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

UNITED STATES FIDELITY AND GUARANTY COMPANY OF MISSISSIPPI — **APPELLANT**

VS.

DEBBIE MARTIN d/b/a CARTMELL GALLERY — **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY

BRIEF OF APPELLANT

J. Wade Sweat (M[redacted]
Marisa C. Atkinson (M[redacted]
COPELAND, COOK, TAYLOR& BUSH, P.A.
200 Concourse, Suite 200
1062 Highland Colony Parkway
P. O. Box 6020 [39158]
Ridgeland, MS 39157
Telephone: (601) 856-7200
Facsimile: (601) 856-7626

ATTORNEYS FOR APPELLANT
UNITED STATES FIDELITY AND
GUARANTY COMPANY OF MISSISSIPPI

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

UNITED STATES FIDELITY AND GUARANTY COMPANY OF MISSISSIPPI — **APPELLANT**

VS.

DEBBIE MARTIN d/b/a CARTMELL GALLERY — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Debbie Martin, underlying Plaintiff/Appellee
2. Cartmell Gallery, Ltd., LLC, underlying Plaintiff
3. Greg Cartmell, artist and owner of Cartmell Gallery, Ltd., LLC
4. Charles W. Wright, Jr., Esq., attorney for underlying Plaintiffs/Appellee
5. United States Fidelity and Guaranty Company of Mississippi, underlying Defendant/Appellant
6. J. Wade Sweat, Esq., attorney for United States Fidelity and Guaranty Company of Mississippi, underlying Defendant/Appellant
7. Marisa C. Atkinson, Esq., attorney for United States Fidelity and Guaranty Company of Mississippi, underlying Defendant/Appellant

Respectfully submitted, this the 28th day of August, 2007.

J. Wade Sweat by Marcus Clemens

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

STATEMENT OF ISSUES

1. 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.

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

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

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

STATEMENT OF THE CASE

I. Course of Proceedings

On April 7, 2003, Appellee's (hereafter referred to as "Martin") office premises at 609 22nd Avenue, Meridian, Mississippi, was damaged by water as a result of a rainstorm described as a 100 year flood event. R.E. 143, 397; T.R. 99; R. 266. Martin submitted an insurance claim to USF&G for the water damage caused by the storm. R.E. 143; R. 266. USF&G promptly investigated the claim by inspecting the damage. On April 23, 2003, USF&G notified Martin that her claim could not be paid because the policy excluded damage caused by water and because there was no evidence of a loss caused by water that backed up through a sewer or drain for which the policy afforded limited coverage. R.E. 122-126; R. 83-87.

On April 7, 2004, Martin sued USF&G seeking compensatory and punitive damages. R.E. 41-141; R. 2-102. Martin filed an Amended Complaint on August 16, 2005. R.E. 142-166; R. 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.E. 167-180; R. 105-111, 319-325.

USF&G filed its Motion for Summary Judgment on September 14, 2005. R.E. 181-245; R. 290-354. 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. 30; R. 642. However, the Circuit Court granted USF&G's Motion for Summary Judgment as to Martin's claim for bad faith denial. R.E. 30; R. 642.

On April 3, 2006, USF&G requested that the Circuit Court alter or clarify its Memorandum Opinion. R.E. 246-250; R. 644-648. The Circuit Court sustained USF&G's Motion to Alter and/or Clarify on May 22, 2006, providing:

> . . . the Plaintiffs shall have the burden at trial to proceed with establishing that their loss is covered pursuant to the insurance agreement in the subject policy and USF&G shall likewise have the opportunity to present defenses on that issue except that consistent with the Memorandum Opinion, USF&G shall not be able to assert the water exclusion as a defense to coverage through the additional sewer and drain backup coverage in the subject policy due to the Court's prior finding that those provisions are inconsistent and ambiguous.

R.E. 251-252; R. 684-685.

The case proceeded to trial on September 27, 2006. R.E. 253; R. 686. At trial, the witnesses were Martin, Greg Cartmell, Monty Jackson, Mike Gardner and USF&G adjuster, Robert Hewitt. The evidence focused on whether the water damage was caused by water that backed up through a sewer or drain, whether any fine art items which were not held for sale were damaged and whether there was coverage pursuant to the electronic data processing system coverage. On September 29, 2006, the jury returned a verdict in favor of Martin in the amount of $39,329, 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[1] on Count III

[1] USF&G is in the process of paying 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

regarding coverage on the electronic data processing system provision. R.E. 257; R. 818. On October 3, 2006, the Court entered a Judgment against USF&G on the jury's verdicts on Counts I, II and III. R.E. 16-17; R. 930-31.

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, 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. R.E. 271-380; R.820-929. On October 12, 2006, USF&G filed its Motion for Judgment Not Withstanding the Verdict. R.E. 254-270; R. 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 resulting in a total remitted judgment against USF&G of $30,299. R.E. 381-382; R. 981-982. Also on December 20, 2006, the Circuit Court denied USF&G's Motion for Judgment Not Withstanding the Verdict. R.E. 37-38; R. 983-984. USF&G timely appealed. Martin also filed a cross-appeal.

II. Statement of Facts

a. April 7, 2003, Flood.

On April 7, 2003, during the early morning hours before daybreak, Martin's office located along 22nd Avenue in downtown Meridian was damaged by water which entered the premises as a result of a rain storm described by Martin's own expert, Monty Jackson, as a

---

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 since Martin had never presented, despite requests, documentation related to items claimed on the Electronic Data Processing Systems coverage.

100 year flood event. R. E. 143, 385, 397; T.R. 99, 183; R. 266. Flood water was standing ankle deep in parts of the premises and extended from the front door to the very back of the store. R. E. 386; T.R. 184. Martin submitted an insurance claim to USF&G for the water damage caused by the storm. R.E. 143; R. 266. USF&G promptly investigated the claim and on April 23, 2003, USF&G notified Martin that her water damage claim could not be paid because the policy excluded damage caused by surface water and because there was no evidence of a loss caused by water that backed up through a sewer or drain for which the policy afforded limited coverage. R.E. 122-126; R. 83-87. The "Sewer or Drain Backup" coverage provision and the Water exclusion are 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 Part Declarations for Sewer or Drain Backup, whichever is greater.

*****

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.

(4) Water that backs up or overflows from a sewer, drain or sump, except as provided in SECTION I.A.4.v. Sewer or Drain Backup.

R.E. 11; Trial Exhibit # P-1. (Policy at pp. 22-23 of 38, Property Limitation of Coverage Endorsement.)

b. Lawsuit Initiated.

On April 7, 2004, Martin filed her Complaint. R.E. 41-141; R. 2-102. Martin filed her Amended Complaint on August 16, 2005. R.E. 142-166; R. 265-289. Martin's Amended Complaint claimed that the water damage was covered according to the terms of the policy. R.E. 144; R. 267. Martin also asserted that USF&G acted in bad faith in handling her claim. R.E. 144; R. 267. USF&G answered denying both coverage and the bad faith allegations. R.E. 167-180; R. 105-111, 319-325.

c. The trial.

At the trial of this matter on September 27, 2006, Martin had the burden to prove that her loss was caused by water that backed up through a sewer or drain in order to recover on her sewer or drain backup claim. However, Martin and her witnesses admitted that they did not know whether the water that damaged the gallery ever entered a sewer or drain.

Debbie Martin testified as follows:

Q. You were not at your gallery when the rain occurred back on April 7, 2003, correct?

A. Correct.

Q. Okay. As far as you know, no one was in the gallery when the water actually entered the gallery, correct?

A. Correct.

Q. The rain had ended, in fact, when you had got down to the gallery?

A. Yes.

Q. You do not know if the water ever – the water that got in your gallery and is the subject of this complaint, you don't know if that water ever got into a drainage system anywhere, correct?

BY MR. WRIGHT: Objection, Your Honor. She's not an expert.

BY MR. SWEAT: That's not an expert question, Your Honor.

BY THE COURT: He just asked her if she knew. Overruled.

A. No.

Q. Okay.

****

Q. You understand that sewer and drain backup coverage here reads "Sewer and Drain Backup," and it talks about if the loss is caused by water that backs up through sewers and drains, correct?

A. Yes.

Q. So it has to get into the drainage system to go through it, correct?

A. I guess. I am not familiar with how it works.

Q. To go through something, you would to – to go through a tunnel, you would have to get in it, correct?

BY MR. WRIGHT: Object to argumentative.

Q. Is that correct?

BY THE COURT: Just a minute. She's on cross-examination. Overruled.

Q. That's correct, right?

A. Yes.

Q. Now, you also told me ---- there has been some questions for Mr. Hewitt – there has been some references to the back bathroom. You told me, during your deposition, you are not aware of any water coming out through any drains in the interior of your gallery, correct?

A. Correct.

Q. And you told me that you couldn't deny that the water that came in the gallery was simply water from flooding rain.

BY MR. WRIGHT: Objection, Your Honor. That's not the proper use of the deposition.

BY THE COURT: Overruled, Mr. Wright. You can answer the question.

A. I told you that I would neither confirm nor deny that fact.

Q. So you cannot deny?

A. I cannot deny and I cannot confirm it.

R.E. 387-389; T.R.196 - 198.

Similarly, Martin's expert witness, Monty Jackson and witness Mike Gardner testified as follows:

Monty Jackson:

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. Right.

A. Because of the amount of rain, I would think that both systems, water and sanitary sewer, was full.

Q. Water could – because of that heavy rainfall, it could have just as easily never – as you described the situation, where drains were already full, water simply went into the gallery and never ever got in the sewer or drain, correct?

A. Some water could have done that, but – because of the head that would be upstream would allow water to be coming out at the low point while it was raining. So it would be ...

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 drain, do you?

A. I do not know that. No.

R.E. 398; T.R. 100.

Mike Gardner:

Q. The water that got into the gallery, you don't know the source of that water, do you?

A. No, sir. I do not, other than the rain.

R.E. 395-396; T.R. 88-89.

Q. Now, you saw debris in front of the building, Cartmell Gallery. You told the jury about that. You told me that that debris was just regular street debris, correct?

A. No. I told you that it was paper pulp and I couldn't tell you exactly what that was.

Q. You don't recall in your deposition – you deny that you told me it was regular street debris?

A. Well, that would be paper and things, but I couldn't – I didn't run a test on it, so I don't know exactly what that is.

Q. The debris that you saw would ordinarily be debris that could be just laying in the street accumulating since someone had cleaned the street; is that correct?

A. Correct.

R.E.393-394; T.R. 85-86.

The cleaning bill for the gallery stated "water damage **possibly** sewage." R.E. 11, 262; R. 940; Trial Exhibit # P-9. (Emphasis added.)

At the trial of this matter, Martin also had the burden to establish, by a preponderance of the evidence, her claim for Fine Arts coverage. The Fine Arts coverage provision of the policy provides as follows:

> t. Fine Arts
>
> (1) We will pay for the direct physical loss to Covered Property caused by or resulting from a Covered Cause of Loss as described in this Additional Coverage.
>
> Under this Additional Coverage Covered Property means fine arts:
>
> (a) Which are owned by you; or
>
> (b) Similar property of others that is in your care, custody, or control.
>
> While on exhibition or otherwise, anywhere in the United States or Canada, and for which a limit of insurance is shown in the Property Coverage Part Declarations.
>
> This Additional Coverage does not apply to fine arts that are "stock."

R.E. 11; Trial Exhibit # P-1. (Policy at pp. 21-22 of 38.)

Martin, claimed damages to various items but several of the items were not art at all, example - computer, counters and frames. The few art items which she did claim were damaged were stock items held for sale. Greg Cartmell testified as follows:

> Q: Now, I notice that there are pictures on the wall there in this particular – who painted those?
>
> A: I painted most of them. Yes, sir.

Q: And were these pictures for sale? Or were they for demonstration? Or what were they for?

A: No. They were for sale on the wall of the gallery.

R.E. 392; T.R. 107.

Martin testified about the typical arrangement where a gallery holds art on consignment while offering it for sale as follows:

Q: Explain to me the arrangements. You talked – there was some discussion about something that was – what were items that sometimes your gallery holds on consignment. And I think I have got an idea about what that is, but can you explain that for me, please?

A: The way most galleries work is, they don't buy inventory out front from an artist. The artist brings in there [sic] work on consignment. The gallery has that work available to sell. And when they make a sale on that, then they pay the artist his commission and the gallery gets a smaller commission for that artwork.

Q: So those items that are there on consignment, they are for sale, correct?

A: Correct.

R.E. 390-391; T.R. 205-206.

SUMMARY OF ARGUMENT

The policy clearly excludes coverage for water damage caused by a flood. The policy did provide limited coverage where water caused damage by backing up **through** a sewer or drain. The sewer or drain backup coverage (an additional coverage) however was limited by the fact that the policy nevertheless excluded damage from water that backed up through a sewer or drain, if the backup was part of a flood.

Martin's claims in this case arose from water damage that was caused by what her own expert described as a 100 year flood event occurring during the early morning hours of April 7, 2003. Martin was not present when the water entered her gallery. However, even when Martin arrived, the water in the gallery was still standing ankle deep in part of the premises and the water extended from the front entrance to the back of her premises. Despite making a claim for sewer or drain backup coverage, Martin and her witnesses admitted that they did not know whether the water ever entered a sewer or drain. There was also no testimony that the water backed up by reversing its flow.

The first reason for reversing and rendering the judgment on Count I related to the sewer or drain backup claim is because Martin failed to present evidence that the water that damaged her gallery ever entered a sewer or drain and that it then backed up by reversing flow. This evidence was essential for Martin to prevail on a claim for sewer or drain backup coverage. *See, Gammons v. Tenn. Farmers Mut. Ins. Co.*, 1986 WL 13039 at *3.

Second, reversal and render for USF&G on Count I is proper because even if Martin is given the benefit of the doubt on whether the water that caused her damage entered a sewer or drain, the water nevertheless resulted from a flood and was surface water and was excluded by the policy as confirmed by numerous courts. *Hirschfield v. Continental Casualty Company*, 199 Ga. App. 654, 405 S.E.2d 737 (1991); *Front Row Theatre, Inc. v. American Mfr's Mut. Ins. Cos.*, 18 F.3d 1343 (6th Cir. 1994).

The Court should reverse and render for USF&G on Count II related to the fine arts claim because Martin failed to prove that any fine arts items were damaged that were not held for sale.

Finally, the Court should reverse and remand on all three counts because the Circuit Court improperly precluded USF&G from presenting evidence concerning Martin's June 2004 flood claim. This evidence would have provided further proof that the water damage arising from the April 7, 2003 was not from sewer or drain backup.

The fact is Martin has tried to stretch her limited additional sewer or drain backup coverage to cover water damage from a flood. Martin experienced another flood a little over a year later in June of 2004, but at that time she had obtained coverage for flood damage. As a result, Martin's coverage claims should have never been tried and should have been disposed of through summary judgment along with her claim for bad faith or at least disposed of after the close of her evidence at trial.

ARGUMENT

I. The judgment on Count I related to the sewer or drain backup claim should be reversed and rendered because Martin failed to present evidence that the water damage to Cartmell Gallery was caused by water that backed up through a sewer or drain.

The policy excludes damage caused by water, but provided a limited additional coverage in the amount of $25,000 for water damage that was caused by water that backs up through a sewer or drain. Martin failed to prove that the water damage to Cartmell Gallery resulted from **water that backed up through a sewer or drain**. The Circuit Court erroneously denied USF&G's Motion for Judgment Not Withstanding the verdict which was

based in part on Martin's failure to present evidence of water damage caused by water that backed up through a sewer or drain.

The standard for judgment not withstanding the verdict is as follows:

> . . . the trial court must consider all the evidence–not just evidence which supports the non-movant's case–in the light most favorable to the party opposed to the motion. The non-movant must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable [jurors] could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded [jurors] in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand.

3M Company v. Johnson, 895 So.2d 151, 160-161 (Miss. 2005) (quoting *Jesco, Inc. v. Whitehead*, 451 So.2d 706, 713-14 (Miss. 1984)).

The Circuit Court correctly instructed the jury that the phrase "to back up" as used in the "Sewer or Drain Backup" policy provision meant "water that flows in a direction opposite to the intended and usual flow." R.E. 383; R. 785. Martin and her witnesses, Jackson and Gardner admitted that they did not know whether the water that caused the damage to her gallery ever entered a sewer or drain. Further, there was no testimony to establish that the water reversed flow and backed up through a sewer or drain. Martin's testimony on this point was as follows:

Cross Examination of Debbie Martin

Q. You were not at your gallery when the rain occurred back on April 7, 2003, correct?

A. Correct.

Q. Okay. As far as you know, no one was in the gallery when the water actually entered the gallery, correct?

A. Correct.

Q. The rain had ended, in fact, when you had got down to the gallery?

A. Yes.

Q. You do not know if the water ever – the water that got in your gallery and is the subject of this complaint, you don't know if that water ever got into a drainage system anywhere, correct?

BY MR. WRIGHT: Objection, Your Honor. She's not an expert.

BY MR. SWEAT: That's not an expert question, Your Honor.

BY THE COURT: He just asked her if she knew. Overruled.

A. No.

Q. Okay.

BY MR. SWEAT: And, Your Honor, may I approach the witness?

BY THE COURT: Yes.

Q. You understand that sewer and drain backup coverage here reads "Sewer and Drain Backup," and it talks about if the loss is caused by water that backs up through sewers and drains, correct?

A. Yes.

Q. So it has to get into the drainage system to go through it, correct?

A. I guess. I am not familiar with how it works.

Q. To go through something, you would to – to go through a tunnel, you would have to get in it, correct?

BY MR. WRIGHT: Object to argumentative.

Q. Is that correct?

BY THE COURT: Just a minute. She's on cross-examination. Overruled.

Q. That's correct, right?

A. Yes.

Q. Now, you also told me ---- there has been some questions for Mr. Hewitt – there has been some references to the back bathroom. You told me, during your deposition, you are not aware of any water coming out through any drains in the interior of your gallery, correct?

A. Correct.

Q. And you told me that you couldn't deny that the water that came in the gallery was simply water from flooding rain.

BY MR. WRIGHT: Objection, Your Honor. That's not the proper use of the deposition.

BY THE COURT: Overruled, Mr. Wright. You can answer the question.

A. I told you that I would neither confirm nor deny that fact.

Q. So you cannot deny?

A. I cannot deny and I cannot confirm it.

R.E. 387-389; T.R.196 - 198.

Similarly, Martin's own expert witness, Monty Jackson and witness Mike Gardner testified as follows:

Cross Examination of Monty Jackson

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. Right.

A. Because of the amount of rain, I would think that both systems, water and sanitary sewer, was full.

Q. Water could – because of that heavy rainfall, it could have just as easily never – as you described the situation, where drains were already full, water simply went into the gallery and never ever got in the sewer or drain, correct?

A. Some water could have done that, but – because of the head that would be upstream would allow water to be coming out at the low pont while it was raining. So it would be ...

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 drain, do you?

A. I do not know that. No.

R.E. 398; T.R. 100.

Cross Examination of Mike Gardner

Q. The water that got into the gallery, you don't know the source of that water, do you?

A. No, sir. I do not, other than the rain.

R.E. 395-396; T.R. 88-89.

Q. Now, you saw debris in front of the building, Cartmell Gallery. You told the jury about that. You told me that that debris was just regular street debris, correct?

A. No. I told you that it was paper pulp and I couldn't tell you exactly what that was.

Q. You don't recall in your deposition – you deny that you told me it was regular street debris?

A. Well, that would be paper and things, but I couldn't – I didn't run a test on it, so I don't know exactly what that is.

Q. The debris that you saw would ordinarily be debris that could be just laying in the street accumulating since someone had cleaned the street; is that correct?

A. Correct.

R.E. 393-394; T.R. 85-86.

The Court of Appeals of Tennessee interpreting the phrase "water which backs up through sewers or drains" [which is the same language at issue here] held that whether water entered the sewer or drain system was essential for coverage by finding that the phrase referred to "water **in** a sewer or drain that flows in a direction opposite to the intended and usual flow." *Gammons v. Tenn. Farmers Mut. Ins. Co.*, 1986 WL 13039 at *3.

Martin nor any of her witnesses ever provided any testimony that the water causing her damage was ever **in** a sewer or drain. As a result, the jury was left to speculate about whether the water that entered the gallery was ever **in** a sewer or drain. Further, even assuming the water entered a sewer or drain, Martin never presented any evidence that the water which damaged the gallery came from water that entered a sewer or drain and backed up by flowing in a direction opposite to the intended and usual flow which was how back up was defined by the Circuit Court's instructions. R.E. 383; R. 785. Evidence establishing that the water causing the damage entered a drain or sewer and that it backed up was necessary in order for Martin to establish her claim for sewer or drain backup coverage. Martin failed to present this evidence. As a result, the verdict was based on speculation and was improper. Mississippi law recognizes that "[o]rdinarily, 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 prove facts necessary to support a claim for sewer or drain backup coverage and the jury's speculation to reach its verdict on Count I was contrary to Mississippi law. As a result, the remitted judgment of $25,000 against USF&G on Count I resulting from the sewer or drain backup coverage, should be reversed and rendered in favor of USF&G.

II. The judgment on Count I should be reversed and rendered because the water exclusion excluded coverage for damages caused directly or indirectly by water.

The Circuit Court incorrectly denied USF&G's Motion for Summary Judgment on Martin's claim for compensatory damages by holding that the policy's water exclusion and the sewer or drain backup coverage were inconsistent and contradictory. R.E. 18-31; R. 630-643. Interpretation of an insurance policy is a question of law. *Noxubee County School District v. United National Insurance Co.*, 883 So.2d 1159, 1165 (Miss. 2004) (citing *Lewis v. Allstate Ins. Co.*, 730 So.2d 65, 68 (Miss. 1998)). Generally, under the law of Mississippi, "when the words of an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written." *Noxubee County School District*, 883 So.2d at 1165 (citing *Paul Revere Life Ins. Co. v. Prince*, 375 So.2d 417, 418 (Miss. 1979)). When interpreting contracts, this Court has opined that "[t]he general rule is

the intention of the parties must be drawn from the words of the whole contract, and if, viewing the language used, it is clear and explicit, then the court must give effect to this contract unless it contravenes public policy." *Heartsouth, P.L.L.C. v. Boyd*, 865 So.2d 1095, 1105 (Miss. 2003) (quoting *Jones v. Miss. Farms Co.*, 116 Miss. 295, 76 So. 880, 884 (1917)). "One should look to the 'four corners' of the contract whenever possible to determine how to interpret it." *Heartsouth*, 865 So.2d at 1105 (quoting *Warwick v. Gauteir Util. Dist.*, 738 So.2d 212, 214 (Miss. 1999) (internal citations omitted)). "'Therefore, when interpreting a contract, the court's concern is not nearly so much with what the parties may have intended but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy.'" *Id.* The parties' disagreement over the meaning of a word or provision, alone, does not render an instrument ambiguous. *Heartsouth*, 865 So.2d at 1105 (citing *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So.2d 96, 105 (Miss. 1998)) (internal citations omitted). Finally, a court should not strain to find an inconsistency. *Titan Indemnity v. Estes*, 825 So.2d 651, 658 (Miss. 2002).

The "Sewer or Drain Backup" coverage provision and the Water Exclusion are 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 Part Declarations for Sewer or Drain Backup, whichever is greater.

*****

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...
>
> *****
>
> (4) Water that backs up or overflows from a sewer, drain or sump, except as provided in SECTION I.A.4.v. Sewer or Drain Backup.

R.E. 11; Trial Exhibit # P-1. (Policy at pp. 22-23 of 38, Property Limitation of Coverage Endorsement.)

Other courts have addressed the question of water exclusions and sewer or drain backup coverage provisions and found that similar provisions are unambiguous when considered together.

In *Hirschfield v. Continental Casualty Company*, 199 Ga. App. 654, 405 S.E.2d 737 (1991), following a rainstorm, rainwater flowed and entered the plaintiff's basement. *Id.* at 738. The plaintiff claimed that an underground drain caused the rainwater that had previously entered the drain system to be diverted upward and eventually across the surface area into the plaintiff's basement, thus coverage was afforded by the Back Up of Sewer and Drains provision. *Id.* Continental Casualty argued that the storm drain had become clogged and was unable to drain the rainwater away causing the water level around the grate to rise to where the rainwater flowed across the surface into the basement. As a result, Continental Casualty argued that coverage was excluded by the water exclusion. *Id.* The Continental policy provided as follows:

> ADDITIONAL PROPERTY COVERAGE – Back Up of Sewer or Drains. We cover loss to your real property and tangible personal property caused by water which backs up through sewers or drains

> except for losses in the section called "Property Losses We Do Not Cover."
>
> * * *
>
> PROPERTY LOSSES WE DO NOT COVER – Water damage meaning: Flood, surface water, waves, tidal water, overflow of a body of water or spray from any of these, whether or not driven by wind.

Id. The court held that the water that entered the basement was surface water, stating: "water which is derived from falling rain 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." *Id.* The court further opined 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.* In this case, the water that entered Martin's premises was "derived from falling water" and thus, was also surface water. Therefore, the alleged damage to the subject premises is excluded from coverage pursuant to the unambiguous water exclusions.

In *Front Row Theatre, Inc. v. American Mfr's Mut. Ins. Cos.,* 18 F.3d 1343 (6th Cir. 1994), blockage in the storm sewer system caused water to overflow the driveway and curb of the theater and enter the theater's front doors (similar to the facts in this case)

causing damage to the interior carpeting. *Id.* at 1345. Front Row Theatre's policy provided as follows:

> G. Exclusions
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
> * * *
> g. Flood
> 1) Including surface water, waves, tides, tidal waves, overflow of any body of water or their spray, all whether driven by wind or not; 2) Mudslides or Mudflow.
> But if loss or damage by fire, theft, explosion, water that backs up from a sewer or drain or sprinkler leakage results, we will pay for that resulting loss or damage.

Id. The court actually concluded that a portion of the damage to the theater fell within the "water that backs up **from** [not through] a sewer exception," but noted that the remaining portion of the damage was caused by surface water flooding. *Id.* at 1348-49. Even despite evidence of water damage caused by water backup (unlike this case), the court nevertheless affirmed summary judgment in favor of American Manufacturer's Mutual. *Id.* at 1349. By affirming the summary judgment the court recognized the controlling effect of the policy's water exclusion even where there might have been damage possibly caused by a drain/sewage backup and held that "the language of the policy that specifically barred coverage where flooding was a contributory cause governs, and precludes payment." *Id.* at 1349; *see also, Montanaro v. Nationwide Ins. Co.*, 2003 WL 1227625 (Conn. Super.) (finding that other factors, such as a clogged drain, possibly contributing to a loss was of no consequence under the language of the policy).

In *Pakmark Corp. v. Liberty Mut. Ins. Co.*, 943 S.W.2d 256, 257 (Mo. Ct. App. 1997), Pakmark experienced a severe flood with water levels over eight feet. However, when the water receded, there was a residue of two to four inches remaining in the Pakmark building which was alleged to be sewage. *Id.* Pakmark filed a claim for property damage as a result of flood and sewage backup. *Id.* at 258. Liberty Mutual denied its claim citing the following provision:

> A. COVERED CAUSES OF LOSS
> When Special is shown in the Declaration, Covered Causes of Loss mean RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
> 1. Excluded in Section B; Exclusions; or
> 2. Limited in Section C; Limitations; that follow.
> B. EXCLUSIONS
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
> * * *
> g. Water
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.

Id. at 258. Pakmark had argued that coverage existed because the all-risk policy did not specifically exclude a loss from sewer backup. *Id.* The court reasoned that the Liberty Mutual policy "clearly provides that there is no coverage 'for loss or damage caused **directly** or **indirectly**,' among other things, flood water, and 'such loss or damage is excluded regardless of any other cause or event [i.e., sewage backup] that contributes concurrently or in any sequence to the loss.' Section B.1 of the Liberty Mutual policy provides that an exclusion is an exclusion regardless of any other cause that contributes to the loss, either concurrently or in any sequence to the loss." *Id.* at 261 (emphasis added). The court further

affirmed the lower court's grant of summary judgment in favor of Liberty Mutual and held that the "policy unambiguously excluded coverage for loss caused directly or indirectly by flooding regardless of any sewage backup that contributed concurrently or in any sequence to Pakmark's loss." *Id.* at 262.; *see also, Executive Corners Office Building v. Maryland Insurance Company*, 1999 WL 33283330 (D.N.D.) (holding no coverage existed for sewer backup pursuant to all risk policy due to application of water exclusion).

Water exclusions, virtually identical to the USF&G exclusion in the instant case, have been found to be unambiguous. The water exclusion in the policy in this case is clear and unambiguous and it is further clear and unambiguous when considered along with the sewer and drain backup additional coverage provision. Therefore, according to Mississippi law the water exclusion must be afforded its plain and ordinary meaning. There was no proof that this water in this case ever entered a sewer or drain. The water came from the 100-year flood and thus was surface water which is excluded.

In considering USF&G's Motion for Summary Judgment, the Circuit Court compared the language of the sewer or drain backup coverage with the language of the water exclusion. Despite the authority cited above, the Circuit Court erroneously concluded that the language of the sewer or drain backup and water exclusion was inconsistent and contradictory. The policy, as many policies, completely excluded damage caused by water either directly or indirectly but through the sewer or drain backup provides an additional limited coverage for damage caused by water that backed up through a sewer or drain. Contrary to Mississippi law, the Circuit Court strained to find an inconsistency and wrongly concluded that the

policy was ambiguous. *Titan Indemnity Company v. Estes*, 825 So.2d 651, 658 (Miss. 2002); *Titan Indemnity Company v. City of Brandon, Mississippi*, 27 F.Supp.2d 693, 697 (S.D. Miss. 1997) (citing *Bradley v. Old Republic Life Ins. Co.*, 712 F.Supp. 90, 94 (S.D. Miss. 1988)). Accordingly, the Circuit Court erred in failing to grant USF&G's Motion for Summary Judgment. As a result, the remitted judgment of $25,000 against USF&G on Count I resulting from the sewer and drain backup coverage, should be reversed and rendered.

III. The judgment on Count II related to the fine arts claim should be reversed and rendered because Martin failed to prove facts sufficient to support coverage according to the fine arts coverage.

Martin had the burden to prove by a preponderance of the evidence that she was entitled to recover on her fine arts claim. R.E. 384; R. 789 The policy provided coverage for damage to fine arts as follows:

> t. Fine Arts
>
> (1) We will pay for the direct physical loss to Covered Property caused by or resulting from a Covered Cause of Loss as described in this Additional Coverage.
>
> Under this Additional Coverage Covered Property means fine arts:
>
> (a) Which are owned by you; or
>
> (b) Similar property of others that is in your care, custody, or control.
>
> While on exhibition or otherwise, anywhere in the United States or Canada, and for which a limit of insurance is shown in the Property Coverage Part Declarations.

> This Additional Coverage does not apply to fine arts that are "stock."

R.E. 11; Trial Exhibit # P-1. (Policy at pp. 21-22 of 38.)

The jury awarded Martin a verdict in the amount of $2,215, related to her fine arts coverage claim. However, Martin failed to prove any damage to art items that were not "stock" and that she "owned . . . or in [her] care, custody or control" were destroyed. As a result, the jury had no basis to award the verdict for fine arts coverage. Martin claimed damage to various items but several of the items were not art at all, example — computer, counters and frames. The few art items which were damaged were"stock" that was held for sale. The policy does not cover any item held as "stock." Greg Cartmell testified as follows:

> Q: Now, I notice that there are pictures on the wall there in this particular – who painted those?
>
> A: I painted most of them. Yes, sir.
>
> Q: And were these pictures for sale? Or were they for demonstration? Or what were they for?
>
> A: No. They were for sale on the wall of the gallery.

R.E. 392; T.R.107.

Martin testified about the typical arrangement where a gallery holds art on consignment while offering it for sale as follows:

> Q: Explain to me the arrangements. You talked – there was some discussion about something that was – what were items that sometimes you gallery holds on consignment. And I think I have got an idea about what that is, but can you explain that for me, please?
>
> A: The way most galleries work is, they don't buy inventory out front from an artist. The artist brings in there [sic] work on consignment. The gallery has that work available to sell.

> And when they make a sale on that, then they pay the artist his commission and the gallery gets a smaller commission for that artwork.
>
> Q: So those items that are there on consignment, they are for sale, correct?
>
> A: Correct.

R.E. 390-391; T.R. 205-206. Martin had the burden at trial to prove, by a preponderance of the evidence, that she suffered property damage to "fine arts" that she either "owned" or to "fine arts" that she held in her "care, custody or control" and that the "fine arts" were not for sale as "stock" of the gallery. R. E. 384; R. 789. The record is devoid of any proof to establish any such damage. At the close of the evidence, USF&G moved for a directed verdict on Martin's claim for fine arts coverage. R.E. 33-34; T.R. 214-215. The Circuit Court erroneously denied USF&G's motion for directed verdict and erroneously denied USF&G's motion for judgment not withstanding the verdict on the fine arts claim as well. R.E.35-38; T.R. 217-218; R. 983-984. As a result, the judgment on count II for $2,215 against USF&G related to fine arts coverage, should be reversed and rendered.

IV. In the alternative, the trial court erred in preventing USF&G from presenting evidence concerning Martin's June 2004 flood claim and therefore the judgment on Count I should be reversed and the case should be remanded with instructions to try Count I and admit evidence of Martin's June 2004 flood claim.

Martin made another claim for water damage subsequently in June 2004. R.E. 264-270; R. 942-948. However, at this point Martin had purchased flood insurance. R.E. 268; R. 946. 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. Gardner's cleaning

invoice for the April 7, 2003 cleanup work reflects that he also cleaned the gallery after the June 2004 flood and it noted that the cleanup work in June of 2004 was the same as the cleanup related to the April 7, 2003 by stating "6-28-04 Same as above." R.E. 262; R. 940. However, Trial Exhibit # P-9 was admitted with this comment redacted. R.E. 39; T.R. 83. The Court erroneously overruled USF&G's objection to the redaction of this comment from P-9. R.E. 39; T.R. 83. Further, the Court sustained objections by Martin when USF&G attempted to cross-examine Gardner about the redacted part of the bill. R.E. 40; T.R. 88. The redaction of this comment and the Court's refusal to allow cross-examination of Gardner about the comment erroneously precluded USF&G from presenting further crucial proof that the water damage arising from the April 7, 2003 rainstorm did not involve sewer or drain backup. Gardner's cleanup bill noted on his bill, the water damage in both the April 2003 and June 2004 were the same and the June 2004 water damage was paid for through flood insurance which as a matter of law does not cover sewer or drain backup damage. As a result, the Court should reverse the judgment below on Count I and remand the case for a new trial on Count I.

CONCLUSION

Martin's gallery was damaged by water from a significant (100 year) flood. She had no flood insurance. She did however have sewer or drain backup coverage, but it was limited by the fact that she did not have coverage for sewer or drain backup water damage arising from a flood. 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 Circuit Court erred in finding that the water exclusion and the other parts of the policy were inconsistent. As a result, the judgment on Count I should be reversed and rendered in favor of USF&G.

Martin also failed to prove any fine art items were damaged and that were not held for sale as stock, therefore the judgment on Count II should be reversed and rendered in favor of USF&G. In the alternative, this Court should remand this case back for a new trial with instructions that evidence concerning Martin's June 2004 flood claim be admitted to the jury.

Respectfully submitted, this the 28th day of August, 2007.

J. Wade Sweat by Maura Atkinson

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 28th day of August, 2007.

J. Wade Sweat by William J. Cowan
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 Brief of Appellant to the following:

Charles W. Wright, Jr., Esq.
Wright & Williamson
P. O. Box 1677
Meridian, MS 39302-1677

Attorney for Appellee

Honorable Robert W. Bailey
Lauderdale County Circuit Court
P. O. Box 1167
Meridian, MS 39302

Lauderdale County Circuit Court Judge

THIS the 28th day of August, 2007.

J. Wade Sweat by Maura J. Catteau

J. Wade Sweat