

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-M-00645

MARGARET AND DR. MAGRUDER S. CORBAN

APPELLANTS

v.

**UNITED SERVICES AUTOMOBILE ASSOCIATION a/k/a
USAA INSURANCE AGENCY**

APPELLEE

On Interlocutory Appeal from the
Circuit Court of Harrison County, Mississippi, First Judicial District

**BRIEF OF *AMICUS CURIAE*
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY
IN SUPPORT OF THE BRIEF OF APPELLEE
UNITED SERVICES AUTOMOBILE ASSOCIATION**

Michael B. Wallace [REDACTED]
WISE CARTER CHILD AND CARAWAY
Post Office Box 651
Jackson, MS 39205-0651
401 East Capitol St., Suite 600
Jackson, MS 39201
Telephone: (601) 968-5535
Facsimile: (601) 968-5519

William C. Griffin [REDACTED]
CURRIE JOHNSON GRIFFIN GAINES
& MYERS
Post Office Box 750
Jackson, MS 39205
Telephone: (601) 969-1010
Facsimile: (601) 969-5120

Reuben V. Anderson [REDACTED]
Fred L. Banks, Jr. [REDACTED]
Debra M. Brown [REDACTED]
Rebecca Hawkins [REDACTED]
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Jackson, MS 39201-2122
Post Office Box 23066
Jackson, MS 39225-3066
Telephone: (601) 352-2300
Facsimile: (601) 360-9777

Attorneys for Amicus Curiae Allstate Property and Casualty Insurance Company

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. All Parties interested in the case of *Corban v. United Services Automobile Ass'n*, No. A2401-06-404, pending in the Circuit Court of the First judicial District of Harrison County, Mississippi. Those parties are identified in the Certificate of Interest persons found on page i of the Combined Response and Brief of Untied Services Automobile Association Regarding Petition for Interlocutory Appeal;
2. Allstate Property and Casualty Insurance Company, defendant in *Hood v. Nationwide Mutual Insurance Company*, No. 61667, pending in the Chancery Court of Rankin County (hereinafter "*Hood*");
3. Michael B. Wallace and the Wise, Carter, Child & Caraway Law Firm, counsel for Allstate Property and Casualty Insurance Company in *Hood*;
4. Rueben V. Anderson, Fred L. Banks, Jr., Debra M. Brown, Rebecca Hawkins and the Phelps Dunbar Law Firm, counsel for Allstate Property and Casualty Insurance Company in *Hood*;
5. Robert H. King, Jr. Sonnenschein, Nath & Rosenthal LLP, counsel for Allstate Property and Casualty Insurance Company in *Hood*;
6. William Griffin and the Currie, Johnson, Griffin, Gaines & Myers Law Firm, counsel for Allstate Property and Casualty Insurance Company;
7. Nationwide Mutual Insurance Company, defendant in *Hood*;
8. Mickey Cowan, Laura Gibbes and Watkins Ludlam Winter & Stennis Law Firm, counsel for Nationwide Mutual Insurance Company in *Hood*;
9. Jim Hood, Attorney General of Mississippi, plaintiff in *Hood*;
10. William H. Liston, Jr., and Liston/Lancaster Law Firm, counsel for Jim Hood in *Hood*;
11. Crymes G. Pittman and Pittman, Germany, Roberts & Welsh, counsel for Jim Hood in *Hood*; and
12. Danny Earl Cupit and the Law Offices of Danny E. Cupit, attorney for Jim Hood in *Hood*.

SO CERTIFIED, this the 17th day of February, 2009.

Michael B. Wallace

MICHAEL B. WALLACE,
Attorney of Record for *Amicus Curiae* Allstate
Property and Casualty Insurance Company

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
SUMMARY OF ARGUMENT IN SUPPORT OF THE POSITION OF THE RESPONDENT.....	1
ARGUMENT.....	3
I. HISTORICAL BACKGROUND OF THE FLOOD/WATER EXCLUSION IN MISSISSIPPI.....	3
A. The Mississippi Insurance Department Has Either Mandated or Approved Homeowners' Insurance Policies Containing Flood/Water Exclusions for Decades.....	3
B. Congress Created the National Flood Insurance Program Because It Recognized that the Private Sector Could Not Economically Provide Flood Coverage.....	4
C. Mississippians Have Been Repeatedly Advised By The Department of Insurance And By Gulf Coast Municipalities That Flood Damage Is Not Covered By Their Homeowners' Policies.....	5
II. THE FLOOD/WATER EXCLUSIONS CLEARLY EXCLUDE STORM SURGE FROM COVERAGE	6
III. NO MISSISSIPPI PROXIMATE CAUSATION RULE MANDATES A FINDING THAT ALL HURRICANE KATRINA LOSSES WERE CAUSED BY WIND, AND SUCH A RESULT IS PRECLUDED IN THIS CASE BY THE UNAMBIGUOUS LANGUAGE OF THE FLOOD/WATER EXCLUSION.	9
CONCLUSION.....	14
APPENDICES	
A. Allstate Policy	
B. Opinion and Judgment on the Pleadings, <i>Jim Hood v. Mississippi Farm Bureau Insurance Co., et al.</i> , No. 61667 (Chancery Court of Rankin County, Mississippi)	

- C. State Mandated Homeowners' Insurance Form
- D. Mississippi Department of Insurance Press Release dated May 21, 1997
- E. Mississippi Department of Insurance Press Release dated July 18, 1997
- F. Mississippi Department of Insurance Press Release dated February 19, 1998
- G. Mississippi Department of Insurance Press Release dated July 6, 2005
- H. Insurance Consumer's Hurricane Checklist
- I. Homeowners Insurance Consumers Guide
- J. Storm and Flood Preparedness Brochure
- K. City of Biloxi's June 2004 Publication entitled "Storm & Flood Preparedness"

TABLE OF AUTHORITIES

Page

CASES

<i>Am. Guarantee and Liability Ins. Co. v. 1906 Company</i> , 273 F.3d 605 (5th Cir. 2001)	7
<i>Bilbe v. Belsom</i> , 530 F.3d 314 (5th Cir. 2008)	8
<i>Blackledge v. Omega Ins. Co.</i> , 740 So.2d 295 (Miss. 1999).....	6
<i>Buente v. Allstate Ins. Co.</i> , No. 1:05 CV 712, 2006 WL 980784 (S.D. Miss. 2006)	7
<i>Commercial Union Insurance Company v. Byrne</i> , 248 So.2d 777 (Miss. 1971).....	13, 14
<i>Ditto v. Hinds County, Mississippi</i> , 665 So.2d 878 (Miss. 1995).....	1
<i>Ebert v. Pacific Nat. Fire Ins. Co.</i> , 40 So.2d 40 (La. App. 1949).....	13
<i>Evana Plantation, Inc. v. Yorkshire Ins. Co., Ltd.</i> , 58 So.2d 797 (Miss. 1952).....	7, 9
<i>Fireman's Insurance Company of Newark, New Jersey v. Schulte</i> , 200 So.2d 440 (Miss. 1967).....	13, 14
<i>Glens Falls Ins. Co. v. Linwood Elevator</i> , 130 So.2d 262 (Miss. 1961).....	10
<i>Grace v. Lititz Mutual Insurance Company</i>	11, 14
257 So.2d 217 (Miss. 1972).	
<i>Grain Dealers Mut. Ins. Co. v. Belk</i> , 269 So.2d 637 (Miss. 1972).....	10
<i>Home Ins. Co., New York v. Sherrill</i> , 174 F.2d 945 (5th Cir. 1949)	13
<i>Kemp v. American Universal Ins. Co.</i> , 391 F.2d 533 (5th Cir. 1968)	13

<i>Leonard v. Nationwide Mut Ins. Co.</i> , 499 F.3d 419 (5th Cir. 2007)	8
<i>Lititz Mutual Insurance Company v. Boatner</i> , 254 So.2d 765 (Miss. 1971).....	13, 14
<i>Lititz Mutual Insurance Company v. Buckley</i> , 261 So.2d 492 (Miss. 1972).....	13, 14
<i>Lunday v. Lititz Mut. Ins. Co.</i> , 276 So.2d 696 (Miss. 1973).....	11
<i>May v. State</i> , 127 So.2d 423 (Miss. 1961).....	1
<i>In re McMillian</i> 642 So.2d 1336 (Miss. 1994).....	1
<i>Royal Ins. Co. v. Martinolich</i> , 179 F. 2d 704 (5th Cir. 1950)	13
<i>Society for the Advancement of Educ., Inc. v. Gannet Co., Inc.</i> , No. 98 Civ. 2135, 1999 WL 33023, at *7 (S.D.N.Y. Jan. 21, 1999).....	9
<i>Smith v. Allstate Indem. Co.</i> , 256 Fed. Appx. 694 (5th Cir. 2007).....	8
<i>Smith v. Dorsey</i> , 599 So.2d 529 (Miss. 1992).....	1
<i>Smith v. Stonebridge Life Ins. Co.</i> , 217 Fed. Appx. 360 (5th Cir. 2007).....	9
<i>State Farm Fire & Cas. Co. v. English Cove Assoc., Inc.</i> , 88 P.3d 986 (Wash. Ct. App. 2004).....	9
<i>State Farm Ins. Co. v. Gay, Jr.</i> , 526 So.2d 534 (Miss. 1988).....	8
<i>Stone v. Robinson</i> , 29 So.2d 206 (Miss. 1954).....	1
<i>Thompson v. Jones</i> , 2008 WL 4879176, No. 2007-EC-01989-SCT 19 (Miss. Nov. 13, 2008).....	1
<i>Tuepker v. State Farm Fire and Cas. Co.</i> , 507 F.3d 346 (5th Cir. 2007)	8

STATUTES

Miss. Code Ann. §83-2-7(1) (1988).	3
42 U.S.C.A. § 4001(b)(1).....	4
FEDERAL FLOOD INSURANCE ACT OF 1956, 4473 (July 17, 1956).....	4

OTHER AUTHORITIES

<i>Black's Law Dictionary</i> (8th ed. 2004).....	8
<i>The American Heritage Dictionary of the English Language</i> (2000, 4th ed.).....	8
<i>The New Oxford American Dictionary</i> (2d ed. 2005).....	7
<i>Webster's Encyclopedic Unabridged Dictionary of the English Language</i> (1989 ed.).....	7

SUMMARY OF ARGUMENT IN SUPPORT OF THE POSITION OF THE RESPONDENT

Much of Appellants' and Appellee's Briefs is devoted to discussing the so-called "anti-concurrent cause" ("ACC") clause found in the United Services Automobile Association ("USAA") homeowners policy. Amicus Allstate Property and Casualty Insurance Company ("Allstate") is the second largest provider of homeowners' insurance in Mississippi. Its policy, Allstate Exh. A,¹ does not contain an ACC clause.² But Allstate believes that there are two other issues raised by this appeal that are of importance to its policyholders, the citizens of Mississippi and the development of Mississippi law.

First, like the Circuit Court below, the courts of this state, including this Court, have historically enforced flood/water exclusions found in homeowners' policies, recognizing that such provisions excluded damage caused by rising water associated with hurricanes, sometimes referred to as tidal or storm surge. Flood/water exclusions have been a standard feature of Mississippi insurance law and practice for decades. Most recently, on December 22, 2008, the

¹ The documents cited in this brief as "Allstate Exhibits" are all attached as appendices hereto and listed in the Table of Contents. All are documents of which this Court may take judicial notice pursuant to Miss.R.Evid. 201(b). Exhibit A was part of the earlier filed Allstate amicus regarding interlocutory appeal, and Exhibit B is the Rankin County Chancery Court's Opinion and Judgment contained in the *Hood* case. This Court may take judicial notice of matters within its own and other courts' files. See, e.g., *In re McMillan*, 642 So.2d 1336, 1338 (Miss. 1994); *Smith v. Dorsey*, 599 So.2d 529, 548 (Miss. 1992). The remaining Exhibits C through K, are all documents issued by governmental entities and/or contained within their records. This Court may take judicial notice of records of state agencies and other such entities. See *Thompson v. Jones*, 2008 WL 4879176, No. 2007-EC-01989-SCT, 19 (Miss. Nov. 13, 2008); *Ditto v. Hinds County, Mississippi*, 665 So.2d 878, 881 (Miss. 1995); *May v. State*, 240 Miss. 361, 365, 127 So.2d 423, 426 (1961); *Stone v. Robinson*, 219 Miss. 456, 461, 69 So.2d 206, 208 (1954).

² Amicus the Attorney General of Mississippi (the "AG") incorrectly suggested in the initial portion of his brief that Allstate's policies contained an ACC clause. (AG Brief, p. 5). In fact, the Allstate provision the AG refers to provides only that if a loss is caused concurrently by both covered and non-covered perils, there is no coverage if the non-covered peril is the predominant cause of the loss. See Allstate policy, p. 8 (Allstate Exh. A hereto). As the AG ultimately acknowledges, such an exclusion is not an ACC clause, and is consistent with Mississippi law. (AG Brief, p.10 fn. 4.) See also discussion *infra* at p. 6, fn. 4.

Chancery Court of Rankin County expressly upheld Allstate's flood/water exclusion, and dismissed the AG's lawsuit, which had alleged that Allstate's flood exclusion was contrary to Mississippi public policy, unconscionable, ambiguous, and violated the Mississippi Consumer Protection Act. See Opinion and Judgment on the Pleadings, *Jim Hood v. Mississippi Farm Bureau Insurance Company, et al.*, Chancery Court of Rankin County.³ (Allstate Exh. B.) Recognizing that homeowners' insurance did not provide coverage for flood, the United States Congress enacted the National Flood Insurance Program ("NFIP") to provide affordable flood coverage. For many years, Gulf Coast residents have been reminded that flood was not covered under their homeowners' policies, and that if they wanted flood coverage, they should purchase a flood policy through the NFIP.

For over fifty years, Mississippi hurricane-related litigation has focused upon a simple issue: whether wind was the direct cause of the loss, or whether water, in the form of "tidal water," was the direct cause of loss. If wind was the direct cause of the loss, there was coverage; if flood/water was the direct cause, there was not. Appellants' argument (Appellants' Brief at p. 25, fn. 13) that, even in the absence of an ACC clause, "storm surge" is not a species of "flood" or "water" that is excluded by the flood/water exclusion is thus wholly at odds with Mississippi decisions in hurricane-related litigation and long-settled principles of Mississippi contract interpretation.

Second, Appellants' assertion that "because the efficient proximate cause of all Hurricane Katrina losses is wind, Katrina losses cannot be 'caused' by excluded water" is at odds with longstanding principles of Mississippi law. (Appellants' Brief, p. 11.) Not only does this

³ Obviously, and contrary to the AG's representation to this Court (AG Brief, p. 2), the Rankin County Chancery Court did not "hold" its ruling in abeyance pending the outcome of this appeal. The cross-motions for judgment on the pleadings had been taken under advisement by the court after both parties submitted proposed orders in August 2008.

argument ignore the plain language of the flood/water exclusion, which excludes flood/water “whether or not driven by wind,” but it is also at odds with Mississippi proximate causation law and this Court’s prior rulings in hurricane-related litigation.

As shown more fully below, the Circuit Court’s determination in this case that that damage caused by “storm surge” is excluded from coverage is correct and should be affirmed.

ARGUMENT

I. HISTORICAL BACKGROUND OF THE FLOOD/WATER EXCLUSION IN MISSISSIPPI.

A. The Mississippi Insurance Department Has Either Mandated or Approved Homeowners’ Insurance Policies Containing Flood/Water Exclusions for Decades.

A flood/water exclusion has been a mainstay of Mississippi homeowners’ insurance policies for decades. Prior to 1987, the Mississippi Insurance Department required that any insurance company selling homeowners insurance in the state use a state-mandated policy form developed by the Insurance Services Office, Inc. (“ISO”) that excluded “Water Damage, meaning: (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind....” (Allstate Exh. C.)

Effective January 1, 1988, insurance companies were directed to submit their own policy forms and rates to the Mississippi Department of Insurance for approval by the Commissioner. *See* Miss. Code Ann. §83-2-7(1) (1988). Since that time, Allstate has submitted policy forms to the Department of Insurance, which it has approved, containing an exclusion for “flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.” (*See, e.g.,* Allstate Exh. A.)

Since 1987, the legislatively-created Mississippi Windstorm Underwriting Association (“MWUA”) has also issued policies containing a water exclusion that excludes loss caused by “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.” (USAA Record Excerpts at Tab 6; Record Vol. 3, page 337.)

Accordingly, a flood/water exclusion has been a fixture of Mississippi insurance law and practice for decades.

B. Congress Created the National Flood Insurance Program Because It Recognized that the Private Sector Could Not Economically Provide Flood Coverage.

The reason for such an exclusion in homeowners’ policies is not difficult to divine. Flood insurance poses unique problems related to risk assessment. The geographically limited market area and catastrophic nature of flood losses make setting a rate that reflects expected losses too expensive to market. As the House of Representatives reported when considering the Federal Flood Insurance Act of 1956:

Private insurance companies do not write flood insurance on real property and only to a limited extent is flood loss coverage available on personal property. The private companies feel that the virtual certainty of the loss by flood, its catastrophic nature, and the problems of making this line of insurance self-supporting prevents them from prudently engaging in this field of insurance. Also insurance companies have indicated that they have not entered this line of insurance because a flood disaster of considerable magnitude during the early years of any flood-insurance operation could bankrupt a company before sufficient reserves were accumulated.⁴

Congress recognized that “many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions.” 42 U.S.C.A. § 4001(b)(1). Accordingly, Congress enacted the National Flood Insurance Act which created the National Flood Insurance Program (“NFIP”).

⁴ HR. REP. 84-2746, P.L. 84-1016, FEDERAL FLOOD INSURANCE ACT OF 1956, 4473 (July 17, 1956)(emphasis added).

C. Mississippians Have Been Repeatedly Advised By The Department of Insurance And By Gulf Coast Municipalities That Flood Damage Is Not Covered By Their Homeowners' Policies.

The Mississippi Department of Insurance ("DOI") has issued a variety of press releases reminding Mississippians that homeowners' insurance policies do not cover flood damage, and encouraging Mississippians to consider whether they need to purchase flood insurance from the NFIP. *See, e.g.,* Allstate Exhs. D-G. The DOI has also published consumer guides that similarly recognize that standard homeowner's policies do not cover flood, and urge Mississippians to consider purchasing flood insurance if they live in low-lying areas. *See, e.g.,* "Insurance Consumer's Hurricane Checklist," (Allstate Exh. H), and the "Homeowners Insurance Consumers Guide" (Allstate Exh. I.)

Various municipalities along the Gulf Coast routinely issue publications in advance of the hurricane season reminding Gulf Coast residents that homeowner's policies do not cover flood damage. For example, in June 2005, three months prior to Hurricane Katrina, the City of Biloxi issued a "Storm & Flood Preparedness" brochure that stated:

If you don't have flood insurance, talk to your insurance agent immediately. Homeowners' insurance policies do not cover damages caused by flooding. However, because the City of Biloxi participates in the National Flood Insurance Program, you can purchase a separate flood insurance policy that will cover the structure and contents of your home. (Allstate Exh. J.)

The City of Biloxi sent similar information to its citizens in a June 2004 publication entitled "Storm & Flood Preparedness." (Allstate Exh. K.)

II. THE FLOOD/WATER EXCLUSIONS CLEARLY EXCLUDE STORM SURGE FROM COVERAGE.

Allstate's flood exclusion excludes losses "consisting of or caused by":

1. Flood, including but not limited to, surface water, waves, tidal waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.⁵

Without the ACC lead-in language, USAA's policy contains a similarly-worded "water" exclusion:

Water Damage, meaning:

- (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind; (R.E. 40.)

Appellants' argument that a policy's definition of "flood," or in the case of the USAA policy "water," does not encompass "storm surge" because the words "storm surge" are not contained in the exclusion is contrary to well-settled principles of contract construction and common sense.

Mississippi law is clear: words used in an insurance policy "should be understood in their plain, ordinary, and popular sense rather than in a philosophical or scientific sense." *Blackledge v. Omega Ins. Co.*, 740 So. 2d 295, 298 (Miss. 1999). This Court "often consults

⁵ Contrary to the assertion contained in the AG's Brief (at p. 10), Allstate's policy does not contain an ACC clause. The provision in the Allstate policy that the AG's Brief claims is an ACC clause provides:

We do not cover loss to covered property described in Coverage A - Dwelling Protection or Coverage B -- Other Structures Protection when:

- a) there are two or more causes of loss to the covered property; and
- b) the predominant cause(s) of loss is (are) excluded... (AG Brief, pp. 4, 10.)

According to the AG, an ACC clause operates to exclude coverage for "any damage caused in whole or in part by hurricane storm surge, even if the property in question also sustained wind damage." (AG Brief, p. 5.) But a simple reading of the Allstate exclusion in question demonstrates that it does not operate in that manner. It precludes coverage in a concurrently caused loss only when the predominant cause of the loss is excluded. As the AG back-handedly acknowledges, properly understood, the exclusion is consistent with Mississippi proximate causation law, not an ACC clause. (AG Brief, p. 10 fn. 4.)

leading dictionaries to determine the ordinary meaning of insurance contracts.” *Am. Guarantee and Liability Ins. Co. v. 1906 Company*, 273 F.3d 605, 618 (5th Cir. 2001); *see also Evana Plantation, Inc. v. Yorkshire Ins. Co., Ltd.*, 58 So. 2d 797, 800 (Miss. 1952) (consulting dictionary definitions of “sleet” and “precipitation”).

Dictionary definitions of “flood” indicate that flood is “a great flowing or overflowing of water, esp. over land not usually submerged.” *See Webster’s Encyclopedic Unabridged Dictionary of the English Language* (1989 ed.). “Storm surge” is generally understood to be “a rising of the sea as a result of atmospheric pressure changes and wind associated with a storm.” *See The New Oxford American Dictionary* (2d ed. 2005); *see also* FEMA’s description of “storm surge” as “water that is pushed toward the shore by the force of the winds swirling around the storm,” and as a “rise in water level [that] can cause severe flooding in coastal areas.” FEMA: Hurricane Hazards: Storm Surge, http://www.fema.gov/hazard/hurricane/hu_surge.shtm (last visited Jan. 30, 2009).

The plain, ordinary understanding of the term “storm surge” is encompassed within the ordinary meaning of flood, because both involve a “great flowing or overflowing of water,” especially “over land not usually submerged.” The Chancery Court of Rankin County recently dismissed the AG’s suit challenging the enforceability of Allstate’s flood/water exclusion, finding that storm surge was encompassed by the ordinary understanding of flood. *See* Opinion and Judgment on the Pleadings, *Jim Hood v. Mississippi Farm Bureau Ins. Co.* (Allstate Exh. B.) Courts in both Mississippi and Louisiana have held that “storm surge” is a species of “flood,” and that damage caused by “storm surge” is thus excluded by similarly-worded flood/water exclusions.⁶

⁶ *See, e.g., Buente v. Allstate Ins. Co.*, No. 1:05 CV 712, 2006 WL 980784, at *1 (S.D. Miss. 2006). (“The inundation that occurred during Hurricane Katrina was a flood, as that term is ordinarily (continued on next page)

If there was any doubt about whether water in the form of storm surge fell within the ordinary meaning of “flood” or “water,” under the *noscitur a sociis* doctrine, a review of the plain, ordinary meanings of the “associated” list of examples set forth in the “flood” and “water” exclusions would be appropriate. As this Court has explained, “[a]ssociated words take their meaning from one another under the doctrine of ‘noscitur a sociis,’ the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to words associated with it.” *State Farm Ins. Co. v. Gay*, 526 So. 2d 534, 537 (Miss. 1988). The list of examples contained in the flood/water exclusions confirms that water in the form of storm surge is excluded from coverage. For example, the plain, ordinary understanding of “storm surge” is encompassed by the ordinary meaning of “waves.”⁷ Similarly, “storm surge” is excluded under the ordinary meanings of “tidal water”⁸ and “overflow of any body of water.”⁹ “Storm surge” would also comfortably fall within the common meaning of “surface water.”¹⁰

understood,...”); *Smith v. Allstate Indem. Co.*, 256 Fed. Appx. 694, 695 (5th Cir. 2007) (unpublished) (flood exclusion “unambiguously exclude[s] coverage for damage resulting from storm surge”); *Leonard v. Nationwide Mut Ins. Co.*, 499 F.3d 419, 437-38 (5th Cir. 2007) (“[t]he phrase ‘storm surge’ is little more than a synonym for a ‘tidal wave’ or wind-driven flood...”); *Tuepker v. State Farm Fire and Cas. Co.*, 507 F.3d 346, 352-53 (5th Cir. 2007) (damages caused by storm surge excluded by water damage exclusion); *Bilbe v. Belsom*, 530 F.3d 314, 316 (5th Cir. 2008) (“the term ‘flood’ includes ‘storm surges’”).

⁷ “Wave” is defined as “[a] ridge or swell moving through or along the surface of a large body of water.” *The American Heritage Dictionary of the English Language* (4th ed., 2000).

⁸ “Tidal” is defined as “relating to or affected by tides: the tidal maximum; tidal pools; tidal waters.” *The American Heritage Dictionary of the English Language* (4th ed. 2000).

⁹ “Body of water” is defined as “the part of the earth’s surface covered with water (such as a river or lake or ocean.” Dictionary.com, body of water, <http://dictionary.reference.com/browse/body%20of%20water> (last visited Jan. 30, 2009).

¹⁰ “Surface water” has been defined as “[w]ater lying on the surface of the earth but not forming part of a watercourse or lake.” *Black’s Law Dictionary* (8th ed. 2004).

Invoking the maxim *expressio unius est exclusio alterius*, Appellants argue that because the words “storm surge” are not found in the exclusion, “storm surge” is not encompassed within the meaning of “flood” or “water.” (Appellants’ Brief, p. 25, fn. 13.) But that maxim has no application here. First, as shown above, the plain meaning of storm surge falls comfortably with the plain, ordinary meaning of “flood,” as well as the plain, ordinary meanings of the other listed examples. The *expressio unius* maxim is only applied when a contract is found to be ambiguous. See, e.g., *Smith v. Stonebridge Life Ins. Co.*, 217 Fed. Appx. 360, 361 (5th Cir. 2007). Even if Allstate “could have further clarified or expressly defined the term in the manner that [the insured] asserts,” that would not “make [the term] ambiguous.” *State Farm Fire & Cas. Co. v. English Cove Assoc., Inc.*, 88 P.3d 986, 991 (Wash. Ct. App. 2004). Second, because the Allstate provision excludes “flood, *including, but not limited to*” the listed examples, it cannot be interpreted as an exhaustive list. See, e.g., *Society for the Advancement of Educ., Inc. v. Gannet Co., Inc.*, No. 98 Civ. 2135, 1999 WL 33023, at *7 (S.D.N.Y. Jan. 21, 1999) (“The *expressio unius [est exclusio alterius]* maxim has no force in the face of directly contradictory language in the contract, such as the clause ‘including but not limited to....’”).¹¹

III. NO MISSISSIPPI PROXIMATE CAUSATION RULE MANDATES A FINDING THAT ALL HURRICANE KATRINA LOSSES WERE CAUSED BY WIND, AND SUCH A RESULT IS PRECLUDED IN THIS CASE BY THE UNAMBIGUOUS LANGUAGE OF THE FLOOD/WATER EXCLUSION.

¹¹ Appellants’ reliance upon *Evana Plantation, Incorporated v. Yorkshire Insurance Company* is wholly misplaced. In *Evana Plantation*, this Court held that coverage for “hail” included “sleet,” relying extensively upon dictionary definitions of “sleet,” “precipitation,” and “hail.” *Evana Plantation*, 58 So. 2d 797, 800 (Miss. 1952). While the Court noted that the insurer could have expressly excluded sleet from coverage, it did not base its ruling on the absence of “sleet” in the exclusion. Instead, this Court observed that the absence of “sleet” in the exclusion indicated that “[a]pparently the insurer regarded sleet as being in the category of hail, and certainly to the layman, reading the policy in its ordinary, everyday sense, the only difference between sleet and hail would be in the size of the particles.” *Id.* Storm surge is similarly understood to be “in the category of” flood.

With startling hyperbole, Appellants argue that it is “undisputed, indeed indisputable,” that because “the efficient proximate cause of all Hurricane Katrina losses is wind, Katrina losses cannot be ‘caused’ by excluded water.” (Appellants’ Brief, pp. 50, 11.) But this statement betrays a fundamental misunderstanding of Mississippi proximate cause law, is in conflict with this Court’s prior hurricane-related decisions., and ignores the unambiguous language of the flood/water exclusions that exclude damage caused by wind-driven flood/water.

No decision of this Court has ever utilized the terminology “efficient proximate cause.” Instead, this Court has recognized that “proximate cause has a different meaning in insurance cases than it has in tort cases.” *Glens Falls Ins. Co. v. Linwood Elevator*, 130 So. 2d 262, 269 (Miss. 1961). In tort cases, in order to “fix[] culpability,” the proximate cause rules “reach back of both the injury and the physical cause to fix the blame on those who created the situation in which the physical laws of nature operated.” *Id.* However, in insurance cases “the concern is not with the question of culpability or why the injury occurred, but only with the nature of the injury and how it happened.” *Id.*, at 269-70. In other words, in insurance cases, the inquiry is not designed to identify and “fix blame” on the remote, originating cause that “created the situation in which the physical laws of nature operated” (e.g. there was a hurricane), but rather to determine whether the nature of the injury itself (here, physical damage to the residence) and “how it happened” (water in the form of storm surge) are covered. *Id.*¹²

Hurricane Katrina did not “invent” storm surge. Hurricanes Betsy and Camille were significant storm surge events. If Appellants’ argument that Mississippi proximate cause law

¹² It is true that the *Glens Falls* opinion went on to note that coverage may exist “if the dominant cause is a risk or peril insured against” even though there were other contributing non-covered factors (*id.*), language repeated by this Court a decade later in *Grain Dealers Mut. Ins. Co. v. Belk*, 269 So. 2d 637, 639 (Miss. 1972). However, the *Belk* Court went on to clarify that, even in that situation, where “the efficient cause of the loss” is covered by the policy, there is no coverage if “the contributing [other] cause is expressly excluded by the terms of the policy.” *Id.*, at 640 (emphasis supplied).

The jury in *Grace* had returned a verdict in favor the insureds. If the “efficient proximate cause” doctrine mandated that all hurricane-related damage was caused by wind, the Court simply would have ruled that the loss was covered, or that a verdict should have been directed in favor of the insured, without further analysis. But the *Grace* Court did not adopt that approach. Instead, after a careful review of the conflicting evidence presented at trial, the Court held that there was “ample testimony to sustain the appellants’ contention that their office building was destroyed by wind *before* the tidal waters reached the property.” *Id.*, at 224. (Emphasis added.)

In other words, wind, a covered peril, was the “direct” or “proximate” cause of the loss based upon a review of the evidence pertaining to that specific loss. But that conclusion was not mandated simply because the loss occurred during a hurricane. Indeed, this Court expressly observed that:

where the question presented to the jury was whether the loss was due to windstorm or to water, the entire question of proximate cause is treated as one of fact independent of the explicit application of any rule of law. *Id.* at 224.

Because the evidence presented a “real issue...as to how much damage was caused by windstorm under the policy,” this Court also held that the insureds were not entitled to statutory interest on the judgment rendered. If, as a matter of Mississippi proximate cause law, all hurricane losses are necessarily caused by wind, this Court could not have found that a “real issue” existed warranting the denial of statutory interest.

This Court’s other hurricane-related decisions likewise do not recognize or endorse a rule of “efficient proximate cause” that mandates that storm surge damage is caused by wind, and therefore covered under a homeowners’ policy. Rather, those cases hold if there was conflicting evidence, juries were to determine whether wind or water caused the loss based upon evidence

specific to the loss.¹⁴ None of the other non-Mississippi cases relied upon by Appellants recognize any Mississippi rule of proximate cause mandating a finding that all hurricane losses, including those caused by storm surge, are caused by wind, rather than flood.¹⁵

In arguing that the ACC clause should not be applicable to hurricane losses, both the Appellants and the AG acknowledge that wind and flood/water in the form of storm surge can act independently to cause damage. As Appellants observed, “[b]ecause the perils of wind and water operate independently, they ‘are not in fact concurrent in most cases because they caused different damage and different losses.’” (Appellants’ Brief, p. 19 (citations omitted; emphasis added).) The AG similarly admits that “[t]he fact that Hurricane Katrina’s hurricane-force winds undisputedly occurred prior to the arrival of its maximum storm surge helps demonstrate that the wind and water do not constitute concurrent causes of the same damage, *because each force acted separately to create unique damage.*” (AG Brief, p. 12; emphasis added.)

¹⁴ See, e.g., *Lititz Mutual Insurance Company v. Buckley*, 261 So. 2d 492 (Miss. 1972) (holding that evidence supported finding that the loss was “caused by wind and rain before the rising water,” and finding no error in jury instructions that provided that the jury could only find in favor of the insureds for “loss resulting from windstorm and not caused by...flood...”); *Lititz Mutual Insurance Company v. Boatner*, 254 So. 2d 765, 766, 767 (Miss. 1971) (evidence supported a finding that the “house and its contents had already been destroyed and distributed over a large area long before the tidal wave came ashore...” and affirming denial of statutory interest to the insured because there was a “real issue presented as to how much damage was caused by windstorm under the terms of the [policy]”); *Commercial Union Insurance Company v. Byrne*, 248 So. 2d 777, 781 (Miss. 1971) (sufficient evidence to support a finding that water came into the house through holes in the roof and windows damaged by wind before tidal water rose into the house); *Fireman’s Insurance Company of Newark, New Jersey v. Schulte*, 200 So. 2d 440, 441 (Miss. 1967) (holding that “whether there was a direct loss by windstorm unaffected [by flood] was a question of fact for the jury”).

¹⁵ See, e.g., *Home Ins. Co., New York v. Sherrill*, 174 F.2d 945, 964 (5th Cir. 1949) (“a question of fact whether the building was destroyed by the direct and sole action of the wind before the water was high enough and rough enough to contribute thereto”); *Royal Ins. Co. v. Martinolich*, 179 F. 2d 704 (5th Cir. 1950) (question of fact whether wind damage occurred before rising water arrived); *Kemp v. American Universal Ins. Co.*, 391 F. 2d 533 (5th Cir. 1968) (sufficient evidence to support finding that rig collapse caused by windstorm); *Ebert v. Pacific Nat. Fire Ins. Co.*, 40 So. 2d 40, 46 (La. App. 1949) (“neither the house nor the truck was affected by the flood water until the wind had blown them from their sites and anchorage. Whatever flood damage may have resulted was incidental....”).

But in all events, both Allstate's flood exclusion and USAA's water exclusion expressly provide that they exclude "flood," "surface water," "waves," "tidal water," or "the overflow of any body of water," or "spray from any of these," "*whether or not driven by wind.*" (Allstate policy, p. 6; emphasis supplied; USAA policy, R.E. 40.) Wind-driven water is thus expressly excluded from coverage by the plain language of the exclusions. This Court expressly affirmed the use of jury instructions embodying a similar flood/water exclusion with similar "whether driven by wind or not" language. *See, e.g., Buckley, supra*, 261 So. 2d at 496 (affirming use of jury instructions containing the "whether driven by wind or not" language). Several other cases decided by this Court involved flood/water exclusions containing the "whether driven by wind or not" language, and this Court never suggested that such language was ambiguous or unenforceable. *See, e.g., Grace, supra*, 257 So. 2d at 219; *Boatner, supra*, 254 So. 2d at 765; *Byrne, supra*, 248 So. 2d at 778; *Schulte, supra*, 200 So. 2d at 441.

CONCLUSION

The Circuit Court of Harrison County correctly determined that damages caused by "storm surge" were excluded under USAA's water damage exclusion. Such flood/water exclusions have been routinely enforced and respected by Mississippi courts.. This Court has never adopted a rule of proximate causation that would compel the conclusion that damage caused by storm surge is wind damage, rather than flood damage. Nothing raised by this case calls for a different conclusion.

Respectfully submitted,



Michael B. Wallace
WISE CARTER CHILD & CARAWAY
Pos Office Box 651
Jackson, MS 39205-0651
401 East Capitol Street, Suite 600
Jackson, MS 39201

Telephone: (601) 968-5534
Facsimile: (601) 968-5519

Reuben V. Anderson [REDACTED]
Fred L. Banks [REDACTED]
Debra Brown [REDACTED]
Rebecca Hawkins [REDACTED]
PHELPS DUNBAR LLP
Post Office Box 23066
Jackson, MS 39225-3066
111 E. Capitol Street, Suite 600
Jackson, MS 39201
Telephone: (601) 352-2300
Facsimile: (601) 360-9777

William C. Griffin [REDACTED]
CURRIE JOHNSON GRIFFIN GAINES
& MYERS
Post Office Box 750
Jackson, MS 39205
Telephone: (601) 969-1010
Facsimile: (601) 969-5120

*Counsel for Amicus Curiae Allstate Property and
Casualty Insurance Company, Amicus Curiae*

CERTIFICATE OF SERVICE

The undersigned attorney of record for Allstate Property and Casualty Company does hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to the following persons at the addresses indicated:

Judy M. Guice
JUDY M. GUICE, P.A.
P.O. Box 1919
Biloxi, MS 39533

Danny Earl Cupit
Law Offices of Danny E. Cupit
P.O. Box 22929
Jackson, Ms 39225-2929

Richard T. Phillips
SMITH, PHILLIPS, MITCHELL, SCOTT &
NOWAK, LLP
P.O. Drawer 1586
Batesville, MS 38606

Jim Hood
Attorney General for the State of
Mississippi
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

Clyde H. Gunn, III
Christopher C. Van Cleave
W. Corban Gunn
CORBAN, GUNN & VAN CLEAVE
P.O. Drawer 1916
Biloxi, MS 39533

Rickey T. Moore
Meredith Aldridge
Mary Jo Woods
Special Assistant Attorneys General
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

Robert P. Thompson
Robert L. Goza
COPELAND, COOK, TAYLOR & BUSH, P.A.
P.O. Box 6020
Ridgeland, MS 39158

William F. Merlin
Mary Kestenbaum
Merlin Law Group
777 S. Harbour Island Blvd.
Suite 950
Tampa, FL 33602

Hon. Lisa P. Dodson
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

Amy Bach
United Policyholders
222 Columbus Avenue
Suite 412
San Francisco, CA 94133

H. Mitchell Cowan
Laura L. Gibbes
Watkins Ludlam Winter & Stennis, P.A.
P.O. Box 427
Jackson, MS 39205

Crymes G. Pittman
Pittman Germany Roberts & Welsh
P.O. Box 22985
Jackson, MS 39225-2985

William H. Liston, Jr.
Liston/Lancaster
P.O. Box 645
Winona, MS 38967

W. Scott Welch, III
Baker Donelson Bearman Caldwell &
Berkowitz
Post Office Box 14167
Jackson, Mississippi 39206

This the 17th day of February, 2009.



Michael B. Wallace (REDACTED)