. *Titan Indemnity Co. v. Estes*, 825 So.2d 651, 658 (Miss. 2002). Therefore, the Circuit Court's finding that the policy was contradictory simply because it broadly excluded losses caused either directly or indirectly by water, but also provided limited coverage for water that backed up through a sewer or drain was erroneous and should be reversed. As to the second basis, the fact the water exclusion did not exclude water from outside the plumbing system is of no consequence. The policy clearly excludes surface water which was the cause of Martin's water loss in this case.

As previously discussed in USF&G's initial brief, other courts have found nearly identical policy language to be unambiguous, enforceable and applicable to nearly identical factual situations. *Hirschfield, supra*; *Front Row Theatre, Inc, supra*; *Pakmark Corp. v. Liberty Mut. Ins. Co.*, 943 S.W.2d 256, 257 (Mo. Ct. App. 1997); and *Executive Corners Office Building v. Maryland Insurance Company*, 1999 WL 33283330 (D.N.D.). Finally, another court addressing Mississippi law has upheld as enforceable an anti-concurrent causation clause identical to the anti-concurrent clause in this policy. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 430 (5th Cir. 2007); *see also*, *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 354 (5th Cir. 2007). The Circuit Court failed to make any reference to these cases from other jurisdictions which had compared water exclusions to sewer or

drain backup coverage. The Circuit Court's finding of ambiguity was erroneous and should be reversed.

(b.) Martin admits that excluded flood and surface water caused her loss.

Martin admits that the water that entered her gallery was flood and surface water which is excluded from coverage. Martin's brief at pp. 11-12 makes this admission more than once by stating as follows:

> **"Water was above the curbs and the street drains were not draining** in the early morning hours at daybreak." (*Emphasis added.*)
>
> ". . . the system [referring to street drains] was either **overloaded or stopped up** to the point that **it** [water] **could not get underground** [i.e. — it could not enter the drain] and therefore was **flowing on top of the ground in that particular area.**" (*Emphasis added).*

The testimony of Martin's expert, Monty Jackson, establishes that the water that entered Martin's gallery was excluded flood and surface water. Monty Jackson testified as follows:

> Q: Now, based on your inspections and your engineering background in water and sewer and infrastructure of the city, do you have an opinion as to the result of the heavy rain that occurred on April 7, 2003 as it affected the sewer and drainage system?
> A: Yes. I do.
> Q: What is that opinion?
> A: Basically, the — there was so much rain that occurred on April 7th that the system was either overloaded or stopped up to a point that **it couldn't get underground and, therefore, was flowing on top of the ground** in that particular area. We had so much rain in the city itself that the major creek, Swashee, reached the top of its bank. . . .

T.R. 96. *(emphasis added)*

* * *

> Q: Okay. And I believe what you were describing is sometimes because of the rate of rainfall, the amount and both the intensity of it, a situation can occur where there is simply so much water that it just overflows over a drain and goes past it and never enters that drain, correct?

A: That's true.
Q: Okay. And I believe you, in that deposition, described this as a 100-year rain event; is that correct?
A: Yes.
Q: Can you explain for the jury what a 100-rain event or flood means?
A: A 100-year rain means, basically, that there's a 1% chance of that size rain occurring at any one rain event. It also has been described as a rain that occurs once every 100 years. But that is the easy way to describe it. It's a 1% chance that that size rain will occur during a rain event.
Q: And I believe in an affidavit that you prepared in this you classified it as an extremely heavy rainfall, correct?
A: That is correct.

T.R. 99.

* * *

Q: And I believe you – we talked about the water that got in the various premises going up and down 22nd Avenue. You don't know whether or not that water ever got into the sewers or drains or whether it was that situation, where water simply went over the top of the drain because it couldn't have gotten in and had got in the premises, correct?
A: I don't know which one really occurred.

* * *

Q: In fact, in this case, the gallery, you don't know what water — whether the water in her gallery had ever passed through the sewer or drain, do you?
A: I do not know that. No.

T.R. 100.

Martin's loss was caused by water that was surface water which is excluded pursuant to the unambiguous water exclusion. Martin's judgment on Count I for the Sewer or Drain Backup Coverage should therefore be reversed and rendered.

III. There is still no evidence supporting fine arts coverage.

Martin has not offered any evidence supporting the jury's award of damages in Count II of the Judgment with regard to Fine Arts Coverage. On Exhibit P-13, Martin

indicated with red exes what she considered to be fine art. However, she did not testify or offer any other evidence that these items of fine art belonged to her or were in her care, custody or control as required by the policy. R.E. 11; Trial Exhibit #P-1 (Policy at pp. 21-22 of 38.) The $4,800 painting which is argued by Martin as support for the verdict on Count II was Cartmell's painting. T.R. 188. Cartmell testified that his artwork in the Gallery was for sale. R.E. 392; T.R 107. Therefore such artwork was stock and not covered under the policy. Additionally, Martin later testified as to the consignment arrangement of the items for sale in the gallery. R.E. 390-391; T.R. 205-206. The consignment arrangement holds the items out for sale and therefore they are classified as stock.

As there is no evidence substantiating that any fine art belonged to Martin or was in her care, custody or control, Martin's claim that she is entitled to coverage for her fine arts claim fails. Therefore, the Circuit Court erroneously denied USF&G's motion for directed verdict and judgment not withstanding the verdict on the fine art claim and Count II of the Judgment should be reversed and rendered.

IV. Exhibit P-9 should not have been redacted.

Martin contends that the written statement by Gardner Carpet Cleaning concerning the water damage to the gallery not being caused or attributed to water that backs up through a sewer or drain on the invoice which was Trial Exhibit #P-9 is not relevant. The Mississippi Rules of Evidence defines "relevant evidence" as the following:

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MISS. R. EVID. 401.

Count I revolves around whether there is coverage under the Sewer or Drain Back-up provision of the policy or whether the water exclusion precludes coverage. It is certainly relevant to the instant case that in June 2004, Martin's gallery **again** received damage as a result of heavy rains and flooding. R.E. 264-270; R. 942-948. It is also relevant that at the time of the 2004 heavy rains and flooding, the gallery was insured by a policy of flood insurance purchased by Martin, which paid Martin's claim for damage. R.E. 268; R. 946. It is also relevant that Martin testified in her deposition that she had **no** sewer and drain backup damage during the June 2004 flood. R.E. 267-268; R. 945-946. Of further relevance and importance is that Gardner Carpet Cleaning came and again cleaned up the water damage in June 2004. R.E. 262; R. 940. Gardner Carpet Cleaning indicated on the June 2004 invoice that the damage was the **same** as the damage cleanup on April 7, 2003. R.E. 262; R. 940. Clearly it is relevant that the water damage that occurred in June 2004 did not result from water that backed up through a sewer or drain since the June 2004 damage was the **same** as the April 7, 2003, damage. Therefore the April 7, 2003, damage was not caused by water that backed up through a sewer or drain.

The Circuit Court erroneously allowed Trial Exhibit #P-9 to be redacted despite USF&G's objections, thereby preventing USF&G from presenting further relevant and important proof that the water damage arising from the April 7, 2003, rainstorm did **not**

involve sewer or drain backup. Therefore, the Court should reverse the judgment below on Count I and remand the case for a new trial on Count I.

USF&G'S RESPONSE TO MARTIN'S CROSS-APPEAL ARGUMENTS

I. The Circuit Court was correct to grant USF&G's Motion for Remittitur.

The standard of review for considering a remittitur on appeal is abuse of discretion. *Stringer v. Crowson*, 797 So.2d 368, 371 (Miss. Ct. App. 2001) (citing *Ross-King-Walker, Inc. v. Henson*, 672 So.2d 1188, 1193 (Miss. 1996)). On December 20, 2006, the Circuit Court correctly granted USF&G's Motion for Remittitur reducing the jury's excessive award of $39,329, to Martin on Count I related to sewer and drain backup to $25,000. USF&G's policy limits sewer and drain backup coverage to $25,000. *(Trial Exhibit P-1 and P-2).*

The Sewer and Drain Backup coverage states:

> 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.

(Trial Exhibit P-1 and P-2).

Martin erroneously arrives at the conclusion that the limit of the sewer and drain backup is $50,000, which equals twice the limit articulated in the policy. Martin arrives at this faulty figure by claiming that she paid for two policies of coverage for the single premises located at 609 22nd Avenue, Meridian, Mississippi; thereby doubling the $25,000 limit for sewer and drain backup. Appellee's brief at pp. 21-22.

Nowhere does the policy indicate that Martin paid for two policies. There is only **one** policy number. There is only **one** location identified in the policy, which is 609 22nd Avenue,

Meridian, Mississippi. There was only **one** premium charged. Which all means that there is only **one** policy insuring Martin and the **one** location of 609 22nd Avenue, Meridian, Mississippi. *Trial Exhibits P-1 and P-2.*

Quite to the contrary of the argument in Martin's brief, Martin **admitted** that there was only one policy during the prior hearing on USF&G's Motion for Remittitur on December 18, 2006. The exchange during this hearing went as follows:

> BY MR. SWEAT: . . . The policy is very clear that the most it will pay is $25,000 of the Limit of Insurance in the Property Coverage Part Declarations. . . .$25,000 was simply the most that they will pay on this policy for Sewer or Drain Backup. The fact that he is trying to confuse this issue of two different premises being insured, it's 609 22nd Avenue. The policy says the most they are going to pay is $25,000, if you look at the Limit of Insurance section to determine that limit. Based on the verdict, it should be remitted.
>
> BY THE COURT: **Was there any testimony or evidence that double premiums were paid?**
>
> BY MR. SWEAT: **No. Your Honor.**
>
> BY MR. WRIGHT: **There was one premium**, but on the policy it had two premises.
>
> BY THE COURT: I understand that.
>
> BY MR. WRIGHT: Yes, sir.
>
> BY THE COURT: But it wasn't a premium paid for each policy?
>
> BY MR. WRIGHT: **Just one policy.**
>
> BY THE COURT: Right.
>
> BY MR. WRIGHT: The premises shown under the policy as premise one and premise two.
>
> BY THE COURT: Yes, sir.
>
> BY MR. SWEAT: Both 609 22nd Avenue.

T.R. 272-273. (Emphasis added.)

The Circuit Court correctly reviewed the policy and sustained USF&G's Motion for Remittitur. The Circuit Court concluded as follows:

> BY THE COURT: All right. Well, the Court looked at this. And it's the Court's opinion that the policy limit is $25,000 under the

> policy that the insurance – that the insurance company would be liable for, so the Motion for Remittitur will be granted down to $25,000.

T.R. 273.

However, despite her admissions discussed above, what could still be causing confusion on Martin's part is that there are two (2) descriptions of the **one insured premises**. The premises of 609 22nd Avenue, Meridian, Mississippi, is described as a business of (1) picture frames, custom framing; and (2) an art gallery or dealer. *Trial Exhibit P-1 and P-2.* Although there are two (2) descriptions, there is only **one** insured location, 609 22nd Avenue, Meridian, Mississippi and **one** policy, as Martin admits. Despite Martin's admission and the possible confusion, she completely misrepresents to the Court in her brief that, "Martin paid for two policies for coverage of $26,523.00 on each for a total of $53,046.00 with a $25,000 sewer or drain backup on each for a total of $50,000.00 and therefore is entitled to the entire $39,329.00." Martin's brief, p. 22. The evidence and Martin's admission at the hearing on USF&G's Motion for Remittitur indicates this is simply not the case.

Therefore as the policy clearly states (and Martin even agrees), the limit of the Sewer and Drain Backup coverage is $25,000. Accordingly, the Circuit Court did not abuse its discretion and properly granted USF&G's Motion for Remittitur.

II. The Circuit Court was correct in granting USF&G's Motion for Summary Judgment with regard to punitive damages.

In her Complaint and Amended Complaint Martin claimed that USF&G acted in bad faith or lacked a legitimate or arguable reason for denying the subject claim. R.E. 41-141;

R. 2-102; R.E. 142-166; R. 265-289. USF&G cannot be held liable for "bad faith" if it had a "legitimate or arguable" reason for its actions involving the claim. *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290 (Miss. 1992); *Richards v. Allstate Ins. Co.*, 693 F.2d 502 (5th Cir. 1982); *see also Standard Life Ins. Co. Indiana v. Veal*, 354 So.2d 239, 248 (Miss. 1977) (holding that "if an insurance company has a legitimate reason or an arguable reason for failing to pay a claim, punitive damages will not lie"). Even if Martin were able to prevail on the issue of coverage, in order to establish a claim of bad faith against an insurance company, Martin must also show that USF&G lacked an arguable or legitimate basis for denying the claim in order to prevail on a claim of bad faith. *Liberty Mutual Insurance Company v. McKneely*, 862 So.2d 530, 533 (Miss. 2003) (citing *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So.2d 637, 641 (Miss. 1998) (citing *Life & Cas. Ins. Co. of Tennessee v. Bristow*, 529 So.2d 620, 622 (Miss. 1988)); *Sessoms v. Allstate Ins. Co.*, 634 So.2d 516, 519 (Miss. 1994). The burden of demonstrating that an insurer had no legitimate or arguable reason to deny a claim is a heavy one. *Evangelista v. Nationwide Insurance Company*, 726 F.Supp. 1057, 1059 (S.D. Miss. 1988) (citing *Blue Cross & Blue Shield of Miss., Inc. v. Campbell*, 466 So.2d 833 (Miss. 1984)). The question of whether an arguable reason exists, is a legal question for the Court to determine. *Muphree v. Federal Ins. Co.*, 707 So.2d 523, 530 (Miss. 1997). "Arguable reason" has been defined by this Court as a reason for which there is some credible evidence that supports the conclusions on the basis of which the insurer acts. *Blue Cross & Blue Shield of Miss., Inc. v. Campbell*, 466 So.2d 833, 851 (Miss. 1984). An insurance company "does not need to prove with certainty that the insured was not entitled to payment but that it had a reasonable justification

either in fact or law to deny payment." *Prudential Prop. and Cas. Ins. Co. v. Mohrman*, 828 F.Supp. 432, 440 (S.D. Miss. 1993).

The *Grimes* court further stated that "a denial of a claim fails to be 'arguable' when the denial is unsupported by evidence which is sufficiently credible as to lead a reasonable insurer to deny coverage." *Grimes*,722 So.2d at 642. The trial court should make the determination of whether or not an arguable reason exists. *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869 (5th Cir. 1991) (whether insurer had arguable reason to deny claim is issue of law for court to decide); *Tucker v. Aetna Cas. & Sur. Co.*, 609 F.Supp. 1574 (S.D. Miss. 1985), *aff'd in part rev'd in part,* 801 F.2d 728 (5th Cir. 1986) (trial judge has responsibility of determining whether arguable reason - either legal or factual - existed for failure to pay claim); *Blue Cross & Blue Shield of Miss.*, 466 So.2d at 842 (Miss. 1984) (holding if trial court finds that insurer had arguable basis for nonpayment, then bad faith issue should not be submitted to jury).

Martin has failed to offer any evidence that USF&G acted in bad faith or lacked a legitimate or arguable reason for denying her claim. Accordingly, the Circuit Court in its Memorandum Opinion issued March 23, 2006, correctly found:

> . . . [T]here are no genuine issues of material facts in dispute for the jury to resolve regarding whether the Defendant had an arguable basis to deny payment of this claim. The Court is of the opinion that USF&G had an arguable basis to deny the claim due the language used in the exclusionary clause and its interpretation of the clause, as well as its interpretation of the Additional Coverage section. The Defendant read the policy to exclude damage caused by water, be it from under the door of the Gallery or coming up through the drains outside of the building. Thus, the Court concludes that the Defendant did have an arguable basis to deny coverage and that punitive damages are unwarranted.

> The Court also finds that the Plaintiff has not shown that the Defendant denied coverage with malice, gross negligence or wanton disregard to the rights of the Plaintiff. USF&G merely received a claim from the Plaintiff, investigated the cause of the loss, interpreted its policy and denied coverage. There is no evidence before the Court that the Defendant conducted itself in such a way as to call for the imposition of punitive damages. Therefore, the Court finds that there are no disputed issues of material fact which preclude summary judgment as to the Plaintiff's claim of bad faith refusal to pay, and that the Defendant is entitled to entry of judgment as a matter of law.

R.E. 30; R. 642.

Martin's analysis of this issue is to simply state in two conclusory sentences that USF&G "does not have a legitimate or arguable reason to deny payment of the claim [as it pertains to the electronic data processing coverage] and Plaintiff has showed prior requests."

Martin never presented documentation related to items claimed on the Electronic Data Processing Systems coverage, despite USF&G's requests. USF&G never denied payment of this claim. The "ball" was in Martin's "court" to provide the requested supportive documents and in turn, USF&G would pay Martin's claim under the Electronic Data Processing Systems policy provision.

Bob Hewitt discussed the process of paying covered claims during his testimony:

> Q: Now, he also asked you about the computer. Do you recall that?
> A: Yes.
> Q: Okay. And when you pay a claim – there was a lot of questioning of you about paying for that computer.
> A: Yes.
> Q: Besides determining that something is covered, what do you have to have to pay a claim?
> A: You have to verify what the computer cost or we would have to have a model, brand name, and some verification that the computer is damaged and what it would cost to replace.
> **Q: Did Mr. Wright ever – you told Mr. Wright that you asked him for that, correct?**

A: Yes.
Q: Did he ever give you that?
A: No.
Q: If he had given you that, would you have paid it?
A: Yes.
Q: Of course, he was questioning you about that under the Electronic Data Processing Coverage, correct?
A: Yes.

T.R. 169-170. (Emphasis added.)

The Circuit Court even reminded Martin that Mr. Hewitt stated that he would have paid the claim had he been provided with the requested documentation indicating the cost to repair the computer. T.R. 152. To no one's fault but her own, USF&G did not pay Martin's Electronic Data Processing claim.

The only indication that USF&G ever received regarding the possible values of the computer ($2,600), Gene Hurst wire bill ($495), HP color copier, fax, scanner, printer ($409.24) and Electrical-Telephones ($300), was the general itemization provided by Martin that was Exhibit # P-13. No further supporting or substantiating documentation, such as receipts for purchase or repair costs were ever received by USF&G from Martin.

The Electronic Data Processing Systems provision provides in pertinent part:

SECTION I - COVERAGE

* * *

3. Coverage Extensions.
Coverage provided by these Coverage Extensions is included within and subject to the Limits of Insurance shown in the Property Coverage Part Declarations and described in each extension.

* * *

d. "Electronic Data Processing Systems."
(1) "Electronic data processing systems" is added to SECTION I. A. 1. b. Business Personal Property and is included within and subject to the Limit of

Insurance for Business Personal Property shown in the Property Coverage Part Declarations.

* * *

SECTION V - DEFINITIONS

* * *

6. "Electronic Data Processing Systems" means:

a. One or more computer hardware components capable of accepting information and processing that information or converted material according to a plan or program;

b. Electronic data processing, recording or storage media such as films, tapes, discs, drums, or cells;

c. Data stored on such media; or

d. Programming records used for electronic data processing or electronically controlled equipment; but "Electronic data processing systems" does not include:

a. "Valuable records which exist on electronic or magnetic media"; or

b. One or more computer hardware components capable of accepting information and processing that information or converted material according to a plan or program which are used to control the operation of any mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power.

Trial Exhibit #P-1 (Policy at pp. 4, 34-35 of 38.)

The only item covered under this provision would be the computer, which Martin valued at $2,600. The wire, the HP color copier, fax, scanner, printer and the electrical telephones do not fall within the definition of "Electronic Data Processing Systems" as articulated in the policy. They are **not**: computer hardware components capable of accepting information and processing that information; electronic data processing, recording or storage media; data stored on such media; or programming records. Therefore, the wire, the HP color copier, fax, scanner, printer and the electrical telephones are not covered under the Electronic Data Processing Systems provision of the policy.

However, the jury seemed to include at least part of these items' values (determined, but unsubstantiated by Martin) in conjunction with the computer in arriving at its award for Count III of the Judgment in the amount of $3,084. The jury's verdict and award of $3,084, is $484, more than the computer value of $2,600, offered by Martin. Therefore, the jury's verdict of $3,084, for Count III of the Judgment pertaining to the Electronic Data Processing Systems provision was clearly excessive.

In addition to not providing documentation to substantiate the items claimed under the Electronic Data Processing Systems provision, Martin cannot provide any evidence that USF&G acted with malice, gross negligence or in wanton disregard of the rights of Martin to substantiate her allegation of bad faith. USF&G did not act in bad faith in handling Martin's claim nor did USF&G deny payment of Martin's Electronic Data Processing Systems claim. It is Martin's own fault that her claim under the Electronic Data Processing Systems provision was not paid. Martin's failure to provide USF&G with supporting cost documentation prohibited USF&G from paying the claim. Accordingly, Martin is not entitled to punitive damages and the Circuit Court was correct in its granting of USF&G's summary judgment with regard to punitive damages.

Nevertheless, this issue has been resolved. USF&G tendered payment including interest to Martin on Count III of the Judgment entered by the Court pertaining to the Electronic Data Processing Systems claim on January 9, 2008.

CONCLUSION

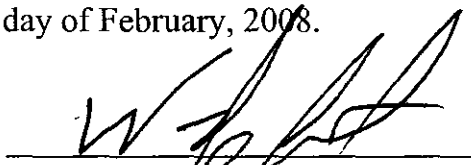
For the foregoing reasons, the Mississippi Supreme Court should reverse and render the Circuit Court's judgment on Count I in favor of USF&G because Martin failed to prove

that the water that damaged her premises ever entered a sewer or drain and then backed up by reversing flow and entered her gallery. Even if the water which damaged Martin's gallery did enter a sewer or drain and reverse flow, the water exclusion nevertheless excluded coverage because Martin's gallery was damaged during a flood.

The Mississippi Supreme Court should also reverse and render the Circuit Court's judgment on Count II in favor of USF&G because Martin also failed to prove any fine art items were damaged and that any fine art items were not held for sale as stock.

Additionally, the Circuit Court correctly granted USF&G's remittitur motion remitting the judgment amount on Count I in accordance with the policy to $25,000. The Circuit Court was also correct in its granting of USF&G's Motion for Summary Judgment on the issue of punitive damages.

Respectfully submitted, this the 1st day of February, 2008.



J. WADE SWEAT, attorney of record for
United States Fidelity and Guaranty
Company of Mississippi

CERTIFICATE OF FILING

I, J. WADE SWEAT, do hereby certify that I have this day caused to be delivered, via courier, the original and four true and correct paper copies and a diskette of the Brief of Appellant United States Fidelity and Guaranty Company of Mississippi, 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 1st day of February, 2008.

J. WADE SWEAT

CERTIFICATE OF SERVICE

I, J. Wade Sweat, do hereby certify that I have this day forwarded by U. S. mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following:

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Lauderdale County Circuit Court Judge

THIS the 1st day of February, 2008.

J. Wade Sweat