IN THE SUPREME COURT OF MISSISSIPPI

HELEN FLAMMER AND RAUL FONTE	APPELLANT
VS.	CASE NO. 2008-TS-00222
AUDUBON INSURANCE GROUP	APPELLEE

BRIEF FOR 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.

John A. Scialdone, Esquire
Attorney of Record for Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law:

Other Authorities:

STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting the summary judgment motion of Audubon Insurance Group ("Audubon") and dismissing the Plaintiffs'/Appellants' claims against Audubon with prejudice.

2. Whether the trial court erred in the standard it applied in granting summary judgment in favor of Audubon and whether it erred in the presumptions or factual issues in favor of the Plaintiffs/Appellants in granting summary judgment in favor of Audubon.

3. Whether the trial court erred in finding that the parties had stipulated that Plaintiffs'/Appellants' claim was based solely on the gross negligence of Audubon as an agent for a disclosed principal.

4. Whether the trial court erred in finding Audubon was an agent for a disclosed principal versus a co-principal with the Mississippi Windstorm Underwriting Association.

5. Whether the trial court erred in finding Audubon exhibited no conduct which would allow the jury to determine that Audubon committed arbitrary acts or gross negligence amounting to an independent tort, and further whether the trial court erred in taking this issue from the jury when there was direct testimony from Audubon's corporate representative to the contrary.

6. Whether the trial court erred in finding Plaintiffs'/Appellants' claim was nothing more than a "pocketbook dispute."

STATEMENT OF THE CASE

A. Nature of the Case

Helen and Raul Fonte sued the Mississippi Windstorm Underwriting Association ("MWUA"), Audubon Insurance Company ("Audubon") and State Farm Fire and Casualty Company ("State Farm") to recover insurance proceeds for the loss of their newly completed home in Pass Christian, Mississippi following Hurricane Katrina. The Fontes also named their insurance agent (Steve Saucier) as a defendant on the grounds that he failed to properly increase the coverage limits on all of their policies as their home transitioned from a construction project to a completed residence (the Fontes had moved into their home a little over two months before Katrina struck). During discovery, the Fontes learned that Audubon had contractually assumed the vast majority of MWUA's responsibilities, and that the reason they received only a portion of their limits for wind-related damage was that an Audubon-appointed adjuster, with no engineering experience or experience determining the difference between wind and water damage, was given standing instructions to never pay 100% of the stated limits based on an assumption that homes along Highway 90 in Pass Christian were only partially damaged by wind. They further learned the adjuster was prohibited from retaining a consulting engineer, and did not have any weather or meteorological data with which to make the determination.[1] These arbitrary instructions resulted in the adjuster concluding that the second story of the Fonte's home was completely destroyed by wind, but that the first story sustained zero damage from wind, rain or wind-driven debris, and was instead damaged exclusively by tidal surge resulting in a payment of $201,000 of the $430,000 limits available

[1] For the purposes of Audubon's motion and this appeal, plaintiffs are stipulating that the MWUA policy covered wind, wind-driven water and debris, but not rising water or flood.

($400,000 structure / $30,000 contents). The adjuster even conceded in his deposition he had seen numerous homes in Hurricane Katrina which were not subjected to any flooding, but where damage to the roof and windows had caused rain and wind-driven water to damage the walls, floors, appliances and furniture inside of the home; an observation he could not apply to the Fonte's residence because of its location and his standing instructions to draw an opposite assumption. Before trial, MWUA tendered the remaining limits of their policy, and the Fontes reserved their claim against Audubon for negligent and arbitrary adjusting tactics. In continuing to pursue their action against Audubon, the Fontes maintained that because this defendant contractually assumed virtually all of the responsibilities of MWUA (and countersigned the subject policy), it was a co-principal with MWUA and could be held liable for ordinary negligence. The Fontes also maintained that Audubon's conduct was arbitrary and that its adjusting tactics were grossly negligent, which would entitle them to recover punitive damages regardless of whether Audubon had the status of a co-principal or an agent for a disclosed principal. Before trial, Audubon was dismissed by summary judgment on the grounds that "Plaintiffs concede[d] that their claims against Audubon should be dismissed except for the claim of gross negligence" and "there [was] no conduct shown which would allow the fact finder to determine that Audubon had committed acts of gross negligence amounting to an independent tort." (R. 411). The Fonte's opposition brief to Audubon's summary judgment motion covered in precise detail their claim that Audubon was a co-principal of the MWUA and this same point was covered in detail during oral argument. There is absolute clear error by the trial court on this point. Moreover, the Fontes cited specific deposition testimony by Audubon's adjuster and Audubon's corporate representative,

which if given the proper presumption applicable to a summary judgment motion, should have easily allowed the Fontes to present to a jury their claim of negligence and gross negligence for the manner in which Audubon adjusted their claim. This appeal focuses solely on the propriety of Audubon's dismissal.

B. Course of Proceedings and Disposition Below

The Fontes filed suit in the Circuit Court of the First Judicial District of Harrison County, Mississippi against Audubon and others[2] to recover insurance proceeds and damages associated with the denial of coverage.[3] As respects Audubon, the Fontes sought coverage under their MWUA/Audubon wind & hail policy, attorney fees resulting from Audubon's negligent investigation of the loss, and punitive damages for the grossly negligent denial. Subsequently, after MWUA tendered the balance of the Fontes' wind and hail policy limits, Plaintiffs dismissed all claims against the MWUA and Audubon for the recovery of policy limits. The Fontes reserved their claims against Audubon for litigation cost, attorney fees and punitive damages.

Audubon filed a motion for summary judgment denying any liability for its handling of the Fontes' wind claim alleging: (1) it was an agent for a disclosed principal and was therefore immune from any causes of action arising from its negligent claims handling; and (2) its adjustment of the Fontes' claim did not rise to the level of an independent tort. (R. 104-129). Replying to Audubon's Motion, the Fontes maintained:

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[2] In addition to Audubon, the MWUA and State Farm, the Fontes filed suit against State Farm agent Steve Saucier as a result of his failure to properly set the limits for the Fontes' flood, wind & hail, and homeowners policies as the construction of their new home moved to completion.

[3] The suit was removed on July 31, 2006 to the Southern District of Mississippi, Southern Division based on federal question jurisdiction (Plaintiffs had asserted a right of recovery against State Farm under a Standard Flood Insurance policy issued pursuant to NFIA). The Southern District subsequently remanded the case back to the Circuit Court on July 19, 2007 reasoning "[t]he plaintiffs' flood insurance claim has now been settled, and only state law claims remain to be decided." *Helen Flammer and Raul Fonte v. State Farm Fire and Cas. Co., et al.*, Civil Action No. 1:06CV728 LTS-RHW, Memorandum Opinion and Order of Remand dated July 19, 2007.

(1) Audubon's contractual assumption of MWUA obligations and the equity rights Audubon held in wind and hail policy premiums rendered it a co-principal with the MWUA therefore subjecting Audubon to claims for simple negligence; and (2) the absolute control Audubon asserted over the scope and methodology of adjuster John Jay's investigation, as well as the method actually employed by Jay, was grossly negligent and designed to produce arbitrary results. (R. 297-315).

Following the briefing on Audubon's Motion for Summary Judgment, the parties argued the Motion before the trial Court. At the hearing, one of the Fontes' primary arguments was that Audubon could be held liable for simple negligence because it was a co-principal with the MWUA. Not only was the issue of co-principal status briefed extensively in the Fonte's opposition to Audubon's motion, but it was also discussed in detail at the outset of counsel's presentation at oral argument:

> "MR. SCIALDONE: Thank you, Your Honor. The exact testimony that we would like to present to a jury in this case is what we have cited in our brief from our deposition.
>
> You should not have to file a lawsuit and go through discovery and hire experts simply to get what you were entitled to. An underwriter has an obligation to treat you fairly and to do a reasonable good faith assessment of your loss before having to do that.
>
> Now, the distinction between Audubon and the MWUA is important on one front in this case. And that's the issue of are they an agent or are they a co-principal with the wind pool. That issue relates to whether or not we can hold them liable for simple negligence or are we limited in presenting a bad faith claim, an arbitrary claim to the jury.
>
> When you listen to counsel's arguments, you probably heard the first portion of what would lead us into our position on co-principal status in that Audubon administers all of this.
>
> ... they made the initial payments to the plaintiffs, they come to you on an Audubon check. Audubon is a co-

> principal with the wind pool. They are not a simple agent carrying out an individual task. They have assumed the responsibilities of the underwriter.
>
> Under their serving agreement they are guaranteed almost 10 percent of the premium regardless of claims experience. They share in the premiums with the wind pool. They issue the policy. They countersign the policy with the wind pool. In fact it comes to you on Audubon letterhead.
>
> They set the claims procedures. They hire the adjustors. They determine the loss. They pay you. And on a quarterly or biannual basis they go back and they get reimbursement from the wind pool.
>
> That's more than being an individual agent sent to go do. That is the principal. That is – except for the fact that the wind pool sets the premium and receives the initial check, Audubon and AIG are doing everything that the law is concerned about in the obligations of the principal.
>
> They are in fact carrying out all of the tasks that Mississippi is – that the State of Mississippi is concerned with and how you deal with your, and how you deal with an insured. Co-principal status of Audubon is part of what we want to put on to a jury.
>
> And that is, take a look at everything that they do and tell us whether you think that is a simple agent or whether you think they actually assumed a substantial portion of responsibility.
>
> If we do that, we can put on a case of simple negligence. That is, that they did not meet a reasonable standard of good faith when they came out to adjust this claim. Otherwise we prove on a case of bad faith – we're going to put on both, but otherwise we're limited to simply a case of bad faith."[4]

It is against the foregoing position at oral argument, and the details set out on co-principal status in the Fonte's brief that the error in the Court's conclusion that plaintiffs were conceding their case was based solely on gross negligence is most apparent. The record is absolutely clear that the judge simply overlooked co-principal status and failed

[4] Transcript of Hearing on Audubon's Motion for Summary Judgment, pp. 14 -17.

to make any findings regarding same or plaintiff's ability to present a simple negligence claim to the jury.

In the alternative, the Fontes argued that even if Audubon was an agent for a disclosed principal it would still be liable for gross negligence and arbitrary conduct, with counsel summarizing the evidence for jury consideration as follows:

> "Now, we questioned John Jay. That's the adjustor that they sent out to come out to this property. We set out his testimony here very clearly. But there's two or three critical points that we are asking that we be allowed to make through to the jury on.
>
> Now, John Jay had no experience in civil engineering. He had no experience in meteorology. What's critical is that he was not given any of the data to adjust the plaintiff's home. When we asked him, we said, how did you make that decision. And his answer to me which we cited on page three. It says, we were told by FARA that we were not to pay 100 percent of any, of any of the claims along U.S. 90 in the Gulfport, Pascagoula – Bay St. Louis area.
>
> I asked him after that, well, what criteria were you given for that assumption. And his answer here is critical and it's something we want a jury to hear. He said, I should tell you that initially we were given a list of engineering firms to make assignments to.
>
> However, he goes on to tell me, when those reports came back inconclusive, inconclusive, that means that they couldn't tell them, then we were told to stop using engineers.
>
> I later took the corporate deposition of Audubon, and I cite one question to them that I have on page four. And I asked them, would agree with me that going to the property to do a loss adjustment under the presumption that in no event could the loss be 100 percent of the policy limits would be arbitrary. He said, if that was the directions, that may be arbitrary.[5]

[5] *Id.* pp. 17-18.

Following the hearing, the Circuit Court entered its Order granting summary judgment in favor of Audubon. (R. 409-411). In its Order, the trial court found that "Plaintiffs concede that their claims against Audubon should be dismissed except for the claim of gross negligence" and "[t]he uncontradicted facts in this case are that this was a 'pocketbook dispute' ...." (R. 411). As noted earlier, the Fontes did not agree to dismiss their negligence claim and in fact presented a detailed argument on co-principle status. Moreover, at no point did the Fontes characterize or argue the nature of their claim against Audubon as involving a "pocketbook dispute". To the contrary, the Fontes detailed their claim against Audubon for an arbitrary adjusting tactic which resulted in Audubon allowing only a portion of their available limits on the basis that only the second floor of their home was damaged by wind. The Fontes had to file suit in order to receive a tender of the remainder of their policy limits with MWUA, and with policy limits having been tendered, it is absolutely impossible that the Fontes would have presented a pocketbook dispute to the jury. To the contrary, the case is purely and solely focused on negligent, and arbitrary adjusting tactics employed by Audubon. It is from this summary judgment Order that the Fontes now appeal.

C. Statement of Facts

On August 29, 2005, the Fontes' home at 1221 East Beach Boulevard, Pass Christian, Mississippi was reduced to a slab as a result of Hurricane Katrina. (R. 305). Plaintiffs maintained a wind and hail insurance policy originally marketed, sold and underwritten by the MWUA. (R. 305). However, pursuant to the "Extension of Servicing Insurer Agreement" entered by and between Audubon and MWUA, Audubon assumed the following duties from the MWUA becoming the entity solely responsible for: "a)

performing all necessary company statistical and computer functions; b) paying all required taxes, board and bureau fees; c) arranging for the countersignature of policies, if necessary; and d) providing full claim supervision." (R. 305, 341-346). In exchange for Audubon's assumption of obligations previously owed to policy holders by MWUA, Audubon was granted an equity right in policyholder premiums "equal to eight and seventy-five hundredths percent (8.75%) of the net premiums received of all policies and endorsements." (R. 305-306, 341-346). In Audubon's corporate deposition, its designee described that Audubon (an AIG subsidiary) handled the entire claims process from accepting notice of the loss, assigning it to an adjusting firm, reviewing the firm's findings, processing the claim, and issuing payment or reasons for denial. (R. 306, 328). 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 the normal course of handling claims, MWUA would not review any adjusting reports obtained by Audubon, but would rather only reimburse the company based on periodic accounting summaries. (R. 306, 330). This is an important point on co-principal status, as it demonstrates the substantive nature of Audubon's assumption of the responsibility of the original principal, MWUA. In fact, one of the core responsibilities of an underwriter to its insured is to promptly investigate and fairly adjust loss claims. Here this responsibility has been contractually assumed by Audubon. 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.[6] (R. 306, 331-332).

[6] *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

The record demonstrates that the wind and hail policy received by the Fontes was actually issued by Audubon Insurance Company (R. 131). Even without knowledge of the contract that existed between MWUA and Audubon, a policy holder receiving this document would see Audubon and AIG as principals. Likewise, when the Fontes received correspondence from their underwriters regarding the loss after Katrina, there was no involvement by MWUA. Instead they received AIG correspondence (R. 214-215) and Audubon Insurance checks (R. 219-220).

Pursuant to its assumed duty to adjust wind & hail claims, Audubon assigned adjuster John Jay to handle the Fontes' claim. Yet Jay testified he had no training in meteorology, structural engineering or any other expertise suitable for differentiating between wind and water. (R. 306).

> Q. Do you have any training in meteorology?
>
> A. No.
>
> Q. Do you have any training in structural engineering?
>
> A. No.
>
> Q. Or any training in civil engineering?
>
> A. No. (R. 298, 317).
>
> * * * * * * *
>
> Q. . . . Before Katrina have you been called on . . . to adjust claims when there was an issue involving the difference between wind damage and water damage to the same structure?
>
> A. No. (R. 298, 318).

(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 ....").

Notwithstanding Jay's insufficient qualifications and lack of relevant experience, Audubon refused to provide Jay with any objective meteorological data or allow him to engage the services of an engineer in adjusting the Fontes' claim. (R. 311, 334-336). The only thing Audubon provided was a directive mandating that under no circumstances was Jay allowed to pay 100% of any claim along Highway 90 in the Gulfport/Biloxi/Pass Christian area. (R. 311, 319-320, 333)

> Q. . . . You were not given any meteorological data to use in connection with adjusting the claim by Helen and Raul Fonte?
>
> A. That's correct.
>
> Q. Were you given or did you retain the services of any engineer to assist in adjusting their claim?
>
> A. No.
>
> Q. Were you given the services of a consulting engineer to make a determination of how the structure may have failed during the storm?
>
> A. No.
>
> Q. Did you consult with anyone else, other than an engineer or meteorologist, to make a determination of how the structure failed during Hurricane Katrina?
>
> A. No.
>
> Q. You made that decision, determination yourself?

> A. We were told by FARA[7] that we were not to pay one hundred percent of any of the claims along U.S. 90 in the Gulfport/Biloxi/Pass Christian area because of the fact that it was assumed and believed that the flood surge, or flood, created a significant part of the total damage. This applied largely to slab claims we called them, meaning that all that was left was the foundation. That the structure had been totally removed by one or both of the perils.
>
> Q. What criteria were you given for that assumption, and you said not to pay one hundred percent? If there was a slab there, how were you coming up with what you were going to pay?
>
> A. I should tell you that initially we were given a list of engineering firms and told to make assignments to those firms to get an opinion about which arrived first, wind or water, and secondly, which of the two perils would have caused which and the most significant damage. That was rescinded when the reports began to not be conclusive as to address those issues. (R. 298-299, 318-320).

John Jay, who from the outset lacked the requisite knowledge and skill necessary to provide a realistic investigation of the Fontes' claim, was stripped of any objective data by Audubon and asked to arbitrarily deny all claims along the Mississippi Gulf Coast – not pay 100% of any claim. As a result, Jay's "investigation" of the Fontes' loss failed to consider the effect rain water (entering the structure as a result of wind damage) had on the first floor of the Fontes' home. (R. 307). He made an arbitrary assumption that the second story of the Fontes' home blew away prior to the arrival of storm surge yet the first floor remained in pristine condition (unaffected by rain water and wind) until the arrival of storm surge. (R. 307).

> Q. Looking back at your February 7th report, it appears to me that the estimate you made was to – was based on an

[7] FARA Catastrophe Services is the adjusting firm Audubon outsourced Hurricane Katrina claims handling to.

assumption that wind damaged the upper level, the second floor of the home and the roof of the home and that water damaged the remainder; is that correct?

A. That's correct. (R. 308, 323).

* * * * * * *

Q. Did your estimate – would it be correct to say that this estimate did not take into account possible damage to the lower portions of the home that would have been caused by the loss of the roof or breaking of the windows on the upper portion of the home from the ingress of rainwater or wind-driven water?

A. I think that would be correct. (R. 308, 324).

The significance of John Jay's failure to consider the ingress of rain and wind-driven water into the first level of the Fonte's home is heightened when one considers his testimony that he observed other homes damaged by Hurricane Katrina which had no flooding whatsoever, where damage to the roof and windows caused ingress of water onto the sheetrock, floors and contents of the structure.

A. In other words, you want me to describe the physical damage I saw on the non-flood involved dwellings.

Q. That's right. From the worst you saw to the most minor you saw. I'm just trying to get a range from you on it.

A. From a minor end of the scale first, there were a lot of roof damage, shingles missing from wind damage. Blown out windows. Wind-driven water. The most severe had, you know, roof structure blown away, speaking of trusses or rafters. Porches collapsed where the supports were blown out from under them. That sort of thing. Those were the most severe.

Q. Would you say that in the range – given your minor case involved some windows blown out and roof shingles missing, coming forward to your severe cases that in these type dwellings there was water ingress damage that came from the roof into the attic spaces and into the drywall or ceiling structure?

A. Quite often, yes.

Q. What about damage to the flooring in the home from being wetted? Would that be common?

A. Some of the older homes that were on pier and beam foundations had hardwood floors, sustained water damage where windows were blown in.

Q. What about damage to appliances; would that be common in these structures?

A. In some, yes. (R. 307, 308)

* * * * * *

However, referring to the Fonte's home, John Jay conceded:

Q. But you never considered the impact of water ingress through the roof or through the windows that would have run down and damaged the lower portion of the home.

A. I did not because I didn't know the sequence. I just didn't. There was nothing left there that could have told me that or in my total experience there you just wouldn't know that with this kind of loss. (R. 309).

In other words, John Jay actually had solid evidence that homes which were exposed to no flooding whatsoever still experienced rain and wind-driven water damage to their interior, where the roof and windows were compromised. However, because of the pre-standing instructions he was given for MWUA cases on Highway 90, and because John Jay had no meteorological data which would tell him how long wind impacted the structure prior to the arrival of any storm surge, he was unable to apply any similar

consideration to the Fonte's loss. Accordingly, John Jay had no possible way of understanding how long the structure had been exposed to wind, the velocity of the wind, or the timing of the wind prior to the arrival of storm surge. Even though Audubon later retained an expert (SEA Ltd.) to provide them with a storm damage analysis (R. 276), there was never any question that John Jay was never provided any expert consultation, and that no analysis on the wind or water impact to the structure was ever performed by Audubon or John Jay prior to making their loss determination. In fact, Audubon did not consult an engineer or obtain any meteorological data relevant to the Fonte's residence until it was sued and almost two years after Hurricane Katrina.

Helen Flammer provided perhaps the best summary of the Fontes' direct contention that Audubon acted arbitrarily and recklessly.

> In our time of total need, we found it extremely difficult to locate a name, a number, a way of contacting Audubon. It took a long time to receive a phone call. The decision to pay us for the second floor of our home, we feel, was shameful. A hurricane is a combination of wind and water, and to assume that – to arbitrarily say that the second half of our home could have been damaged by wind is – I just thought – we thought – felt it was a very reckless and arbitrary decision to make . . . . (R. 309, 361-362).

And by admission of Audubon's own corporate representative – its adjustment of the Fontes' claim may have been "arbitrary." (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 (would) be arbitrary?
>
> A. If that was the directions that may be arbitrary. (R. 300, 340).

SUMMARY OF THE ARGUMENT

The trial court's grant of summary judgment in favor of Audubon was erroneous. Viewing the evidence in the light most favorable to the Fontes, the trial court clearly erred in finding that the parties had stipulated that Plaintiffs' claim was based solely on the gross negligence of Audubon. The trial court's summary dismissal of the Fontes' claim asserting Audubon was a co-principal in the Fontes' wind & hail policy was likewise erroneous because it was based on the same faulty logic. At all times pertinent hereto, the Fontes maintained they had a cause of action arising from Audubon's negligence and, in the alternative, a cause of action arising due to Audubon's grossly negligent and contrived adjusting tactics. The trial court failed to consider the first position.

Notwithstanding the over cite of the Fontes' negligence claim, the trial court also erred in finding Audubon exhibited no conduct which would allow the jury to determine that Audubon committed arbitrary acts or gross negligence amounting to an independent tort. Although the trial court held "[t]he uncontradicted facts in this case are that this was a 'pocketbook dispute," that simply is not the case. (R. 411). As detailed in the Fontes' Memorandum Opposition to Audubon's Motion for Summary Judgment, the Fontes' case is not a pocketbook dispute rather it is a liability dispute – with Audubon completely refusing to pay the Fontes' for damage the first floor of their home sustained during Hurricane Katrina as a result of its grossly negligent, contrived and reckless investigation (R. 312-313).

ARGUMENT

I. Standard of Review

"This Court employs a de novo standard of review when reviewing orders granting or denying summary judgment." *Thomas v. Columbia Group, LLC*, 969 So.2d 849, 852 (Miss. 2007) citing *Mantachie Natural Gas v. Miss. Valley Gas. Co.*, 594 So.2d 1170 (Miss. 1992). "The moving party must show that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Miss. R. Civ. P. 56(c)). "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Id.* (quoting *Titus v. Williams*, 844 So.2d 459, 464 (Miss. 2003)). "All evidence ... must be viewed in the light most favorable to the party against whom the motion has been made, as 'he is given the benefit of every reasonable doubt.'" *Id.* (quoting *Spartan Foods Sys., Inc. v. American Nat'l Ins. Co.*, 582 So.2d 399, 402 (Miss. 1991).

II. Law and Argument

A. The Fontes did not stipulate that their claim was based solely on the gross negligence of Audubon.

After MWUA tendered the balance of the Fontes' wind & hail policy limits, Plaintiffs dismissed all claims against the MWUA and Audubon for the recovery of policy limits. The Fontes reserved their claims against Audubon for attorney fees and punitive damages. In the Fontes' Memorandum Opposition to Audubon's Motion for Summary Judgment, wherein the Fontes dismissed all claims against Audubon for the recovery of policy limits, the Fontes' specifically stated "as a co-principal with MWUA, Audubon would additionally be liable, ***under a negligence standard*** for compensatory

damages (i.e., attorney fees)." (R. 310)(emphasis added). The Fontes' argument to hold Audubon liable for compensatory damages under a negligence standard was again reiterated in the hearing on the motion.

> Coprincipal status of Audubon is part of what we want to put on to a jury. And that is, take a look at everything that they do and tell us whether you think this is a simple agent or whether you think they actually assumed a substantial portion of responsibility.
>
> If we do that, we can put on a case of simple negligence. That is, that they did not meet a reasonable standard of good faith when they came out to adjust this claim. Otherwise we p[ut] on a case of bad faith – we're going to put on both, but otherwise we're limited to simply a case of bad faith.[8]

The trial court's contention that all of the Fontes' claims were voluntarily dismissed except for their claim for gross negligence ignores both the briefing on the issue as well as the hearing.

B. <u>Audubon and the MWUA are co-principals to the Fontes' wind & hail policy.</u>

"Under Mississippi law, courts interpret insurance policies according to contract law." *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*, 555 So.2d 67, 70 (Miss. 1989). Moreover, Mississippi's law of contracts permits the assignment of contractual rights and duties. *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*

[8] Transcript of hearing on Audubon's Motion for Summary Judgment, pp. 16-17.

Planning and Development Dist. v. Alfa General Ins. Corp., 790 So.2d 818, 821 (Miss. 2001).

In the case at bar, Audubon expressly agreed to perform all of the underwriting and claim processing functions of MWUA, and to accept as its own liability for damages resulting from its breach of their duties. (R. 341-346). Because Audubon assumed contractual obligations owed to wind and hail policy holders such as the Fontes, Audubon is a co-principal with MWUA and not a simple agent under the direction of same. Audubon's assumption of MWUA obligations placed Audubon in MWUA's shoes in regards to the contractual relationship between MWUA and the Fontes. It had complete autonomy in adjusting and paying the Fontes wind and hail claim. (R. 328-332). As "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," Audubon was not an agent of MWUA as Audubon was acting under their own authority and not at the direction of another. *Aladdin Construction Co., Inc. v. John Hancock Life Ins. Co.*, 914 So.2d 169, 175 (Miss. 2005).

This very argument, involving Audubon as a servicing insurer, was accepted in *Maes v. Audubon Indemnity Insurance Group*, 164 P.3d 934 (N.M. June 15, 2007). In *Maes*, Audubon was the servicing insurer for the New Mexico Property Insurance Program "NMPIP" (a governmentally subsidized program designed to help homeowners procure insurance who are otherwise unable to obtain it on the open market). Audubon had many of the same responsibilities and obligations that it does in this case – responsibility for administering the policies, adjusting claims, and paying claims. And, like this case, Audubon would issue claim payments under the policy with the NMPIP reimbursing it. In holding that *Maes* had a cause of action directly against Audubon as a

principal underwriter, the court reasoned "this agreement [servicing insurer agreement] does not evidence the control necessary to form or constitute an agency relationship." *Id.* at 939.

C. Audubon's adjustment of the Fontes' wind & hail claim was conducted in a grossly negligent, malicious and reckless fashion.

Even accepting Audubon's contention that it is an agent for a disclosed principal, liability will attach for the reckless, malicious and grossly negligent manner in which the Fontes' wind & hail claim was adjusted. "An adjuster has a duty to investigate all relevant information and must make a realistic evaluation of a claim." *Bass v. California Life Ins. Co.*, 581 So.2d 1087, 1090 (Miss. 1991) citing *Banker's Life & Casualty Co. v. Crenshaw*, 483 So.2d 254, 272, 276 (Miss. 1985). Agents for disclosed principals who fail to adhere to this duty shall incur individual liability if their conduct in accord with same is grossly negligent, malicious or recklessly disregards the rights of the insured. *Conyers v. Life Ins. Co. of Georgia*, 269 F.Supp.2d 735, 738 (N.D. Miss. 2003); *Hart v. Bayer Corp.*, 199 F.3d 239, 247 (5th Cir. 2000); *Phillips v. New England Mut. Life Ins. Co.*, 36 F.Supp.2d 345, 348 (S.D. Miss. 1998); *McFarland v. Utica Fire Ins. Co.*, 814 F.Supp. 518, 521 (S.D. Miss. 1992); *Bass v. California Life Ins. Co.*, 581 So.2d 1087, 1090 (Miss. 1991); *Dunn v. State Farm Fire and Casualty Co.*, 711 F.Supp. 1359, 1361 (N.D. Miss. 1987).

Audubon assigned an adjuster (John Jay) with no training in meteorology, structural engineering, civil engineering or other expertise suitable for differentiating between wind and water damage in adjusting the Fontes' wind & hail claim. (R. 317). As admitted by Audubon in its corporate deposition, Jay was not provided with any meteorological data or allowed to retain the services of an engineer and/or consulting

expert in adjusting the Fontes' claim. (R. 334-336). Jay was only provided the Claims Procedures Guidelines instructing that under no circumstances was he to pay 100% of wind & hail policy limits. (R. 319-320, 333).

The end result is that Jay arbitrary assumed the second story and roof structure of the Fontes' home blew off prior to the arrival of storm surge, but the first floor of the Fontes' home remained in pristine condition until the arrival of storm surge. (R. 324-325). In arbitrarily adjusting the Fontes' claim in this fashion, Jay failed to consider that losing the roof and second story would render the home a constructive total loss, even without the effect of water. (R. 325). Jay admitted that on a number of other adjusting files he inspected homes damaged in Hurricane Katrina which had no storm surge or flood damage, but where the roof and window damage caused water to affect the ceilings, drywall, appliances, furniture, and finished flooring. (R. 322). He applied none of these assumptions to the Fontes' home because he was instructed he could not pay 100% of policy limits.

The adjustment of the Fontes' wind & hail claim was conducted in a malicious, reckless and grossly negligent manner. Summary judgment was improperly granted as material issues of fact exist.

D. The Fontes' claim is not a "pocketbook dispute."

This Honorable Court has only addressed a "pocketbook" dispute on two occasions. In *State Farm Mut. Auto Ins. Co. v. Roberts*, 379 So.2d 321 (Miss. 1980), both the underwriter and the insured agreed on the extent of damage (i.e., the car was "demolished"). The only dispute in the *State Farm* case was whether the policy provided coverage for the actual cash value of the vehicle or the payoff amount. *Id.* 322. Similarly,

in *Cossitt v. Alfa Insurance Corp.*, 726 So.2d 132 (Miss. 1998), both the insured and her underwriter agreed the insured's claim for med-pay benefits was covered. The only dispute "between the parties [was] as to the amount of med-pay benefits available" under the policy; the amount of coverage the policy actually provided. *Id.* at 137.

As evidenced in both the *State Farm* and *Cossitt* cases, a "pocketbook" dispute only exists when the parties are in agreement as to the extent of the damage (i.e. the car is demolished), but a dispute still remains as to the value of that agreed upon destruction. *State Farm Mut. Auto Ins. Co.*, 379 So.2d at 322. The case at bar is not a "pocketbook" dispute because the parties are not in agreement as to the extent of damage. The Fontes maintain the bottom floor of their home incurred substantial damage as a result of wind, wind-driven debris and rain water entering the structure as a result of same yet Audubon attributes all first floor damages to storm surge. This case is not a "pocketbook dispute" it is a liability dispute.

In fact, if the trial court was correct in its characterization of the Fontes' claim as nothing more than a pocketbook dispute, then any claim in which an underwriter tenders even one dollar (but ignores the damage the rest of the structure incurred) will automatically shield itself from punitive damages by creating a "pocketbook dispute." Mississippi law does not support this contention. The Fontes' claim was not a "pocketbook dispute" – it was a liability dispute (i.e., did Audubon owe the Fontes coverage for the first floor of their home).

CONCLUSION

The trial court erroneously granted summary judgment in favor of Audubon. Audubon was a co-principal with the MWUA and is therefore liable for its own

negligence – an issue the trial court failed to address. Notwithstanding, material issues of fact exist regarding the manner in which Audubon "investigated" the Fontes' claim. Material issues of fact exist as to whether an inept adjuster, armed with no data and given a directive to not pay 100% of any claim rises to the level of gross negligence. A jury will find that it does.

Respectfully submitted, this 13th day of May, 2008.

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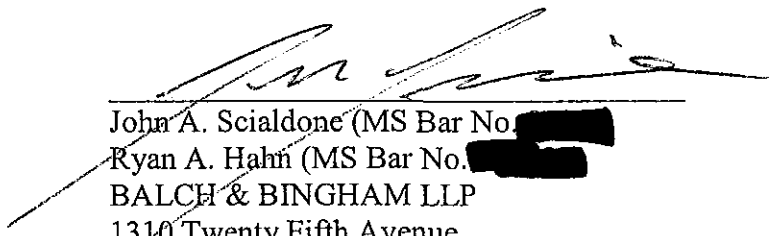
BY: BALCH & BINGHAM LLP



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CERTIFICATE OF SERVICE

I, undersigned attorney for Appellants Helen Flammer and Raul Fonte, certify that I have on May 13, 2008, served a copy of the Appellant's Brief by U.S. Mail First Class, postage prepaid, to the following persons at these address:

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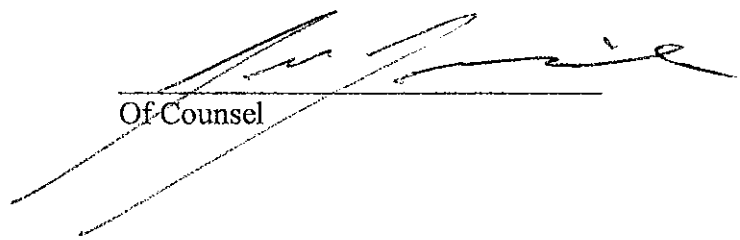

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