IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-TS-0222

HELEN FLAMMER and RAUL FONTE **APPELLANTS**

vs.

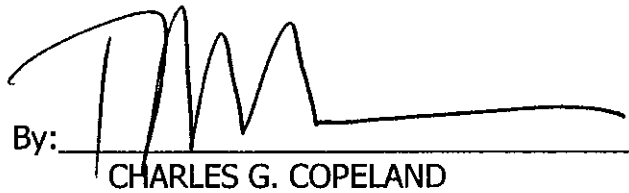
AUDUBON INSURANCE GROUP **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons, including themselves, have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Helen Flammer and Raul Fonte, Plaintiffs/Appellants;
2. John A. Scialdone, Ryan Hahn, and Balch & Bingham LLP, counsel for Plaintiffs/Appellants;
3. Audubon Insurance Company (improperly identified by Plaintiffs/Appellants as Audubon Insurance Group), Defendant/Appellee;
4. Walker W. Jones III, Jason R. Bush, Brad Moody, and Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel for Defendant/Appellee;
5. The Honorable Laurence Paul Bourgeois, Jr., Circuit Court Judge, Harrison

County, Mississippi.

By: 

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STATEMENT OF *AMICUS CURIAE*

This amicus brief is presented by the Mississippi Windstorm Underwriting Association ("MWUA"). MWUA was created by the Mississippi Legislature in 1987 in order to "assure an adequate market for windstorm and hail insurance in the coast area of Mississippi." 1987 MISS. LAWS, CH. 459, § 1. In creating MWUA, the Mississippi Legislature granted it certain powers, among them the power "[t]o cause to be issued, or issue, policies of insurance to applicants." MISS. CODE ANN. § 83-34-5 (2005).[1]

The purpose of this amicus brief is for the MWUA to educate this Court about the MWUA. In addition, although MWUA no longer has a servicing insurer such as Audubon, it does have a contract with a claims management company, serving essentially the same claims supervision role for which Audubon has been brought into this lawsuit. If this Court reverses established Mississippi law and allows third party administrators to be liable for simple negligence, then MWUA (as well as insurance companies throughout Mississippi) will not be able to find any adjusters or firms willing to handle their claims without additional fees. This will result in an increase to in costs that will be passed onto the policyholders, *i.e.*, the citizens of the State of Mississippi.

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[1] On March 22, 2007, many of the statutes governing MWUA were changed by the Mississippi Economic Growth and Redevelopment Act of 2007. Section 83-34-5 has been changed to read, in pertinent part, that the power granted MWUA is "to issue policies of essential property insurance on insurable property to applicants." MISS. CODE ANN. § 83-34-5 (2008).

SUMMARY OF THE ARGUMENT

The Plaintiffs/Appellants Helen Flammer and Raul Fonte (hereinafter, referred to collectively as "the Fontes") argue to this Court that MWUA has somehow abdicated its responsibilities under the insurance policies it issues, making Audubon a party – or co-principal – to the insurance contract. Nothing could be further from the truth.

As MWUA outlines below, the facts relied upon by the Fontes in promoting this argument are inaccurate and unsupported by the record and the law. Defendant/Appellee Audubon Insurance Company ("Audubon") is a company with which MWUA entered into a contract. There is nothing in this contract or the manner in which it was performed that made Audubon a party to the insurance policy between MWUA and the Fontes.

After the factual mistakes made by the Fontes are corrected, it is clear that Audubon's role as it related to this case is nothing more than that of a third party administrator. Mississippi law, as Audubon argued in its brief, is clear that a third party administrator – an adjuster – cannot be held liable for simple negligence. As such, the Circuit Court's decision to grant Audubon summary judgment should be affirmed.

ARGUMENT

This is a case about what is the form of individual liability the agent for a disclosed principal (in this case, a claims supervisor) can have. As Audubon argues in pages 16-18 of its brief, this issue has been decided by this Court. Applying this established law to the actual facts relevant to MWUA leaves this Court with one decision: affirming the Circuit Court's decision to dismiss the Fontes' claim against Audubon.

1. There Is No Factual Basis for the Fontes' Claim that Audubon Is a Co-principal on their MWUA Policy.

In their brief, the Fontes recite a number of "facts" relevant to MWUA. It is based on these misstatements of fact that the Fontes then present their argument that Audubon is a co-principal to the insurance policies issued and guaranteed by MWUA and therefore can be held liable for simple negligence. There is, however, neither a factual or legal basis for this argument.

The Fontes claim that "Audubon had contractually assumed the vast majority of MWUA's responsibilities . . . ." APPELLANTS' BRIEF AT 1. To the Circuit Court, Mr. Scialdone stated that "Audubon administers all this" and "Audubon and AIG are doing everything that the law is concerned about in the obligations of the principal." ID. AT 4, 5. Mr. Scialdone even went so far as to tell the Circuit Court that all MWUA does is "set[] the premium[2] and receive[] the initial check." ID. AT 5. These allegations are completely devoid of both factual and legal truth.[3]

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[2] Under Mississippi law, it is actually the Mississippi Commissioner of Insurance that approves what rate can be used to price MWUA's policies. MISS. CODE ANN. § 83-34-17 (2005).

[3] That a party so completely misstates the facts is not sufficient to create an issue of fact sufficient to avoid summary judgment. For a factual issue to undermine summary judgment, it

As the record makes clear, Audubon and MWUA entered in to a contract, wherein Audubon undertook four duties in the Servicing Insurer Agreement it entered:

a) perform all necessary company computer and statistical functions;
b) pay all required taxes, board and bureau fees;
c) arrange for the countersignature of policies, if necessary; and
d) provide full claim supervision.

RECORD AT 341; APPELLEE'S RECORD EXCERPTS AT TAB 25. In consideration for these tasks, MWUA paid Audubon a fee based on a percentage (8.75%) of the gross premium received by MWUA as a result of the windstorm and hail policies it sold and an additional $50 per claim.[4] ID.

The first contractual task Audubon undertook addressed MWUA's need to maintain statistical data. It is unlikely any policyholder – absent reviewing the Servicing Insurer Agreement – was even aware that Audubon maintained MWUA's statistical data. In this day and age of computer data, this Court cannot – and should not – find that Company A, which maintains data for Company B, is a party to all Company B's contracts.

The second of Audubon's contractual tasks was to pay the taxes and fees MWUA owed as a result of the policies it issued. Audubon used approximately half of the 8.75% fee it received funds to pay MWUA's taxes and fees. This contractual task is akin to a person or company contracting with a financial professional to handle the payment of

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must be a genuine factual dispute. MISS. R. CIV. P. 56.

[4] The Fontes claim that Audubon has some "equity rights" in the premiums paid by policyholders to MWUA. The basis for this argument is that the manner in which Audubon's fee is determined is based on a percentage of gross premiums. This, however, is a matter of contract and a legal right, not an "equity right." *Great Southern Land Co. v. Valley Securities Co.*, 137 So. 510, 514 (Miss. 1931) (finding a right conferred in contractual terms to be a lega right and not an equity right).

certain bills. Under the Fontes' argument, such a financial professional would become a party to those bills and the contracts they represent just because someone hired the financial professional to pay those bills.

The Fontes focus particular attention on the third of Audubon's contractual duties: arranging for the countersigning of policies. APPELLANTS' BRIEF AT 8. The Fontes apparently believe that the person who countersigns an insurance policy becomes – by virtue of that signature – a party to the policy. The Fontes are unable to cite any authority to support this position, relying instead on general contract law and not focusing on the legal effect of countersigning an insurance policy. Under Mississippi law, the person countersigning an insurance policy is an agent for a disclosed principal. No Mississippi case has required or made those agents to become parties to the insurance guaranteed in the countersigned policy. *Gulf Guaranty Life Ins. Co. v. Middleton*, 361 So. 2d 1377, 1379 (Miss. 1978). *See also Home Ins. Co. v. Thunderbird, Inc.*, 338 So. 2d 391, 392 (Miss. 1976) (Home Insurance was the party to the policy, not its authorized agent who countersigned the policy) and *Aetna Cas. & Sur. Co. v. Condict*, 417 F. Supp. 63, 70 (D.C. Miss. 1976) (countersignature of policy and acceptance of premium did not make agent a party to policy). Being an authorized agent is nothing more than being an agent for a disclosed principal – exactly what Audubon was and exactly what Audubon has argued to this Court. *See, e.g., Prudence Mut. Cas. Co. v. Switzer*, 253 Miss. 143, 148, 175 So. 2d 476, 477 (Miss. 1965) (policy was countersigned by Prudence Mutual's agent) and *Ritchie v. Smith*, 311 So.2d 642, 643 (Miss. 1975) (noting the agent for the insurance company countersigned the policy). Under the Serving Insurer Agreement, Audubon is the agent

authorized to provide countersignatures for MWUA policies.

The fourth task undertaken by Audubon was providing full claim supervision, essentially a third party administrator role. As Audubon describes in its Brief, Mississippi cases have repeatedly and regularly held that third party administrators, adjusters, and other entities and persons involved in the claims handling process are not parties to the insurance policy and cannot be held liable for simple negligence. APPELLEE'S BRIEF AT 15-18. Despite this, the Fontes argue that because Audubon authorized and initially made the claim payments to the Fontes, they are somehow responsible under the policy. APPELLANTS' BRIEF AT 4-5. Again, the Fontes are taking a contractual responsibility between MWUA and Audubon and twisting it beyond recognition. Under the Servicing Insurer Agreement, when a MWUA claim required a payment, Audubon caused a check to be issued to the policyholder. R. AT 342; APPELLEE'S R.E. AT TAB 25. As provided for under the Serving Insurer Agreement, Audubon submitted a monthly bordereau to MWUA, seeking reimbursement of all expenses related to the claim. ID. MWUA then had a contractual obligation to reimburse Audubon within 60 days.[5] ID. An interest charge was also factored into the reimbursement. ID. This method of payment and reimbursement ensured that MWUA claims were paid with MWUA money – not Audubon's money. There is nothing in the manner in which MWUA's Hurricane Katrina claims were paid that would make Audubon a party to MWUA's insurance policies.

Based on their argument that Audubon did everything an insurer must do, it is

[5] During the height of Hurricane Katrina claims – including when the Fontes' initial payment was made – Audubon provided MWUA with a weekly bordereau and sought immediate reimbursement, a request with which MWUA complied.

apparent the Fontes believe that the only thing an insurer does is handle claims. While claims handling is an essential and important task, this is far from true.[6] In creating MWUA, the Mississippi Legislature required a number of tasks to be addressed by MWUA – none of which involved the manner in which claims were handled:

> Within forty-five (45) days after the passage of this chapter, the directors of the association shall submit to the commissioner for review and approval a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors; shall grant proper credit annually to each member of the association for essential property insurance voluntarily written in the coast area; and shall provide for the efficient, economical, fair and nondiscriminatory administration of the association. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation, the establishment of necessary facilities, management of the association, plans for the assessment of members to defray losses and expenses, underwriting standards, procedures for the acceptance and cession of reinsurance, procedures for determining the amounts of insurance to be provided to specific risks, time limits and procedures for processing applications for insurance, and for such other provisions as may be deemed necessary by the commissioner to carry out the purposes of this chapter.

MISS. CODE ANN. § 83-34-13 (2005). As instructed by the Legislature, MWUA – not Audubon – creates its own governing rules. ID. *See also* MISS. CODE ANN. § 83-34-29 ("The association is authorized to promulgate rules for the implementation of this chapter . . . "). MWUA – not Audubon – works to determine the actuarially-sound rate for the windstorm and hail coverage provided by MWUA. MWUA – not Audubon – submits rate filings to the Mississippi Department of Insurance, seeking approval to charge a specific rate to its policyholders. MISS. CODE ANN. § 83-34-17 (2005). MWUA – not Audubon – determines

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[6] Moreover, Mississippi law expressly permits the use of a third party to handle claims. Appellee's Brief at 15-18 (describing cases) and MISS. CODE. ANN. 83-18-1(a) (defining third party administrator).

what policy forms it uses to offer the its statutorily-mandated coverage. MWUA – not Audubon – creates the application available to every licensed Mississippi resident agent or broker so persons and businesses in the six coastal counties can apply for windstorm and hail coverage. MWUA – not Audubon – underwrites each policy, including arranging for and reviewing the results of the physical inspection. MWUA – not Audubon – issues all policies, accepts premium payments, mails notifications regarding the policies, and, if necessary, makes decisions regarding requests for changes to policies as well as decisions regarding cancellation and nonrenewal. MWUA – not Audubon – must file its annual report to the Department of Insurance. MISS. CODE ANN. § 83-34-25 (2005). As the Servicing Insurer Agreement make clear, Audubon has no involvement in these and thousands of other decisions that MWUA must make for its policyholders and itself.[7] The Fontes' are simply incorrect in their recitation of the facts.

2. The Fontes' Co-principal Theory Affects Every Claim and Every Case in Which an MWUA Policyholder Has Not Been Paid the Policy's Limits of Liability.

Audubon correctly states that it is not a co-principal to the MWUA insurance policy issued to the Fontes – and indeed, to every policy issued during the pendency of the Servicing Insurer Agreement. APPELLEE'S BRIEF AT 18. Audubon goes on to argue that even if it were a co-principal, it would not make a difference due to Mississippi law regarding punitive damages. While MWUA agrees it would not make a difference in this case if this

[7] Noticeably absent from this tasks undertaken by MWUA is that of marketing. In its Answer in this cause, MWUA admitted it sold and underwrote the policy issued to the Fontes but denied that it marketed the policy. As the market of last resort for windstorm and hail coverage, MWUA does no marketing. Indeed, part of its statutory mandate is to create incentives for the insurance industry to voluntarily write windstorm and hail coverage in the coastal area. MISS. CODE ANN. 83-34-13 (2005).

Court ignored the co-principal argument, MWUA urges this Court to address and rule on the Fontes' unsupported argument. While the Fontes have been paid their policy limits, a ruling that ignores the co-principal issue leaves MWUA and its policyholders in a precarious position of having to litigate this issue again and again until a case comes before this Court and the issue is addressed. Making Audubon a co-principal makes Audubon a party to every MWUA policy issued during the time Audubon was MWUA's servicing insurer. The result is that Audubon becomes equally liable to every MWUA insured for their losses under the policies. *Liverman v. Cahoon*, 72 S.E. 327, 330-331 (N.C. 1911) (noting that co-principals, as between themselves and the other contracting party, are each liable for the entire contract). The legal chaos that would be created by the ruling requested by the Fontes is unthinkable.

Although the Fontes offered no basis for this Court to find that Audubon is a co-principal with MWUA on MWUA's policies, MWUA asks this Court to consider what it takes for Audubon to be MWUA's co-principal:

1. Audubon and MWUA must have purposefully entered into a contract with each policyholder.
2. Audubon must have made a contribution that assisted in MWUA entering into its contracts with the policyholders.
3. Audubon must have a joint interest in the premiums received by MWUA.
4. Audubon and MWUA must have mutual rights of control or management of MWUA.
5. Audubon must expect to make a profit from MWUA's policies.

6. Audubon must have a right to participate in the profits.

Slaughter v. Philadelphia Nat. Bank, 417 F.2d 21, 30 (Pa. Ct. App. 1969) (finding co-principals are joint venturers). Not one of those elements has been met here. Audubon and MWUA entered into contract that carefully detailed the relationship between MWUA and Audubon. The Servicing Insurer Agreement defines the relationship, the duties of each party, and the payment terms. Nothing in the Servicing Insurer Agreement makes Audubon a co-principal on any of MWUA's policies.

Since there is no legal or factual basis for Audubon to be deemed a co-principal on any MWUA policy, MWUA respectfully requests that this Court address the Fontes' co-principal argument to assist MWUA in resolving its outstanding Hurricane Katrina litigation.

CONCLUSION

MWUA respectfully requests that this Court affirm the Circuit Court's decision to dismiss Audubon. Such a decision – when viewed in light of the actual facts related to MWUA and Audubon – is supported by existing Mississippi law. A reversal of the Circuit Court's decision will put those companies that act as third party administrators out of business in addition to making it exceedingly difficult for MWUA to resolve its outstanding Hurricane Katrina litigation.

RESPECTFULLY SUBMITTED, this the 23rd day of July 2008.

MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION

BY: _____

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CERTIFICATE OF SERVICE

I, Rebecca Blunden, do hereby certify that I have this day caused to be delivered, via United States mail, first-class postage prepaid, a true and correct copy of the above and foregoing document to the following:

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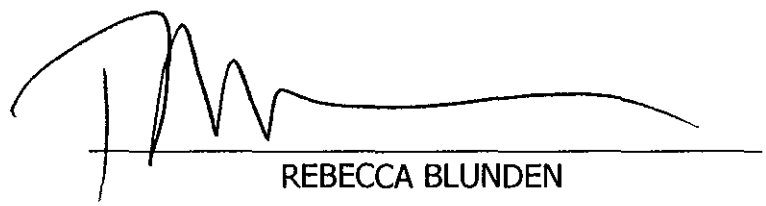
This the 23rd day of July 2008.



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