IN THE SUPREME COURT OF MISSISSIPPI

HELEN FLAMMER AND
RAUL FONTE — APPELLANT

VS. — CASE NO. 2008-TS-00222

AUDUBON INSURANCE GROUP — APPELLEE

REPLY BRIEF OF APPELLANT

On appeal from the Circuit Court of Harrison County, Mississippi

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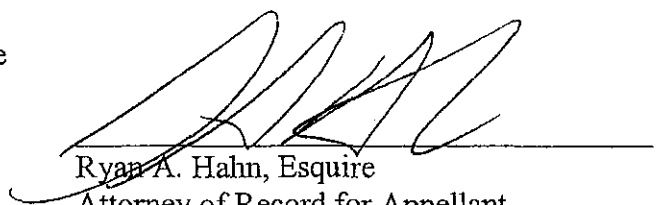
ORAL ARGUMENT IS NOT REQUESTED

AMENDED 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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

- Helen Flammer (Fonte)
- Raul Fonte
- The Law Firm of Balch & Bingham LLP
- John A. Scialdone, Esq.
- Ryan A. Hahn, Esq.
- Audubon Insurance Group
- American International Group, Inc. (AIG)
- The Law Firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
- Walker W. Jones, III, Esq.
- Jason R. Bush, Esq.
- The Law Firm of Copeland, Cook, Taylor & Bush, P.A
- Charles G. Copeland, Esquire
- Rebecca Blunden, Esquire
- Stephanie C. Edgar, Esquire



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REPLY BRIEF FOR APPELLANT

MAY IT PLEASE THE COURT:

Appellants, Helen Flammer and Raul Fonte, respectfully submit the following reply arguments to the brief submitted by Appellee, Audubon Insurance Company ("Audubon"), and to the brief of *amicus curiae* submitted by Mississippi Windstorm Underwriting Association ("MWUA").

Reply Summary

In an effort to provide a more precise focus of their arguments and critique of the positions taken by Audubon and MWUA, the Fontes summarize their reply position as follows:

1. The *amicus* brief submitted by MWUA raises new arguments that were never presented at the trial court level but are still premised on three significant, fundamental errors:

a. MWUA argues at length about functions it did not assign to Audubon, the details of which would be relevant only if a total assignment of all MWUA responsibilities were required to hold Audubon responsible as a co-principal. This is simply not the case. The Fontes' claim against Audubon is based on the claims adjusting duties that were assumed under the Servicing Insurer Agreement, while the partial assignment of a principal's obligations has long been recognized under Mississippi contract law.

b. The remainder of MWUA's arguments about the impact of this action on future relationships and the cost to taxpayers should Audubon be held responsible for its own negligence or arbitrary conduct is completely without merit. In fact, the exact opposite is true. Under the Servicing Insurer Agreement, if Audubon is held liable for its own fault, then Audubon is responsible for paying resulting damages and for its own cost of defense. By attempting to insulate Audubon from liability for its own negligence, the MWUA is arguing a

position that will *increase* its expenses. Under the MWUA's proposal, it would be responsible for paying the cost of litigation against Audubon, even though its contract with Audubon expressly says otherwise.

2. Audubon's arguments fail to address clear error of the trial court in presuming there was a stipulation to dismiss the negligence claims against Audubon, and a clear error of the trial court in failing to make any findings regarding Audubon's contractual assumption of MWUA's responsibilities for claims handling.

3. Likewise, Audubon fails to address the significant evidence submitted in opposition to the motion; evidence that required a jury to decide whether Audubon's conduct constituted simple negligence, gross negligence or arbitrary behavior. Similarly, the jury should have been allowed to resolve the disputed issue of fact over whether Audubon contractually assumed the obligations of MWUA claims adjusting and, therefore, was responsible as a co-principal. Specifically, Audubon's position fails on appeal because it does not account for the trial court's obligation to give a favorable presumption to the weight of the following points of evidence:

a. Audubon contractually assumed all claims handling responsibilities under the Servicing Insurer Agreement with MWUA.

b. Audubon's corporate representative testified that Audubon assumed claims handling and other responsibilities under its contract with MWUA, and that he had no evidence of oversight by MWUA for these responsibilities.

c. Audubon's corporate representative testified that their adjuster, John Jay, may well have employed arbitrary tactics when he evaluated the cause of the loss for the Fontes' residence in Hurricane Katrina.

d. Audubon's adjuster, John Jay, testified that he had standing instructions to presume that homes on Highway 90 could not have been damaged exclusively by wind.

e. John Jay further testified that he had no knowledge of the progression of wind or water (did not know which had come first or the timing of same) and, therefore, drew an arbitrary presumption that wind damaged the second floor but did no damage to the first floor of the residence.

f. John Jay further testified that the presumption he applied to the Fontes' residence was contrary to his observations of other homes damaged by Hurricane Katrina; these homes were damaged exclusively by wind yet there was ample evidence that wind-blown water damaged the sheetrock, floors and appliances in these homes.

g. John Jay further testified that he was instructed to apply such presumptions on Highway 90 in Pass Christian only after Audubon received conflicting engineering reports; therefore, the blanket presumption to refuse to pay 100% of any home loss on Highway 90 was made with advance knowledge of its inaccuracy.

h. John Jay testified that he had no experience in engineering, no experience in meteorology, no experience adjusting slab cases, and no experience determining the difference in loss between wind and water forces during a hurricane.

4. Audubon continues to argue that it is entitled to protection from arbitrary conduct because it was engaged in a "pocketbook dispute" with the Fontes. This argument lacks merit for two reasons:

a. John Jay testified that he adjusted the Fontes' loss without calculating *any damage* for the first floor of the Fontes' residence. In other words, Audubon denied the entire portion of the Fontes' claim based on an arbitrary presumption. It did not pay a lower amount

for the first floor than what the Fontes' considered appropriate; it paid nothing for the first floor, and Audubon admitted this tactic was arbitrary in its corporate deposition.

b. MWUA tendered remaining limits before trial, and settled its exposure separate from Audubon. There can be no pocketbook dispute against Audubon under these circumstances.

5. Audubon's claim that the Fontes have been fully compensated because MWUA tendered the balance of their policy completely ignores settled precedent that delay in payment of funds properly due under a policy entitles the plaintiff to damages resulting from the delay.[1] The Fontes only received the balance of their policy limits after filing suit, and incurring the expenses, frustrations and delay attendant to same.

ARGUMENT

There are several red herring claims made in Audubon's brief that can be disposed of in short order. The Fontes were obliged to bring all of their claims against each of their underwriters in a single proceeding. It would be absolute error to penalize any litigant for pleading alternative causes of action against separate underwriters, providing separate types of coverage. Nevertheless, this is exactly what Audubon tries to argue in a significant portion of its background statement, reciting allegations from the Fontes' petition against State Farm and its agent, Steve Saucier, pertaining to whether Steve Saucier obtained the correct amount of flood limits and whether State Farm was reasonable in denying alternative living expense coverage. Audubon also puts effort into discussing the Fontes' arguments for coverage under the terms of State Farm's homeowner's policy, arguments specific to "explosion coverage," and which have

[1] *Universal Life Insurance v. Veazley*, 610 So.2d 290 (Miss. 1992)(recognizing that an insurer's negligent failure to pay a valid claim entitles the insured to all foreseeable damages caused by such negligence, including anxiety, emotional distress, inconvenience, expense, attorney's fees and the like). In accord, *Essinger v. Liberty Mut. Fire Ins. Co.*, 2008 WL 2631047 (5th Cir. 2008).

absolutely nothing to do with MWUA policy or Audubon's adjusting tactics under same. Likewise, an appeal of Judge Simpson's ruling on the meaning of the explosion clause under State Farm's policy is not currently before the Court, and would not be addressed on appeal unless State Farm or Plaintiffs sought a review of the judgment following trial.

To be certain, Audubon could not support its motion for summary judgment with any of this evidence. None of it is relevant to the outcome of this appeal. Likewise, Audubon presents no evidence whatsoever that the Plaintiffs' allegations against State Farm or Steve Saucier were considered in any manner in the claims adjusting process employed by Audubon, or that the Plaintiffs' claims against State Farm and Steve Saucier have any meaning, relevance or impact on the amounts originally tendered by Audubon after Hurricane Katrina or by MWUA after filing suit. Thus, large sections of Audubon's brief are simply irrelevant.

Audubon's discussion of the standard of review for a motion for summary judgment fails to provide any real connection to the proceedings at the trial court level or the opposing evidence offered by the Fontes. Instead, Audubon simply repeats basic criteria for standards on summary judgment, which prevent an opponent from resting upon allegations or denials in their pleadings, or asserting allegations without additional evidence. This argument bears absolutely no connection to the Fontes' opposition to Audubon's motion.

As noted in the Fontes' original brief and in the preceding summary in this reply, Appellants set forth direct, specific and compelling evidence to oppose Audubon's motion, and the court failed to discuss any of this evidence, much less apply requisite presumptions in favor of the impact of their evidence. Contrary to Audubon's brief, the Fontes did not rely at all on their pleadings, and instead submitted extensive deposition testimony and documents to support their position.

To apply the correct standard, the trial court had to view the evidence submitted by the Fontes "in the light most favorable to the party against whom the motion has been made," and he was obligated to provide the Fontes "the benefit of every reasonable doubt." *Thomas v. Columbia Group, LLC*, 969 So. 2d 849, 852 (Miss. 2007) (quoting *Spartan Food SYF., Inc. v. American Nat'l. Ins. Co.*, 582 So. 2d 399, 402 (Miss. 1991).

Against the foregoing standard, the trial court had to consider whether the evidence submitted by the Fontes would permit a jury to find that Audubon was a co-principal of the MWUA and therefore liable for simple negligence through its contractual assumption of claims adjusting responsibilities. This, in turn, allows for the recovery of compensatory damages, including for example, attorney fees. *Universal Life Insurance v. Veazley*, 610 So.2d 295 (Miss. 1992). On this issue, the Fontes were entitled to every reasonable doubt, and a favorable presumption as to how a jury would rule in light of the following evidence:

1. The Servicing Insurer Agreement, where Audubon contractually assumed claims handing responsibilities on all files from MWUA (R. 305, 341-346; R. Ex. T. 4, Ex. "C");[2]

2. The terms of the Servicing Insurer Agreement, which reflected a broad assignment of responsibilities and a guaranteed interest in the premium (R. 341-346; R. Ex. T. 4, Ex. "C");

3. Audubon's actual direction of the adjusting process on the Fontes' property, including the testimony of their corporate representative that MWUA exercised no oversight of this process, which included the following testimony:

[2] Rec. Ex. T. 4 refers to plaintiff's opposition to Audubon's motion for summary judgment contained in the record excerpts of plaintiffs. This opposition is also R. 297-362, and contains Ex. C, the Servicing Insurer agreement, R. 341-346. Likewise, Ex. "A" contains deposition testimony of the adjuster assigned by Audubon, John Jay, and Ex. "B" contains deposition testimony of Audubon's corporate representative.

"Q. Prior to suit being filed, just in the ordinary adjusting and payment of the claim, it was John Jay's recommendation that came in to Audubon and Audubon adopted, approved those recommendations, and gave instructions for payment.

A. Correct."[3]

4. Additional testimony by Audubon's corporate representative on these key issues as follows:

- Audubon retained sole responsibility for the adjusting for plaintiffs' claim. Specifically, Audubon accepted the receipt of a notice of loss, then assigned an adjusting firm, then reviewed that adjusting firm's findings, and finally processed the claim. (R. Ex. T. 4, p. 19 of Deposition, R. 328).

- In the normal course of handling claims, no MWUA employee would review a report from an adjuster, and in this case, the claim as adjusted by John Jay was submitted internally by Audubon, and Audubon issued a check for payment without any intervention by MWUA. (R. Ex. T. 4, p. 19 of Deposition, R. 330).

- Audubon issued and signed the policy. (R. Ex. T. 4, p. 19, 5 of Deposition, R. 331-332).

- Audubon used and relied on a law firm to publish claims procedure guidelines for Hurricane Katrina, which were followed and approved by their representatives. (R. Ex. T. 4, Ex. "B" p. 21 of Deposition, R. 329, 333).

- Audubon relied on these guidelines to select and appoint an adjuster, who lacked any experience in civil engineering, and who was prohibited from retaining a consulting engineer, and did not have any meteorological data, to adjust the claim. (R. Ex. T. 4, Ex. "B" p. 21-22 of Deposition, R. 334).

- In fact, if a claim happened to be reported to MWUA directly, it would immediately be diverted to Audubon and, from that point forward, MWUA would have no further handling responsibilities. (R. 306, 329).

- In fact, when the policy was initially placed with MWUA, Audubon actually prepared its own declarations page, and then counter-signed the policy together with MWUA.[4] (R. 306, 331-332).

- Likewise, when the Fontes received correspondence from their underwriters regarding the loss after Katrina, there was no involvement by MWUA. Instead,

[3] R. Ex. T. 4, R. 328-340, refers to the corporate deposition transcripts attached to the Record Excerpts, which is also Exhibit "B" to the opposition against summary judgment.

[4] *United American Ins. Co. v. Merrill,* 978 So.2d 613 (Miss. 2007)("[I]t is the law that a person is bound by the contract, the documents that they sign."); *Alliance Trust Co. v. Armstrong,* 186 So. 633, 635

they received AIG correspondence (R. 214-215) and Audubon Insurance checks (R. 219-220).[5]

- Audubon also provided a directive mandating that under no circumstances was the adjuster allowed to pay 100% of any wind claim along Highway 90 in the Gulfport/Biloxi/Pass Christian area. (R. 311, 319-320, 333).

- Audubon admitted this practice was arbitrary - - namely that appointing an adjuster to a property under the presumption that in no event could the loss equal 100 percent of policy limits is contrary to the fair evaluation of an insurance claim. (R. Ex. T. 4, Ex. B, p. 64 of Deposition R. 340).

Without any doubt whatsoever, there is more than enough evidence for a jury to reasonably conclude that Audubon contractually assumed a portion of the responsibilities of the MWUA to its policyholders and, therefore, could be held liable as a co-principal. While both MWUA and Audubon attacked the notion of the term "co-principal" and take issue with the absence of this same expression being found in other insurance cases, neither have refuted the settled jurisprudence in Mississippi recognizing that insurance agreements are governed under contract law, and that contract obligations can be assigned for any direct obligation of the assignee.[6]

Further, the evidence shows that MWUA had no oversight or control over Audubon's claims handling. The key to the concept of "agency" is that the agent acts on the principal's behalf and is subject to the principal's control.[7] Because MWUA had no oversight or control

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[5] (Miss. 1939)("The courts appear to be unanimous in holding that a person who, having the capability and opportunity to read the contract ... is ordinarily bound thereby."); *Coombs v. Wilson*, 107 So. 874, 875 (Miss. 1926)("Under the law [even] a person who blindly signs a contract is bound thereby ....").

[6] *Whiddon v. Federated Mutual Insurance Company*, 138 Fed. Appx. 663, 665 (5th Cir. 2005) citing *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 475 (5th Cir. 1996); see also *Lumbermens Mut. Cas. Co. v. Thomas*, 55 So.2d 67, 70 (Miss. 1989). *Great Southern Nat. Bank v. McCullough Environmental Services, Inc.*, 595 So.2d 1282, 1287 (Miss. 1992). For an assignee to incur the obligations of the assignor, the assignee must expressly agree to assume the obligations. *Midsouth Rail Corp. v. Citizens Bank & Trust Co., Inc.*, 697 So.2d 451, 455 (Miss. 1997). An assignee, assuming the obligations of an assignor, "essentially stands in the shoes of the assignor." *Southern Mississippi Planning and Development Dist. V. Alfa General Ins. Corp.*, 790 So.2d 818, 821 (Miss. 2001).

[7] *Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co.*, 914 So.2d 169 (Miss. 2005), citing Restatement (Third) of Agency § 1.01 (Tentative Draft No. 2, 2001); *Norris v. Cox*, 860 So.2d 319 (Miss. App. 2003).

over Audubon's claims handling, there is a serious question of whether an agency relationship existed.

Even if Audubon could not be held liable as a co-principal, the Fontes were entitled to the same favorable presumption as to whether they could prove a claim against Audubon in its status as an agent for gross negligence and arbitrary behavior. On this point, the trial court was obliged to give favorable preference to a jury's ability to reach a conclusion that Audubon acted in an arbitrary fashion when they instructed their claims adjuster, John Jay, to presume that he could not pay 100% of policy limits for any wind case on Highway 90 in Pass Christian. This resulted in his arbitrary finding that the second story was completely destroyed by wind, but that nothing on the first story was affected by these destructive wind forces covered under the policy. The trial court was presented with other specific testimony sufficient to defeat a summary judgment motion on this point, as follows:

1. Audubon's corporate representatives' testimony that they acted in an arbitrary fashion, which included the following testimony (R. Ex. T. 4, Ex. B, p. 64, R. 340):

> Q. Would you agree with me that going to the property to do a loss adjustment under the presumption that in no event could the loss be a hundred percent of the policy's limits be arbitrary?
>
> A. If that was the directions that may be arbitrary.

2. The adjuster, John Jay's admission that he had no engineering experience and no meteorological data to use in adjusting the loss of the Fontes' home (R. Ex. T. 4, Ex. A, p. 17, R. 317);

3. John Jay's admission that he did not know the progression of wind or water and had no idea which came first in the storm or how the Fontes' home was actually destroyed (R. Ex. T. 4, Ex. A, p. 23, 58-59, R. 319-325);

4. John Jay's admission that he had adjusted the loss on other homes in Katrina that did not flood, but nevertheless sustained significant water damage because wind driven water penetrated the roof and windows onto the sheetrock, flooring, appliances and furniture, observations he was unable to apply on the Fontes' loss because of Audubon's arbitrary instructions (R. Ex. T. 4, Ex A, p. 23-24, 58-59, R. 298-299, 307-309, 311, 319-320, 324-325, 333);

5. John Jay's admission that he was originally instructed by Audubon to retain engineers, but that instruction was rescinded after engineering firms were unable to give conclusive results, leading to the arbitrary presumption to never pay policy limits. (R. Ex. T. 4, Ex. A, p. 23-24 of Deposition, R. 298-299, 318-320).

A jury charged on the proper standard for claims adjusting could easily conclude that these points of evidence, along with Audubon's *admission* that it acted in an arbitrary fashion, constituted arbitrary conduct which was grossly negligent.

Nowhere in Audubon's brief does the company make any effort to address the trial court's basic error in concluding that a stipulation had been reached to waive the negligence claim against Audubon. On this same point, moreover, MWUA makes the unprofessional and slanderous claim that counsel for the Plaintiffs presented evidence on co-principal status that was "factually and legally false." To support this irresponsible statement, MWUA quotes from counsel's argument at the hearing on Audubon's summary judgment motion, which was relevant not for the purpose of the opposing evidence submitted, but for confirming there was absolutely no stipulation to waive the claim of co-principal status with the negligence action against Audubon. To be certain, the Fontes asserted co-principal status based on the contract between Audubon and MWUA, and the testimony of Audubon's corporate representative. This evidence

was clearly set out in the Fontes' opposition brief and submitted to the Court as evidence in advance of the hearing. The same evidence was also referenced extensively at oral argument, but MWUA ignores this basic truth and instead resorts to defensive, underhanded and misleading argument, which is nothing more than defamation.

As noted in the argument summary, MWUA takes the absurd position that holding Audubon responsible for its own negligence on duties that it assumed by contract would somehow damage MWUA or the taxpayers of Mississippi. However, what is noticeably missing from their argument is a reference to the Servicing Insurer Agreement and the specific terms that allocate cost for civil actions, a topic which was also detailed in the testimony by Audubon's corporate representative. This evidence showed the exact opposite result would occur. The contract expressly provides Audubon is responsible for paying its own legal fees, expenses and damages that result from a finding that it is liable for the method by which it handled the claim. Otherwise, MWUA has to pick up all of those expenses. This is evident from paragraph 9 of the agreement between Audubon and MWUA (Rec. Ex. T. 4, Ex. C, R. 341-346) that provides:

> 9. In the event the Servicing Insurer, its affiliates, or any director, officer, servant, agent or employee of the Servicing Insurer or its affiliates [collectively "Servicing Insurer"] is subject to litigation concerning an issue arising out of the duties undertaken by the Servicing Insurer pursuant to this Agreement, the Servicing Insurer is obligated to pay the costs and fees of any nature related to defending any litigation brought against the Servicing Insurer. If the litigation results in a finding of liability against the Servicing Insurer, the Association will not indemnify the Servicing Insurer for liability of any nature, including but not limited to liability for compensatory damages, consequential costs, exemplary damages, punitive damages, penalties or any other type of extracontractual award. To the extent, however, that the damages awarded against the Servicing Insurer include any loss covered under the litigant's policy as provided for in the underwriting rules and guidelines of the Association, then the Association shall be responsible for that portion of the loss. If the litigation results in a finding of liability against the Servicing Insurer, the Association will not reimburse the Servicing Insurer for the costs and fees of any nature related to defending the litigation.

By arguing that Audubon should be insulated from responsibility for those duties it assumed by contract from MWUA, and held liable only for gross negligence, MWUA is creating

negligence indemnity obligation whereby risk and expense of Audubon's actions (even those that are determined to be negligent) are borne entirely by MWUA, notwithstanding the contract language to the contrary. At the same time, Audubon would still be allowed to retain its guaranteed portion of all premiums collected by MWUA, and its claims adjusting fees. It is an absolute impossibility that this result would benefit the MWUA or the tax payers of Mississippi.

The remainder of the arguments raised by MWUA, which attempt to set out a variety of technical responsibilities retained by MWUA and not delegated by contract to Audubon, are completely irrelevant. None of these arguments were raised or presented at the trial court level, and none of the actions listed in MWUA's brief have anything to do with Audubon's investigation and adjustment of the Appellants' claim.

Under the Servicing Insurer Agreement, Audubon and only Audubon is responsible for defending itself and satisfying any judgment for compensatory damages, punitive damages on other extra-contractual damages. In that respect, Audubon maintains it can be liable for such damages only upon a showing of gross negligence. Not so.

In *Universal Life Insurance v. Veazley*, 610 So.2d 295 (Miss. 1992), this Court addressed this issue and expressly adopted the rule that an insurer's negligent failure to pay a valid claim entitles the insured to all foreseeable damages caused by such negligence, including anxiety, emotional distress, inconvenience, expense, attorney's fees and the like.

> Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance when the loss of a loved one is exacerbated by the attendant financial effects of that loss. Additional inconvenience and expense, attorney's fees and the like should be expected in

> an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.[8]

Thus, the Fontes are entitled to recover compensatory damages for inconvenience, mental anguish, attorney's fees and the like from Audubon, who was solely responsible for denying the claim.

Audubon continues to portray the nature of the Fontes' claim as a "pocketbook dispute." A "pocketbook" dispute arises when the parties agree as to the extent of the damages (i.e. the car is demolished), but the amount due and owing for the damage is in dispute. In this case, Audubon and the Fontes have not agreed on the extent of damages. Plaintiffs maintained the bottom floor of their home incurred substantial damage as a result of wind and wind-driven debris while Audubon attributed all first floor damages to storm surge. This is not a "pocketbook" dispute, but rather a liability dispute.

Even if the claim could be characterized as a "pocketbook dispute" initially, that was no longer the case at the time of the hearing on Audubon's motion. Given that the Fontes had to file suit to recover the balance of their policy limits from MWUA, and that MWUA subsequently tendered the limits before Audubon's motion, it would be impossible for the Fontes to present a pocketbook dispute to the jury vis-à-vis Audubon. The Fontes' had already recovered 100% of the limits under their wind policy. Instead, the case against Audubon is purely and solely focused on the negligent and arbitrary adjusting tactics employed by Audubon in denying the Fontes' claim. Under *Veazey,* the Fontes are entitled to recover compensatory damages, including attorney's fees.

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[8] 610 So.2d at 295, emphasis added. In accord, *Essinger v. Liberty Mut. Fire Ins. Co.*, 2008 WL 2631047 (5th Cir. 2008)("Thus, Mississippi law recognizes that negligent conduct of the insurance company can justify recover of, for example, attorney's fees.").

Audubon also cites to the testimony of the Fontes' expert meteorologist, Richard Henning, for the proposition that "scientists looking at the same data could come to different conclusions." But Audubon cut Henning's answer short through the use of ellipses. In the very next sentence, Henning made clear that the maximum winds affected the Fontes' home for at least 60 to 90 minutes before the arrival of storm surge. The entire quote, (R. Ex. T. 22 of Appellee, p. 120 of deposition of Richard Henning, R. 294) in context, reads as follows:

> I think that the scientists looking at the same data could come to different conclusions. One thing that I am somewhat emphatic about is that the maximum winds occurred anywhere between 60 and 90 minutes prior to the greatest surge arriving. I think that's in dispute based on the radar evidence. The fact that the – by the time the winds had turned into the south allowing the worst of the surge to come in, that the – the crescent of convection associated with the inner eyewall had passed well north of Pass Christian and was up north of Interstate 10. So I've had a pretty strong disagreement with anybody who would argue that the strongest winds and the highest sure were coincident because of that, that radar analysis.

Audubon also attempted to bootstrap the report of a SEA Project Engineer to support its decision to deny the Flammer's claim. In reality, SEA was not retained until March 30, 2007, well after Audubon made its decision to deny the Flammers' claim. Thus, Audubon cannot rely upon the SEA report to justify its denial.

Likewise, Audubon ignores other evidence of the devastation to the property associated with high winds. This includes the report of Ivan Mandich, which described wind-related damage that clearly damaged both stories of the structure. That report (Appellee Rec. Ex. T. 7), emphasizes that "the wind impact was not only a direct force on the surface of the structure, but also a twisting effect was found." The report also documents wind-blown debris from "top to bottom of the building" blown into the pool while concluding "the action of the wind was so strong that pieces of an iron fence were found twisted to an unusual degree around the objects such as a tree branch or an edge of the pool."

A jury reviewing this data in conjunction with the arbitrary decision of the Audubon appointed adjuster could easily find gross misconduct and arbitrary processing of this claim.

CONCLUSION

Audubon issued an edict precluding its adjusters from paying 100% of the policy limits of any wind policy on any property on Highway 90, regardless of the actual cause of the loss. Audubon purposefully elected not to provide its adjusters with the information they needed to make a realistic assessment of the cause of the loss – no meteorological data, no engineering analysis, nothing. John Jay, the adjuster who investigated the Fontes' home, admitted he had no engineering experience of any kind and no prior experiencing in differentiating between wind versus water damage. Armed with his instructions to deny at least some portion of the wind claim, no engineering report, no weather data, no prior experience and no knowledge of the actual wind/water progression (which came first), John Jay arbitrarily decided that the top floor of the Fontes' home was utterly destroyed by wind, but no portion of the bottom floor was damaged in the least. Even the corporate representative of Audubon admitted Jay's decision was arbitrary.

Regardless of whether Audubon's conduct is gauged by simple negligence, gross negligence or otherwise, the trial court had to view the evidence submitted by the Fontes "in the light most favorable to the party against whom the motion has been made." At a minimum, the overwhelming evidence of Audubon's arbitrary decision process is sufficient to require a jury trial, even if Audubon was deemed to be a mere agent for a disclosed principal.

But Audubon was more than a mere agent. It assumed all claims handling responsibilities of MWUA. It was not subject to control of the MWUA. There was no oversight of its claims handling. It countersigned the policy. It was guaranteed a percentage of the

premiums. Under these circumstances, Audubon cannot pretend that it was merely an "agent" carrying out instructions of a principal, MWUA. In fact, Audubon had complete autonomy with respect to claims handling. Even if Audubon is not a co-principal, it is an independent contractor because it was not controlled by MWUA. Therefore, Audubon is responsible for its arbitrary claims handling process, and no one else.

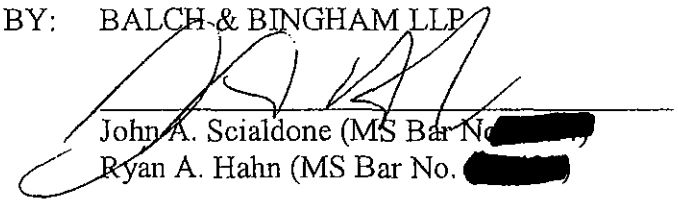
Audubon claims it can only be held liable for mental anguish, inconvenience, attorneys fees and the like only upon a showing of bad faith or gross negligence. But the Mississippi Supreme Court has previously held such damages are recoverable for an insurer's negligent denial of a valid claim. Thus, contrary to Audubon's argument, the Fontes are entitled to collect extracontractual damages from Audubon upon a showing of simple negligence in the claims handling process. Clearly, there is sufficient evidence in the record to carry that burden.

Viewing the direct, specific and compelling evidence offered by the Fontes in the most favorable light, this case must be remanded for a trial by jury. The trial court failed to address any of the evidence offered by the Fontes, and certainly failed to apply the presumption against summary judgment. In fact, the trial court even found a stipulation where none existed, and relied upon the fictitious stipulation in his reasons for judgment. For all of these reasons, the summary judgment in favor of Audubon must be reversed, and this matter remanded for trial by jury.

Respectfully submitted, this 19th day of August, 2008.

HELEN FLAMMER AND RAÚL FONTE
APPELLANTS

BY: BALCH & BINGHAM LLP



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CERTIFICATE OF SERVICE

I, undersigned attorney for Appellants Helen Flammer and Raul Fonte, certify that I have on August 19, 2008, served a copy of the Appellant's Brief by United States Mail postage prepaid, to the following persons at these addresses:

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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have express mailed the original Reply Brief of the Appellant to the Clerk of the Circuit Court of Harrison County, First Judicial District, and hand delivered an accurate copy of the Brief to the Honorable Stephen B. Simpson, Sherrie L. Moore, Esq., and Walker W. Jones, III, Esq. on this the 19th of August, 2008. An accurate copy of the Brief has this day been served upon all other Counsel by United States Mail, with sufficient postage affixed.

S. Michelle Taunton

S. Michelle Taunton