NO. 2008-TS-00222

IN THE SUPREME COURT OF MISSISSIPPI

HELEN FLAMMER AND
RAUL FONTE — APPELLANTS

v.

AUDUBON INSURANCE GROUP — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

(Oral Argument Not Requested)

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Audubon Insurance Company, Incorrectly
Named as Audubon Insurance Group

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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Helen Flammer and Raul Fonte, Plaintiffs/Appellants;
2. Audubon Insurance Company, incorrectly named as Audubon Insurance Group, Defendant/Appellee;
3. American International Group, Inc.;
4. Balch & Bingham LLP, and its attorneys, John A. Scialdone and Ryan A. Hahn, Counsel for Plaintiffs/Appellants;
5. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. and its attorneys, Walker W. Jones, III, Jason R. Bush, and Brad C. Moody Counsel for Audubon Insurance Company;
6. The Mississippi Windstorm Underwriting Association; and
7. The Honorable Lawrence Paul Bourgeois, Jr., Circuit Court Judge, Harrison County, Mississippi.

Walker W. Jones, III (MB No. [redacted])
Jason R. Bush (MB No. [redacted])
Brad C. Moody (MB No. [redacted])

Attorneys of Record for Audubon Insurance Company

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ORAL ARGUMENT NOT REQUESTED

Audubon Insurance Company does not request oral argument. The legal principles governing the issue(s) raised by the Appellants in this appeal are clear, and therefore, oral argument is not necessary.

STATEMENT OF THE ISSUES

Whether the Circuit Court correctly found that Audubon Insurance Company was acting as an agent for a disclosed principal, the Mississippi Windstorm Underwriting Association, and that Audubon's conduct in adjusting and processing the Plaintiffs' claim for insurance benefits under their wind and hail policy covering their destroyed beach front home did not rise to the level of gross negligence, malice, or reckless disregard for the rights of the Plaintiffs.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The Plaintiffs' house on East Beach Boulevard in Pass Christian, Mississippi, was swept off its foundation by a storm surge of approximately 28 feet (which would have resulted in over 12 feet of water in their home) from Hurricane Katrina. Despite this fact, their wind insurer, the Mississippi Windstorm Underwriting Association ("MWUA") eventually settled their claim and paid policy limits to the Plaintiffs under their wind policy. The Plaintiffs also received the policy limits of $140,000.00 under their flood policy for flood damage to their home and contents. Not satisfied with $570,000.00, representing the policy limits from both their wind policy and their flood policy, the Plaintiffs seek to recover punitive and extra-contractual damages against the agent of the MWUA.

Hurricane Katrina destroyed Raul Fonte and Helen Flammer's (the "Fontes") two-story second home and personal property located at 1221 East Beach Boulevard in Pass Christian, leaving only the foundation and some debris. The Fontes, who are residents of New Orleans, Louisiana, had three separate policies on their beach front home at the time Katrina struck the Mississippi Gulf Coast: (1) a wind and hail policy written through the MWUA, (2) a federal flood policy, and (3) a homeowner's policy, written by State Farm.

When Katrina destroyed the Fontes' home, Audubon Insurance Company ("Audubon") was handling the claims for the MWUA, functioning essentially as a third party administrator. The Fontes' wind and hail policy had a coverage limit for the dwelling in the amount of $400,000.00, and $30,000.00 for personal property. The wind and hail policy only provides coverage for wind and hail damage.

In the present case, Audubon paid the Fontes $171,402.21 for windstorm damage to the building and $30,000.00 for windstorm damage to contents (which was the policy limit for contents coverage) in February 2006. The adjusters determined that flood water likely damaged the entire first floor of the Fontes' beach front home. However, Audubon paid for the roof and the upper story portion of the home, along with the contents in the upper story of the home. After the settlement with the MWUA, the Fontes continued to press forward against Audubon seeking extra-contractual damages; namely punitive damages.

Under Mississippi law, to recover extra-contractual damages from Audubon, the Fontes must show more than mere negligence. For the Fontes to recover against an agent, such as Audubon, the Fontes must show that Audubon acted with gross negligence, malice or reckless disregard for their rights. However, the Fontes' own expert meteorologist testified in his deposition: "there's no way to discount the water, that there was a 28-foot storm surge that hit that area, and that the home was definitely impacted by storm surge." Furthermore, the Fontes also have a claim against their agent Steve Saucier, for allegedly failing to increase the policy limits on their flood policy. Audubon's payment to the Fontes, based on the determination that the first floor of their beach front home was damaged by flood, was certainly not grossly negligent or without an arguable basis. The Circuit Court correctly dismissed the claims against Audubon, and this Court should affirm.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

A. Allegations in the Complaint.

The Fontes filed this lawsuit on June 29, 2006 in the Circuit Court of the First Judicial District of Harrison County, Mississippi against State Farm Fire & Casualty Company ("State Farm"); the MWUA, Audubon Insurance Company (incorrectly named as "Audubon Insurance

Group"); and their insurance agent, Steve Saucier. (R. 9-37). The Complaint states that the Fontes purchased all three policies insuring their home and personal property at 1221 East Beach Boulevard, Pass Christian, Mississippi, through State Farm agent Steve Saucier: (1) their homeowner's insurance policy from State Farm, (2) their flood insurance policy and (3) a wind & hail insurance policy from the MWUA. (R. 11-12). The Complaint correctly states that Audubon Insurance Company handles all insurance claims for the MWUA as the MWUA's third party administrator. (R. 12, at ¶ 11). The Complaint states the "wind & hail insurance policy was underwritten, sold, marketed and issued to plaintiff entirely and solely by MWUA, by and through Steve Saucier." (R. 13, at ¶ 15).

The Complaint asserts that the Fontes' claim for additional living expense benefits under their homeowner's policy with State Farm was denied. (R. 16, at ¶ 23). State Farm asserted that its "inspection revealed that [the Fontes'] property sustained damage from wind and water" and because "[d]amage to [the Fontes'] home from wind did not render [their] home uninhabitable" the Fontes were not entitled to loss of use benefits. (R. 16, at ¶ 23, 46-47). The Complaint acknowledges that the Fontes' flood insurance policy had limits of $100,000.00/dwelling and $40,000.00/contents, and the Fontes were paid policy limits. (R. 17, at ¶ 24; 45). The Fontes allege that they instructed Steve Saucier in 2004 and then again in 2005 to adjust the coverage provided by their flood policy to the maximum extent available. (R. 17, at ¶ 24).

The Complaint acknowledges that Audubon paid the Fontes $201,402.21 and explained that the $201,402.21 paid amount was "the damage determined to be caused by the peril of windstorm (the only peril covered by your policy)." (R. 18, 48). The Complaint takes issue with the decision not to pay "full coverage" under the "plaintiff's MWUA ... wind & hail policy" and the estimate done by the FARA adjuster. (R. 19-20).

The Complaint contains ten counts, only seven of which are directed at Audubon. The Counts that include Audubon are: Count III Conversion; Count IV Declaration of Insurance Coverage; Count V Specific Performance of Contract; Count VI Unjust Enrichment/Constructive Trust; Count VII Injunction/Equitable Estoppel; Count VIII Indemnity; and Count IX Reformation of Insurance Contract. (R. 24-33)[1] Although much of the Complaint is couched in conclusory and generic terms against all "defendants," the Fontes asserted that State Farm, MWUA and Audubon refused to provide plaintiffs with full insurance coverage for damage caused by Hurricane Katrina. (R. 33, at ¶ 92). The Complaint requests punitive damages as a result of "Defendants' actual malice, gross negligence, willful, wanton and reckless disregard for their policyholders, ..." as well as attorney's fees. (R. 35-36).

B. Settlement with the MWUA.

After this suit was filed, the Fontes reached a settlement agreement with the MWUA. (R. 313). In consideration for the settlement and dismissal of the MWUA, the Fontes received payment of $228,598.00, the remainder of policy limits under their wind and hail policy. (R. 313). Thus, the Fontes have now received the policy limits under their wind and hail policy ($430,000.00) and are solely seeking extra-contractual damages from Audubon. Fontes' Appeal Brief, at pp. 3, 16.

[1] The other counts are: (I) Breach of Insurance Contract as to MWUA and State Farm, (II) Fraud as to MWUA and State Farm, and (X) Misrepresentation, Negligence and Breach of Contract against Steve Saucier. (R. 23, 34). As the Fontes noted in their appellate brief, the case was removed to the United States District Court for the Southern District of Mississippi on July 31, 2006, based on federal question jurisdiction due to the Fontes' claim against State Farm relating to their flood policy. On or about July 20, 2007, the case was remanded back to the Circuit Court of Harrison County.

C. Audubon's Motion for Summary Judgment and the Court's Order.

After the close of discovery, Audubon filed its Motion for Summary Judgment. (R. 98-129). In response to the motion, the Fontes stipulated that counts III, IV, V, VI, VII, VIII and IX were no longer applicable and should be dismissed as to Audubon. (R. 313).

After briefing was complete, on October 8, 2007, the Circuit Court of Harrison County heard argument on Audubon's motion. (R. 409).[2] On December 13, 2007, the Circuit Court entered an order granting Audubon's motion. (R. 409-411). The Circuit Court found that "Audubon functioned as an agent for a disclosed principal." (R. 410-411). The Circuit Court held that under Mississippi law, an agent for a disclosed principal could not be liable for simple negligence or breach of contract. (R. 411). The Circuit Court held that there was "no conduct shown which would allow the fact finder to determine that Audubon committed acts of gross negligence amounting to an independent tort." *Id.*

Thereafter, the Circuit Court entered a Final Judgment of Dismissal with Prejudice as to Audubon on or about January 11, 2008 pursuant to Miss. R. Civ. P. 54(b). (R. 413).

III. STATEMENT OF FACTS.

A. Background Information Regarding Audubon and the MWUA.

The Mississippi Windstorm Underwriting Association is a creature of the Mississippi Legislature, which acted "to provide a mandatory program to assure an adequate market for windstorm and hail insurance in the coast area of Mississippi." *Ass'n Cas. Ins. Co. v. Allstate*

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[2] On the same day, the Fontes argued a motion against State Farm. (R. 409-410). The Fontes essentially argued that the word "explosion" in the State Farm homeowner's policy was ambiguous and therefore, should cover damage from water. (R. 409-410). The Circuit Court denied the Fontes' motion for partial summary judgment and held "Plaintiffs present no facts or authorities which persuade the Court that the explosion exception to the flood/water exclusion should be expanded to include damages caused by storm surge or wind driven water." (R. 410).

Ins. Co., 507 F. Supp. 2d 610, 613 (S.D. Miss. 2007) (quoting 1987 Miss. Laws, ch. 459, § 1).[3] For almost two decades, in accordance with its legislative purpose, the MWUA has made windstorm and hail insurance available to residents of the coastal counties of Mississippi who otherwise would not have been able to get such insurance in the normal insurance market. *Ass'n Cas. Ins. Co.*, 507 F. Supp. 2d at 614.

Audubon entered into a Servicing Insurer Agreement with the MWUA and signed an extension of the agreement in 2004, which extended the agreement through March of 2007. (R. 341-345). Under the Servicing Insurer Agreement, Audubon agreed to perform certain duties, such as providing full claim supervision. (R. 341). Audubon contracted with independent adjusting firms, such as FARA, to assist in the adjusting process. (R. 328, 376). When Audubon received a claim, it assigned the claim to an adjusting firm, reviewed that firm's findings, and processed the claim (either payment or denial). (R. 328, 376). Underwriting and applications for new policies or changes for wind and hail policies were handled by the MWUA in their office in Jackson, Mississippi, not by Audubon. (R. 377, 402-404). Audubon is later reimbursed by the MWUA for claims paid. (R. 342).

After Hurricane Katrina, a "Claims Procedure Guidelines" document was created to give to the different independent adjusting firms. (R. 378-384). The guidelines in this document were suggested to Audubon by counsel for the MWUA (after consulting with engineers). *Id.*

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[3] In creating the MWUA, the Legislature made the following finding of public necessity:

> The Legislature of the State of Mississippi hereby declares that an adequate market for windstorm and hail insurance is necessary to the economic welfare of the State of Mississippi and that without such insurance the orderly growth and development of the State of Mississippi will be severely impeded; that furthermore, adequate insurance upon property in the coast area is necessary; and that while the need for such insurance is increasing, the market for such insurance is not adequate and is likely to become less adequate in the future.

Ass'n Cas. Ins. Co., 507 F. Supp. 2d at 614.

B. Adjustment of the Fontes' Claim.

As the name implies, the MWUA wind and hail policy only provides coverage for the perils of wind and hail. (R. 132).[4] In the present case, John Jay and Deanie Diamond were the independent adjusters who worked for FARA that investigated and adjusted the Fontes' claim under their wind and hail policy.[5] Beginning in middle to late October 2005, when Mr. Jay received his assignment from FARA, these adjusters communicated with the Fontes several times over the course of approximately three and a half months. On October 24, 2005, Ms. Flammer sent an email to John Jay which attached some photos of the house during construction. (R. 148). The email states in part, "[a]s per your conversation with my husband Raul today, see attached pictures of my house at 1221 East Boulevard in Pass Christian during construction. We had finished building and furnished it recently."[6] *Id.*

Subsequently, Ms. Diamond sent a letter to Ms. Flammer,[7] enclosing the personal property inventory forms to be completed by room and floor. (R. 149). The letter further states "[i]t would help me if you could also give a floor/plan diagram with room sizes on each level, if at all possible." *Id.* As Ms. Diamond explained in her letter, the "floor plan/diagram would just

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[4] The policy also expressly excludes damage caused by flood, as follows:

> **Water Exclusion Clause:** This Company shall not be liable for loss caused by, resulting from, contributed to or aggravated by any of the following --
>
> a. flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not; ....

(R. 140).

[5] John Jay was the adjuster for FARA primarily responsible for handling the Plaintiffs' claim, and was assisted by Deanie Diamond, another adjuster working for FARA.

[6] Only the front portion of the house facing the Gulf was two-story; the older portion of the house further north was one story. (R. 243).

[7] The letter is undated, but based on subsequent correspondence, was likely sent in December 2005.

help us discuss your loss and in determining the portion of the loss to wind and to flood/surge." *Id.*

In an email dated January 17, 2006, Ms. Diamond again requested Mr. Fonte to provide "information on the following in the **upper story** of your home."[8] (R. 172). Thereafter, on January 20, 2006, John Jay provided a status report to FARA, which stated in part: "[w]e have had limited cooperation from these insureds regarding the construction details and features of this dwelling...." (R. 174). On January 24, 2006, Ms. Flammer sent a letter to Deanie Diamond, which enclosed certain information regarding the building and contents. (R. 225-235).

On or about February 4, 2006, John Jay prepared his final report. (R. 241-245). The report indicates that the loss was first inspected on November 2, 2005. (R. 242). Enclosed with the final report was an estimate for covered wind damage, as well as photos. (R. 246-270). The Report states in part that "we are informed that the risk was covered by a NFIP policy. Mr. Fonte has refused to give us any information such as policy number and coverage limits." (R. 242-243).[9] The Report states the following under **CAUSE OF LOSS:**

> The loss that is the subject of this claim clearly was the direct result of winds and tidal surge from Hurricane KATRINA. The location of the risk is approximately on U.S. Highway 90 and about one block north of the beach .... *There is clear evidence of tidal surge in that area* as well as evidence of significant winds from the hurricane. *The height of the surge and its wave action are documented* to have been about 30 feet above MSL or *high enough to engulf the entire bottom floor of this mixed one and two-story building.*

(R. 242) (emphasis added).

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[8] This email requested the following information regarding the upper story of the home: the number and type of rooms; wall covering throughout: drywall painted, paper, other coverings etc.; floor covering-carpet, marble, tile or wood; crown molding in the rooms; ceiling materials; any special lighting or fixtures; and number of windows and doors; and confirmation regarding whether the roof consisted of composite shingles. (R. 172).

[9] The Fontes received full policy limits ($100,000.00 dwelling/$40,000.00 contents) under their flood policy in September 2005. (R. 19, at ¶ 24, 45).

Subsequently, AIG Clams Service ("AIG CS"), acting on behalf of Audubon, sent a letter to the Fontes stating that "[w]e are in receipt of the adjusters' report who inspected your loss," and a "payment is being made in the amount of $201,402.21, which is the damage determined to be caused by the peril of windstorm (The only peril covered by your policy)."[10] (R. 48) On or about February 16, 2006, payment was sent to the Plaintiffs in the amount of $171,402.21 for windstorm damage to the dwelling and to the carport and $30,000.00 for windstorm damage to the contents (which was the policy limit for contents). (R. 53-54).

C. Evidence Supporting Audubon's Claim Decision.

There is substantial evidence in this case to support Audubon's claim decision that the lower floor of the Fontes' home was destroyed by flood waters. Again, the Fontes received the policy limits of $140,000.00 under their NFIP policy for flood damage to their home and contents.[11] (R. 17, at ¶ 24). Clearly, there was some flood damage to their home. Additionally, State Farm denied the Fontes' claim for additional living expense benefits under their homeowner's policy and because "[d]amage to [the Fontes'] home from wind did not render [their] home uninhabitable ...." (R. 16, at ¶ 23, 46-47).

The Fontes' own meteorologist, who was designated as an expert in this case, testified that the storm surge at the site was approximately 28 feet high and the home was definitely impacted by storm surge.[12] Col. Richard Henning testified:

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[10] This letter is also undated, but was apparently sent on or around February 16, 2006.

[11] Therefore, they are judicially estopped from denying that there was flood damage to their property, at least to the extent of the $140,000 payment they accepted. *See, e.g. Mills v. State Farm Fire and Cas. Co.*, No. 1:07cv73, 2007 WL 1514021, at *5 (S.D. Miss. May 21, 2007).

[12] According to an engineer designated as an expert by the Fontes, the base of their Pass Christian property on Beach Boulevard was 15.5 feet above mean sea level. (R. 71).

> Q. Do you agree that reasonable minds could differ as to the amount of contribution as to the amount of wind versus water at the Flammer residence and the timing of them?
>
> A. I think that the scientists looking at the same data could come to different conclusions. ...

(R. 294). Henning further testified:

> Q. And I think I asked you a similar question earlier, but if I were to ask you, would you agree that both water and wind damaged the Flammer residence in Pass Christian or the Fonte residence? Is that a question you have an opinion on, or is that outside --
>
> A. I'd have an opinion. I'd say that *there's no way to -- that -- there's no way to discount the water, that there was a 28-foot storm surge that hit that area, and that the home was definitely impacted by storm surge. There's no doubt about that.*

(R. 295-296) (emphasis added).

Ms. Flammer testified in her deposition that the home was destroyed by wind and water, and reasonable minds could differ as to the timing of each and which did the most damage. (R. 275). Ms. Flammer testified "[i]t was completely destroyed by a combination of wind and water, of which we know who -- which came first, which did the most damage, and I don't think anybody in this room knows the answer to that, ..." (R. 273). Mr. Fonte, who is a chemical engineer, testified that he did not feel qualified to offer an opinion as to whether both wind and water damaged their beach front home. (R. 155).

Audubon retained engineer Shawn Johnson of SEA Ltd. as an expert in this case to render an opinion regarding the cause of the damage to the Fontes' home. Johnson's report concluded that the "probable depth of the storm surge at the Flammer property was between 26 and 28+ feet above mean sea level" and that the residence likely would have "been subjected to between 11 to 15 feet of floodwater at the peak of the storm surge, likely submerging all of the first floor of the home." (R. 278, 283). Johnson further opined that given the depth of the storm

surge, the flood water would have been sufficient to dislodge the house from its foundation. (R. 284).[13] Johnson concluded that "the probable cause of the majority of the damage sustained by the Flammer residence was due to floodwaters associated with the storm surge during Hurricane Katrina." (R. 290).

Additionally, the Fontes have asserted a claim in this case against their agent Steve Saucier, based at least in part on his alleged failure to increase the coverage limits under their flood policy to the maximum extent available. (R. 17, at ¶ 24, R. 156, 160). The Fontes also filed and argued a motion against State Farm, which essentially argued that the word "explosion" in the State Farm homeowner's policy was ambiguous and therefore, should be construed to cover damage from water. (R. 409-410). Surely the Fontes would not have pursued these claims seeking additional damages from co-defendants caused by damage to their property from flood water unless there is some factual basis to support the claims.

SUMMARY OF ARGUMENT

The Fontes clearly had flood damage to their beach front second home on Beach Boulevard/Highway 90 in Pass Christian from Hurricane Katrina. Unfortunately, the Fontes were underinsured with respect to their flood insurance, but they promptly received their policy limits from their flood policy. Adjusters from FARA inspected and adjusted the loss (which was only a foundation and some debris) and correctly determined that the flood waters at that site were high enough to engulf the entire bottom floor of their home. However, the Fontes' claim

[13] Johnson also noted that he "observed nearby properties to the north, including some as near as 200 to 300 yards to the northwest, survived Katrina more or less intact." (R. 290). Mr. Fonte admitted in his deposition that homes approximately 400 feet or one block northwest of his home (further away from the beach) remained standing after Katrina. (R. 169-171). The SEA report further states that it "is highly unlikely that the home would have been completely destroyed by winds of the magnitude recorded in the Pass Christian area." (R. 291).

for benefits from wind damage was not denied altogether. The adjuster recommended payment for wind damage to the roof, and the second story portion of the house. The policy limit for personal property was only $30,000.00, and this was paid. The Fontes were paid $201,402.21 in February 2006 for wind damage to their house and contents.

Throughout this case, the Fontes' claims have been a moving target, and often difficult to discern. The Complaint is conclusory and contains generic allegations, often against all "defendants." After conducting extensive discovery and after Audubon filed its motion for summary judgment, the Fontes stipulated that the seven "counts" in their Complaint against Audubon were dismissed. The Fontes admitted that since they received the remainder of the policy limits by virtue of their settlement with the MWUA, they were pursuing claims against Audubon for extra-contractual benefits. The only claim that was even potentially viable against Audubon was a claim for gross negligence, malice or reckless disregard for the insured's rights.

When it is helpful to the Fontes' cause, they argue that the adjustment of their claim under their wind and hail policy was arbitrary and that Audubon should have considered the possibility that wind damage and the subsequent rain water caused more damage than what was originally paid. As a red herring the Fontes put forth a myriad of immaterial facts relating primarily to the independent adjuster who worked for FARA. They assert, again without any support or authority, that an adjuster should have had training in meteorology and/or engineering. While this borders on absurd, even the Fontes' meteorologist testified that scientists could come to different conclusions on the causation of the damage to their home. Their meteorologist also testified that the home was definitely impacted by the 28 foot storm surge. No amount of training in engineering can change the fact that the Fontes' home was predominately destroyed by flood water.

When it seems to help their cause, the Fontes have argued that they should be able to recover from co-defendants for flood damage and against their insurance agent for allegedly failing to increase the policy limits on their flood policy. Continuing their legal posturing, the Fontes argue on appeal that the Circuit Court of Harrison County did not consider all of their arguments, including an argument that Audubon should somehow be liable for simple negligence. The Circuit Court heard all of the Fontes' arguments, entertained a lengthy oral argument, and asked counsel for both sides several questions. The Fontes did not cite any authority for this novel theory in response to Audubon's motion for summary judgment, at oral argument, or in their appellate brief.

After hearing argument, the Circuit Court correctly held that Audubon was acting as an agent for the MWUA. The Circuit Court also correctly held that Audubon's conduct did not rise to the level of gross negligence, malice or reckless disregard for the rights of the Fontes.

ARGUMENT

I. STANDARD OF REVIEW.

This Court applies "a de novo standard of review to a trial court's grant or denial of summary judgment." *Moore v. Mississippi Valley Gas Co.*, 863 So. 2d 43, 47 (Miss. 2003). The appellate standard of review is, therefore, "the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure." *Id.* Mississippi Rule of Civil Procedure 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." While the moving party has the burden of demonstrating that no genuine issue of fact exists, "when a party opposing summary judgment on a claim or defense as to which

that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law." *Moore*, 863 So. 2d at 47 (quoting *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 684 (Miss.1987)).

To survive summary judgment, the non-moving party must offer "significant probative evidence demonstrating the existence of a triable issue of fact." *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 364 (Miss. 1983). The Mississippi Supreme Court has "repeatedly stated that the party against whom a motion for summary judgment is made 'may not rest upon allegations or denials in her pleadings'" and that "[a]llegations or denials, without more, are insufficient to create an issue of fact sufficient to avoid summary judgment." *Hartford Casualty Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1218 (Miss. 2001). Additionally, "[i]n order for summary judgment to be inappropriate, there must be genuine issues of *material* fact; the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material." *Evan Johnson & Sons Const. v. State,* 877 So. 2d 360, 365 (Miss. 2004).

II. AUDUBON WAS ACTING AS THE AGENT OF THE MWUA AND THEREFORE CANNOT BE LIABLE FOR NEGLIGENCE OR BREACH OF CONTRACT.

It is well established under Mississippi law that an agent for a disclosed principal, such as a third party administrator or adjuster, cannot be liable for simple negligence. *Bass v. California Life Ins. Co.,* 581 So. 2d 1087, 1091 (Miss. 1991); *Gallagher Bassett Servs., Inc. v. Jeffcoat,* 887 So. 2d 777, 784 (Miss. 2004) ("we take this opportunity to revisit our holding in *Bass* and conclude it plainly states and we now reiterate that an insurance adjuster, agent or other similar entity may not be held independently liable for simple negligence in connection with its work on a claim."). Similarly, an agent for a disclosed principal cannot be liable for breach of contract. *See, e.g., Jabour v. Life Ins. Co. of North America*, 362 F. Supp. 2d 736, 740 (S.D. Miss. 2005)

("[I]t is clear that as an agent for a disclosed principal, [an agent] can incur no contractual liability."). "Such an entity may be held independently liable for its work on a claim *if and only if* its acts amount to any one of the following familiar types of conduct: *gross negligence, malice, or reckless disregard for the rights of the insured." Gallagher Bassett Servs., Inc.*, 887 So. 2d at 784. (emphasis added).

At the time Hurricane Katrina hit the Mississippi Gulf Coast, Audubon was acting as the servicing insurer for the MWUA. In this capacity, Audubon acted as an agent of the MWUA in servicing the MWUA's policies. The Fontes spend much time and argument on the relationship between Audubon and the MWUA, and allege that Audubon was somehow more than an agent for the MWUA. This alleged factual dispute is incorrect (it even contradicts the allegations in the Fontes' Complaint) and immaterial. [14]

Undisputed deposition testimony in this case shows that applications for wind and hail policies are handled by the MWUA in their office in Jackson, Mississippi. (R. 341, 377, 402-404).[15] The MWUA owns all files, records and data obtained or created by Audubon in the performance of its duties under the agreement. (R. 342). When Audubon received a claim, it assigned the claim to an adjusting firm, reviewed that firm's findings, and processed the claim (either payment or denial). (R. 328, 376). Furthermore, as the Fontes noted several times in

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[14] This argument is in direct contrast to the Fontes' own Complaint, which has not been amended, and states: Audubon Insurance Group, a.k.a. Audubon Insurance Company handles all insurance claims for the MWUA as the MWUA's third party administrator. (R. 12, at ¶ 11). The Complaint further states: the wind & hail insurance policy was underwritten, sold, marketed and issued to Plaintiffs entirely and solely by the MWUA, by and through Steve Saucier (the State Farm agent). (R. 13 at ¶ 15).

[15] The Fontes assert in the appeal brief that "Audubon expressly agreed to perform all of the underwriting ... functions of the MWUA ...." Fontes' Appeal Brief, p. 18. Again, this is incorrect and contradicts their Complaint. The Fontes cite to pages 341-346 of the record, which is the Servicing Insurer Agreement. The Servicing Insurer Agreement states that the Association (MWUA) performs the duties of "issuing and processing of new and renewal insurance policies ...." (R. 341).

their briefs, the Claims Procedure Guidelines document that was provided to the adjusting firms in the wake of Hurricane Katrina originated as suggestions from the counsel for the MWUA. (R. 378-383).

A United States District Court has already examined the relationship between Audubon and the MWUA pursuant to the Servicing Insurer Agreement and held that at the time "**Audubon, as a servicing insurer, was acting as an agent of MWUA.**" *Andry v. Audubon Ins. Co.*, Civ. Act. No. 06-3187; 2006 WL 3904998, at *6 (E.D. La. Dec. 27, 2006) (emphasis added). *Andry* also involved citizens of Louisiana who had a second home on Beach Boulevard in Pass Christian that was damaged by Hurricane Katrina. *Id.* at *1. In *Andry*, the plaintiffs filed suit against several defendants, including Audubon, MWUA, FARA, Nationwide Property and Casualty Insurance Company and engineers. *Id.* at *1-2.

The case was removed to federal court, and the defendants argued that Audubon and FARA were improperly joined solely to defeat diversity jurisdiction. *Id.* at *4. The court held:

> Under MWUA's plan of operation, a servicing insurer is 'an insurer who enters into an agreement with the Association to provide and service policies on risks referred to it by the Association.' Although insurers like Audubon Insurance Company may issue policies in their own right, that is not their role with MWUA policies. *As an agent or servicing insurer of MWUA, Audubon Insurance Company provides service on MWUA policies; such service includes issuing policies on behalf of MWUA, adjusting claims, and supervising claims. The Court concludes that Audubon, as a servicing insurer, was acting as an agent of MWUA.*

Id. at *6 (emphasis added).

The court held that the plaintiffs' breach of contract claim was not viable against Audubon. *Id.* Similarly, the court noted that an agent such as an adjuster could not be liable for simple negligence. *Id.* Relying on *Bass*, the court in *Andry* concluded that the only potentially viable claim against Audubon (as the agent of the MWUA) was conduct that constituted an

independent tort. This conduct must be "grossly negligent, malicious, or which shows a reckless disregard for the rights of the insured." *Id.* (citing *Bass v. California Life Ins. Co.*, 581 So. 2d 1087, 1089 (Miss. 1991)).

The Fontes have ignored the *Andry* opinion both in their response to Audubon's motion for summary judgment and in their appellate brief. Instead, the Fontes cite a case from New Mexico, *Maes v. Audubon Indemnity Ins. Group*, 164 P.3d 934 (N.M. 2007). *See* Fontes' Appeal Brief, at p. 18. The sole issue in *Maes* was whether, under the New Mexico Fair Access for Insurance Requirements Plan Act, Audubon had statutory immunity from suit. *Maes*, 164 P.3d at 935. Therefore this case is inappropriate and irrelevant.

Just as the United States District Court held in *Andry*, when it analyzed the relationship between Audubon and the MWUA, Audubon was acting as the agent for the MWUA in adjusting and processing the Fontes' claim.

III. THE FONTES' CHARACTERIZATION OF AUDUBON AS A CO-PRINCIPAL IS ALSO IMMATERIAL.

The Fontes assert in a conclusory manner several times in their brief that Audubon was a "co-principal" with the MWUA, and argue that as a result, Audubon can be liable under a negligence standard. Notably, the Fontes do not cite *any authority* for this novel theory. This simply is not the law in Mississippi.[16] Even *if* Audubon were a "co-principal" with the MWUA, (which it was not), that would place Audubon in the same status as an insurance company.[17] Again, this avails the Fontes nothing as they would still have to prove that Audubon had no

[16] Furthermore, the Fontes did not plead a claim for negligence against Audubon in their complaint. They did plead a breach of contract claim against the MWUA, but not Audubon, which further supports the fact that Audubon was an agent for the MWUA.

[17] The Fontes acknowledge this in their appeal brief, when they assert that Audubon was a co-principal with MWUA which "placed Audubon in MWUA's shoes in regards to the contractual relationship between MWUA and the Fontes." Fontes' Appeal Brief, at p. 18.

arguable basis for its claim decision to recover extra-contractual damages. In other words, this Court need not decide this issue because the standard required for a claim based upon an independent tort against an agent (such as an adjuster or a third-party administrator) is the same as what is required for a "bad faith" claim against an insurer. *See, e.g. Ray v. Travelers Ins. Co.*, No. 2:98cv33-B-B, 1998 WL 433949 at *2. (N.D. Miss. Jun. 26, 1998) ("The *Bass* standard applicable to adjustors ... is the same as the bad faith standard applicable to insurers ...."): *Caldwell v. Alfa Ins. Co.*, 686 So. 2d 1092, 1095-96 (Miss. 1996) ("To recover punitive damages from an insurer for 'bad faith', the insured must prove by a preponderance of evidence that the insurer acted with (1) malice, or (2) gross negligence or reckless disregard for the rights of others.") (citations omitted); *Broussard v. State Farm Fire and Cas. Co.*, 523 F.3d 618, 628 (5th Cir. 2008) ("To recover punitive damages for bad faith denial of their insurance claim, the Broussards 'must show that the insurer denied the claim (1) without an arguable or legitimate basis, either in fact or law, and (2) with malice or gross negligence in disregard of the insured's rights.'"); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 232-33 (Miss. 2001) ("The issue of punitive damages should not be submitted to the jury unless the trial court determines that there are jury issues with regard to whether: 1. The insurer lacked an arguable or legitimate basis for denying the claim, and 2. The insurer committed a willful or malicious wrong, or acted with gross and reckless disregard for the insured's rights."). Mississippi courts have sometimes used the term "bad faith" in the context of claims against agents. *See, e.g. Rasberry v. Blue Cross & Blue Shield of Mississippi*, 850 So. 2d 1194, 1200 (Miss. Ct. App. 2002) (affirming summary judgment in favor of third party insurance administrator and holding that no "bad faith" was shown).

If Audubon had an arguable or legitimate basis for its coverage determination (made based upon adjusting criteria by Audubon's principal, the MWUA) and subsequent payment of the Fontes' claim, then its conduct does not rise to the level of an independent tort. *See, e.g. Cossitt v. Alfa Ins. Co.*, 726 So. 2d 132, 138 (Miss. 1998) (noting that the Mississippi Supreme Court has defined an arguable reason as "nothing more than an expression indicating the act or acts of the alleged tortfeasor do not rise to heightened level of an independent tort.").[18]

Additionally, "[p]unitive damages may not be awarded if the claimant does not prove by *clear and convincing evidence* that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888, 896 (Miss. 2006) (quoting Miss. Code Ann. § 11-1-65)); *accord Broussard*, 523 F.3d at 628. Similarly, an insured may not recover extra-contractual or consequential damages such as attorney's fees unless the insurer's decision to deny benefits was done without "a reasonably arguable basis." *Broussard*, 523 F.3d at 628 (citation omitted).[19]

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[18] *See also Horton v. Hartford Life Ins. Co.*, 570 F. Supp. 1120, 1123 (N.D. Miss. 1983) (granting the insurer's motion for summary judgment on the plaintiff's claims for extra-contractual damages, in the context of a disability claim, noting that some of the actions of the insurance company were "questionable," but holding that a difference of opinion based on the reports of two doctors "cannot be said to rise to the level of an independent tort."); *Davidson v. State Farm Fire & Cas. Co.*, 641 F. Supp. 503, 510 (N.D. Miss. 1986) (granting summary judgment in favor of the insurer on the plaintiffs' claims for extra-contractual and punitive damages, and stating "[t]he issue before the court is not whether State Farm's denial of the plaintiffs' claim was wrongful, but whether its conduct amounted to gross negligence so as to be in reckless disregard for the rights of the plaintiffs or whether it acted with malice toward the same.").

[19] *See also Stratford Ins. Co. v. Cooley*, 985 F. Supp. 665 (S.D. Miss. 1996) (holding that insurer had an arguable basis for denying payment, and therefore concluded "that the claim for attorney's fees ... fails."); *Universal Life Insurance Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992) (stating that attorney's fees might be available as damages where an insurer had no legitimate or arguable reason for denying benefits).

The issue of whether Audubon's handling of the Fontes' claim constituted bad faith *is an issue of law for the court.* *Broussard*, 523 F.3d 618, 628 ("The question of whether State Farm had an arguable basis for denying the Broussards' claim 'is an issue of law for the court.'"); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 232-33 (Miss. 2001) (holding that questions of whether an insurer lacked an arguable or legitimate basis for denying a claim and committed a willful or malicious wrong or acted with gross and reckless disregard for the insured's rights are matters of law to be decided by the trial judge on the issue of punitive damages).

IV. AUDUBON HAD AN ARGUABLE BASIS TO DETERMINE THAT THE FIRST FLOOR OF THE HOME WAS DAMAGED BY FLOOD WATER.

Audubon's determination of the scope of the covered loss was reasonable. There is ample evidence to support the finding that flood water destroyed the majority of the Fontes' home, including the lower story. John Jay determined that both tidal surge and wind damaged the Fontes' beach front home and his report notes that the height of the surge and its wave action documented would have been high enough to engulf the entire bottom floor of the Fontes' mixed one and two-story dwelling. (R. 242).

Some houses as near as 200-300 yards northwest of the Fontes' (clearly within sight distance of the Fontes' property and further from the Gulf) survived largely intact. (R. 169-171, 173, 290). Storm surge heights were documented to have been in the range of approximately 26-28+ feet above mean sea level in that area, which would have subjected the Fontes' home to between 11 and 15 feet of floodwater. (R. 278, 283).[20]

[20] Shawn Johnson's report from SEA concluded that "the probable cause of the majority of the damage sustained by the Flammer residence was due to floodwaters associated with the storm surge during Hurricane Katrina." (R. 278; 290).

Although John Jay was not aware of the status of the Fontes' claim under their flood policy, his determination that flood damaged a large portion of the home is consistent with the fact that the Fontes received policy limits under their flood policy. It is also consistent with the Fontes' claim against Steve Saucier for allegedly failing to increase the limits of the flood policy.

Ms. Flammer testified in her deposition that the home was destroyed by both wind and water, and reasonable minds could differ as to the timing of each and which did the most damage. (R. 53-55).[21] The Fontes' own meteorologist, Col. Richard Henning, testified that the home was definitely impacted by the 28 foot storm surge. (R. 295-96). He testified:

> Q. Do you agree that reasonable minds could differ as to the amount of contribution as to the amount of wind versus water at the Flammer residence and the timing of them?
>
> A. I think that the scientists looking at the same data could come to different conclusions. ...

(R. 294).

Based on the evidence in the present case, Audubon's investigation and payment, based on John Jay's report, was reasonable.[22] Audubon's determination that water substantially damaged the Fontes' home, including the entire first floors of their home was certainly not

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[21] Mr. Fonte, who is a chemical engineer, testified that he did not feel qualified to offer an opinion as to whether both wind and water damaged the Plaintiffs' home. (R. 155).

[22] The Fontes focus on a myriad of irrelevant facts relating to the claim adjustment, most of which do not merit response. The Fontes assert in their appeal brief that "Audubon provided ... a directive mandating that under no circumstances was Jay allowed to pay 100% of any claim along Highway 90" in the area. Fontes' Appeal Brief at p. 10. This is incorrect and the undisputed testimony is that John Jay was informed of this presumption or instruction by FARA; not Audubon. (R. 319). Jay testified that he was "told by FARA" that he was not to pay 100% of a wind claim along U.S. 90 for slab claims, where only the foundation was left, because of the fact that it was assumed and believed that the flood surge created a significant part of the total damage. (R. 318-20). Jay also testified that many of the initial engineering reports regarding causation of the loss were simply inconclusive. *Id.*

grossly negligent or without a legitimate or arguable basis.[23] A review of the Court's opinion in *Gallagher Bassett Servs., Inc.* supports the Circuit Court's grant of summary judgment.

In *Gallagher Bassett Servs., Inc.*, the Plaintiff, Bo Jeffcoat, was injured in an accident while driving a vehicle of his employer, NHL. *Id.* at 780. Plaintiff attempted to obtain payment under NHL's uninsured motorist ("UM") policy. *Id.* NHL's insurer was Reliance National Indemnity Company ("Reliance"), who had a contract with Gallagher Bassett Services, Inc. ("Gallagher") to adjust claims under the policy. *Id.* at 780-81. "Thus, Gallagher was the separate, independent adjusting company that was contractually obligated to adjust [the] claim." *Id.* at 781. The claim was delayed for a period of approximately one year after Jeffcoat filed his claim, as the claims representative, Love, attempted to determine how many vehicles were in the NHL fleet.[24] *Id.*

The amended complaint alleged that Gallagher's and Love's actions were grossly negligent, malicious, and/or evidenced reckless disregard for Jeffcoat's rights. *Id.* at 780.[25] The case went to trial, and the jury returned a verdict against Gallagher for $3,000,000.00 in actual

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[23] The Fontes acknowledge the fact that water caused more damage to their home than $140,000.00, the amount of policy limits for their NFIP policy. Again, one of their claims against Steve Saucier is for failing to increase the policy limits on their NFIP policy. Similarly, in other pleadings, the Plaintiffs have argued that a clause in co-defendant State Farm's policy should allow for coverage from "explosions" due to water. While the Fontes certainly would have a right to make alternative arguments if they were seeking coverage under policies where the limits have not been exhausted, the argument in the present case totally undercuts their claim for extra-contractual damages against Audubon. It strains credibility to imagine how the Plaintiffs can claim in one pleading that Audubon did not have a reasonably arguable basis for determining the lower floors of the home were damaged by water, while at the same time the Plaintiffs are seeking damages from co-defendants for damage to the home caused by water.

[24] The claims representative, Juana Love, believed she could not obtain a legal opinion on the issue of stacking until she obtained a "fleet schedule," which purportedly listed the number of vehicles in the NHL fleet. *Id.*

[25] Jeffcoat alleged that as a result of Gallagher's unreasonable delay and failure to promptly determine and pay the amount of coverage under the policy, he experienced extreme emotional trauma and severe depression.

damages and $500,000.00 in punitive damages. On appeal, the Mississippi Supreme Court reversed and rendered judgment in favor of Gallagher. The Court stated:

> we take this opportunity to revisit our holding in *Bass* and conclude it plainly states and we now reiterate that an insurance adjuster, agent or other similar entity may not be held independently liable for simple negligence in connection [with] its work on a claim. *Such an entity may be held independently liable for its work on a claim if and only if its acts amount to any one of the following familiar types of conduct: gross negligence, malice, or reckless disregard for the rights of the insured.*

Id. at 784 (emphasis added).

The Court noted that "Gallagher never denied Jeffcoat's claim or recommended such a denial. It paid the $5,000 medical benefits under the policy on March 30, 1995, *after Jeffcoat filed suit and almost one year after he gave notice of his claim.* It paid $10,000 under the uninsured motorist provision on September 7, 1995." *Id.* at 783. (emphasis added). While the Court noted several things that Gallagher and/or Love could or should have done differently in handling the claim,[26] the Court held that it was clear that Gallagher's acts in the adjustment of this claim were at most negligent. *Id.* at 784. The Court again noted that a delay in payment of approximately ten months to a year was insufficient and stated "Gallagher never denied or recommended denial of this claim, but it did not pay any benefits on the policy until ten months after Jeffcoat made the claim." *Id.* at 784.

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[26] For instance, and without limitation, the Court noted:

> Gallagher did not provide training or resources to support its adjusters' work on uninsured motorist claims. Gallagher failed to give its adjusters any resources or training regarding stacking in Mississippi. Although she was generally familiar with stacking, Love did not know that stacking was available in Mississippi or how it works until Jeffcoat's lawyer informed her that it is and explained how it works. Love knew that she needed a legal opinion on this issue, but she failed to request one. It escapes us why Love would wait until the fleet schedule was discovered to request an opinion. Clearly, Love could have obtained a legal opinion on whether and how stacking applies in Mississippi without knowing the number of vehicles in the NHL fleet.

Id. at 784-85.

Based on the authorities discussed above, it is clear that Audubon's conduct in the present case does not rise to the level of an independent tort.

V. TO THE EXTENT THAT THE FONTES CONTEND THAT THEY WERE UNDERPAID FOR THE PORTION OF THE HOME THAT WAS DAMAGED BY WIND (COVERED), THAT IS A POCKETBOOK DISPUTE.

At one point in this case, it appeared that the Fontes took issue with the *amount* the tendered by Audubon for damage to the portion of the property that both Audubon and the Fontes agreed was caused by wind. In their appellate brief, the Fontes appear to abandon this argument that they were underpaid for the second floor and the roof of the home. The Fontes simply argue that this case is not a pocketbook dispute and that it is coverage dispute. *See* Fontes' Appeal Brief, at pp. 20-21. To the extent that there is a dispute as to the amount tendered by Audubon for that portion of the loss that both Audubon and the Fontes agree was covered under the policy, this is merely a pocketbook dispute.

Much of the claim adjustment process has already been detailed. The adjusters requested information from the Fontes several times about the second story of the house. The Fontes did not provide architectural plans to the adjusters.[27] (R. 146-47, 406). As John Jay testified, if he had the architectural plans, it would not have changed the *scope* of what was covered, but it would have helped him to adjust the portion of the loss that he determined was damaged by wind. (R. 407-08).

"[T]he Mississippi Supreme Court has been extremely reluctant to allow punitive damages in cases where the insurer did not deny coverage, but only disputed the amount of the claim or delayed payment." *Tutor v. Ranger Ins. Co.,* 804 F.2d 1395 (5th Cir. 1986); (citing

[27] John Jay testified that when Mr. Fonte told him that an architect had designed the home, and the additions to the original structure had recently been completed, Jay "asked him for a copy of those drawings, which would have given me the measurements and other important details ...." (R. 147, 406).

Aetna Casualty & Sur. Co. v. Day, 487 So. 2d 830, 832-34 (Miss. 1986) (holding no punitive damages in case of dispute in coverage and delay in payment); *State Farm Mut. Auto. Ins. Co. v. Roberts*, 379 So. 2d 321, 322 (Miss. 1980) (holding award of punitive damages improper when insurer legitimately disputes the amount due under the policy)). *See also Bellefonte Ins. Co. v. Griffin*, 358 So. 2d 387, 391 (Miss. 1978) (holding dispute over method of determining amount due under the policy did not entitle insured to punitive damages). Similarly, in *Cossitt v. Alfa Ins. Co.*, 726 So. 2d 132, 144 (Miss. 1998), this Court affirmed the order of the trial court granting partial summary judgment in favor of the defendant insurer on the bad faith/extra-contractual damages claim, where the defendant tendered $1,000.00 but the parties were engaged in a pocketbook dispute over the amount owed under the policy.

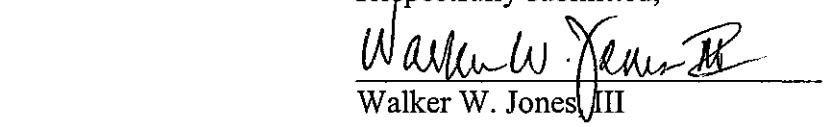
In this case, the Circuit Court correctly held that "regarding the losses covered by the MWUA (wind) policy" the uncontradicted facts are that this was a "pocketbook dispute." (R. 411). There is no conduct shown which amounts to gross negligence or an independent tort.

CONCLUSION

For the reasons stated above, the Circuit Court's order should be affirmed. Based on the undisputed facts, Audubon had a reasonable and legitimate basis for its claim determination, and the Fontes have not met their heavy burden of demonstrating that its conduct rose to the level of gross negligence necessary for an independent tort. Thus, there is no genuine issue as to any material fact and summary judgment was properly granted.

This the 16th day of July, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing brief on the following counsel of record by depositing copies in the United States mail, this 16th day of July, 2008:

Walker W. Jones III

CERTIFICATE OF MAILING TO CLERK

I certify that I will hand deliver an original and three copies of the foregoing brief to the Clerk of the Supreme Court of Mississippi, this 16th day of July, 2008.

Walker W. Jones, III

CERTIFICATE OF SERVICE ON TRIAL COURT JUDGE

I certify that on this date a true and correct copy of the foregoing brief was deposited in the U.S. Mail addressed to the Honorable Lawrence Paul Bourgeois, Jr., this the 16th day of July, 2008.

Walker W. Jones, III