IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-IA-00645-SCT

MARGARET AND DR. MAGRUDER S. CORBAN **APPELLANTS**

VERSUS

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 FOR APPELLEE UNITED SERVICES AUTOMOBILE ASSOCIATION

ORAL ARGUMENT REQUESTED

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UNITED SERVICES AUTOMOBILE ASSOCIATION
a/k/a USAA INSURANCE AGENCY — APPELLEE

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 may evaluate possible disqualification or recusal.

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This 10th day of February, 2009.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

This interlocutory appeal presents issues important to administration of numerous USAA

homeowners insurance claims in this state following Hurricane Katrina. It also presents some issues that have not previously been addressed by this Court. USAA adjusted and paid homeowners insurance claims following Katrina in accord with its approved homeowners policy provisions which provide coverage for damage caused solely by wind. However, the Corbans as Plaintiffs/Appellants seek to invalidate certain provisions of their USAA homeowners policy so as to require that it provide coverage for hurricane damage caused or contributed to by storm surge flooding – i.e., separate damage intended to be covered by flood insurance policies issued through the National Flood Insurance program. USAA respectfully submits that oral argument would be of assistance to the Court in its consideration of these issues.

INTRODUCTION

Without citation to any record support, the Corbans wrongly claim that ACC clauses have been the largest impediment to resolution of Katrina claims. This is simply not true, at least as to homeowners insurance claims advanced by USAA insureds.

The Corbans and their supporting amici have set up a straw man to knock down. They falsely suggest that USAA uses the ACC clause in its homeowners insurance policy to exclude coverage for damage caused solely by wind during a hurricane, simply because a property is later impacted by storm surge flooding. This false suggestion is made in an attempt to fulfill the Plaintiffs' ultimate goal – the goal of achieving coverage of flood damage under homeowners insurance policies. This Court should reject that goal. The Corbans were aware that their homeowners policy did not cover flood damage. That is why they bought a separate NFIP flood insurance policy. They made a claim under that policy after Katrina and received their full flood insurance policy limits of $350,000.

The truth is that USAA does ***not*** suggest its ACC clause operates to exclude hurricane

damage caused solely by wind, just because storm surge flooding later impacts a property. Whether other insurers (or their counsel) who are not parties to this matter have ever advanced such a contention based on language in non-USAA policies is of absolutely no relevance. This case is not about the policy language, contentions, or claims adjusting practices of other insurance companies, for which USAA is not responsible. The Court should disregard the attempts by the Corbans' counsel and their amici to use this case to litigate against ACC clause interpretations allegedly advanced by other insurers and claims adjusting practices allegedly used by other insurers. Affirmation of the trial court's ruling will, in fact, preclude the specter of wholesale claims denial that the Corbans conjure.

USAA's homeowners policy does, in fact, cover hurricane damage caused solely by wind, even if storm surge flooding later impacts a property and causes additional damage or destruction. Only damage caused or contributed to by storm surge flooding is excluded. This has consistently been USAA's position and reflects the way USAA adjusted its claims. Plaintiffs engage in misrepresentation when they suggest otherwise.

The Corbans' own homeowners insurance claim demonstrates that USAA does not take the ACC clause positions about which the Corbans complain in their brief. USAA paid for all damage to the Corbans' property that it could identify as being caused solely by wind, regardless of whether that damage occurred before or after storm surge impacted the property. The Corbans were paid for wind damage to the roofs, fascia and soffits of the house and outbuildings; damage to refrigerated products when electricity went out; and additional living expenses, all totaling $58,827.29. (Record Volume 14 at 1953.) These amounts based on wind damage were paid, despite that the property was very obviously impacted and severely damaged by storm surge flooding, for which the Corbans claimed and were paid their flood insurance policy limits of $350,000. (RV1 at 81, 89; RV14 at

1953.) The provisions of the Corbans' USAA homeowners policy validly exclude coverage for such water damage caused or contributed to by storm surge flooding. (RV2 at 151.)

There is nothing about the ACC clause or water damage exclusion in USAA's homeowners policy that is unclear, unusual, or contrary to public policy. The trial court correctly found the policy provisions to be clear, valid, and enforceable. Those rulings should be affirmed.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

Dr. Magruder Corban and Margaret Corban filed a Complaint against United Services Automobile Association ("USAA") on October 5, 2006. The Corbans alleged that, following Hurricane Katrina, USAA breached the terms of their homeowners insurance policy covering property located at 822 East Beach Boulevard in Long Beach. (RV1 at 11-27.) USAA answered the suit on November 14, 2006, denying that it breached the Corbans' homeowners insurance contract. (RV1 at 30-39.) USAA asserted as an affirmative defense that the damages the Corbans seek in this case are excluded from coverage under the homeowners policy water damage exclusion, including its anti-concurrent causation ("ACC") clause. (RV1 at 35.)

The case was assigned to Judge Lisa P. Dodson, proceeded through discovery, and was set for trial on March 3, 2008. (RV1 at 46.) The parties filed cross-motions for summary judgment regarding the validity of the water damage exclusion and ACC clause contained in the USAA homeowners policy issued to the Corbans. (RV1 at 57-71; RV2 at 284-86; RV5 at 696-724; RV9 at 1241-56.) The parties also filed cross-motions concerning the effect of the Corbans' acceptance of flood insurance benefits under a separate NFIP flood insurance policy for damage caused by storm surge. (RV2 at 287-95; RV4 at 478-81; RV5 at 671-88; RV9 at 1257-67; RV9-10 at 1318-64.) Oral argument was held on those motions on February 22, 2008. (RV11-12 at 1506-1691.)

Subsequently, the trial judge held a phone conference with counsel for the parties and announced her rulings. During that phone conference, and at the Corbans' suggestion, the trial court and parties agreed to an interlocutory appeal. On February 28, 2008, the trial court entered an order continuing the trial and staying the case (RV10 at 1385-86.) Orders memorializing the trial court's rulings followed on March 27, 2008. (RE at 12-21, 58-64; RV10 at 1387-96, 1397-1406.)

One of those Orders held the water damage exclusion and ACC clause in the USAA homeowners policy to be clear and unambiguous. Additionally, Judge Dodson held that the water damage exclusion and ACC clause are valid, enforceable, and not against public policy. (RE at 12-21; RV10 at 1387-96.) The Corbans filed a Petition for Interlocutory Appeal regarding this Order, to which USAA responded. This Court granted the petition for interlocutory appeal on May 16, 2008. (RV12 at 1701-02.)

The trial court also entered an Order on March 27, 2008, finding that the Corbans' damage claim under their separate NFIP flood insurance policy and their acceptance of benefits under that policy constituted an admission that their property incurred some flood damage, at least up to the amount of flood insurance benefits accepted. Judge Dodson ruled that this admission would properly be introduced into evidence at trial, because the collateral source rule does not apply to preclude it. (RE at 58-64; RV10 at 1397-1406.) In their Petition for Interlocutory Appeal, the Corbans did not specifically seek review of that Order. (RV10-12 at 1433-1700.) However, they now seek to challenge its holdings. *See* Appellants' Brief at pp. 40-43.

II. Statement of Facts

A. The Impact of Katrina on the Corban property

Margaret and Dr. Magruder Corban owned a two-story house, constructed in the 1800's and located at 822 East Beach Boulevard, Long Beach, Mississippi. (RV1 at 18, 81-82, 100, 136.) There

were also outbuildings on the property, including a garage, cottage, gazebo, pool dressing room, and potting shed. (RV2 at 254-57.)

The Corbans evacuated from the property and were not present when Hurricane Katrina made landfall on August 29, 2005. (RV1 at 82.) There were no eyewitnesses to the damage that Katrina did to the Corban property. (RV9 at 1297.) However, the house was still standing after the storm, leaving the damage and causes of damage visible and determinable. (RV2 at 271.)

The Corbans had a homeowners insurance policy with USAA, under which they made a claim following Katrina. (RV1 at 13, 55; RV1-2 at 133-168.) They also had a separate NFIP flood insurance policy issued through USAA General Indemnity Company under which they made a claim. (RV1 at 16-17; 33, 81; RV2 at 169-94; RV14 at 1953.)

The wind damage versus water damage factual dispute between the parties centers around the Corbans' contention that the first floor of their house was destroyed by wind, versus USAA's contention that the first floor was destroyed by storm surge flooding. However, it remains beyond dispute that Katrina's winds at the Corban house blew the same or stronger at the second floor level as they did at the first floor level. (RV7 at 978.) Katrina's storm surge impacted the first floor but not the second floor. (RV1 at 81,82; RV2 at 224.) The second floor remains. The first floor is gone. (USAA RE at Tabs 1-5; RV1 at 72, 81, 82, 84: RV2 at 225.)

The first floor of the house was destroyed when its walls were washed away by storm surge. (RV 1 at 72; RV2 at 225.) The second floor of the house, including the roof, remained largely intact. (RV1 at 72, 81, 82, 84, 976.) The statements in the Corbans' brief that the house lost its roof are simply untrue, as is reflected in the photographs and deposition testimony of record. (Compare Appellant's Brief at 3, 40 with USAA RE at Tabs 1-5; RV1 at 72, 82; RV7 at 943, 967-68.) **As stated succinctly by the Corbans' own engineering expert, Ted Biddy:**

"the roof is still on this house."

(RV7 at 943.)

There were no windows broken on the second floor. (USAA RE at Tabs 1-4; RV1 at 81; RV2 at 250.) There was no damage to the interior of the second floor, other than some sagging from the first floor being washed away beneath it. (RV1 at 81, 82; RV2 at 225.) The roof over the second floor was intact, with some scattered shingle damage. (RV1 at 82; RV2 at 252; RV7 at 943, 967-68.) One section of first floor roof sagged downward when the structure underneath it was destroyed by storm surge. (USAA RE at Tabs 3 & 4; RV2 at 248, 252.) One section of copper roof was deformed at the edge when the first floor underneath it was destroyed. (RV1 at 88; RV2 at 268-69.)

There was no rainwater leakage whatsoever into the second floor, and the contents of the second floor were undamaged. (RV1 at 81, 82, 84; RV2 at 225.) A treehouse on the property was undamaged. It was situated in a tree above the level of the storm surge. (USAA RE at Tab 5; RV1 at 83, 102; RV2 at 256.) Rather than being shattered by wind or wind-borne debris, large glass panels from the glassed-in front porch were found lying near the house largely intact. (RV1 at 97; RV7 at 1000.) As admitted by the Corbans' engineering expert, the wood flooring and carpets on the first floor were destroyed by storm surge. (RV5 at 743.)

USAA assigned Haag Engineering Company to inspect the property and give an engineering opinion as to causes of damage. (RV2 at 213, 223.) Haag's engineers determined that all damage to the first floor of the house was caused by storm surge flooding, which breached the first floor walls and washed out the interior of the house. (RV2 at 242.) Haag measured a still water line of 36 inches on an interior wall of the house, and Dr. Corban acknowledged the existence of that 36-inch water line. (RV1 at 82-83; RV2 at 224.) Still water lines are created when flood waters recede. Velocity water in the house, including waves, was substantially higher. (RV2 at 225-26.) Despite

the Corbans are wrong to suggest that it does.

There is nothing contrary to Mississippi public policy about ACC clauses. Mississippi public policy does not frown on limiting homeowners insurance coverage to damage caused solely by wind. Exclusion of coverage for damage caused or contributed to by storm surge flooding is standard and valid. Damage caused by storm surge is covered under an entirely separate insurance regime – the National Flood Insurance Program – available to all homeowners.

The Corbans seek to have this Court impose an efficient proximate cause rule on all homeowners policies. They do so in pursuit of one ultimate goal – to require coverage of storm surge damage under homeowners insurance policies, because storm surge is driven by wind. Aside from the fact that such a ruling would wreak havoc on insurance markets, including the Mississippi Windstorm Underwriting Association (State Wind Pool), Mississippi does not require that insurance policies follow an efficient proximate cause rule. In Mississippi, the efficient proximate cause doctrine – i.e., that an insured may recover for all damage as long as a covered peril was the efficient proximate cause of the loss – is simply a default rule in the absence of contract language to the contrary. A majority of states that have considered the question have held that parties can validly contract out of efficient proximate cause as the rule for determination of coverage. That is what the ACC clause in USAA's policy validly does, and it is in conformity with Mississippi law.

Mississippi has no statutory prohibition of ACC clauses. The approved policy form for the State's Wind Pool, established under Mississippi Windstorm Underwriting Act, contains ACC language and excludes coverage of damage caused, contributed to, or aggravated by storm surge. USAA's policy form does the same and was approved by the Mississippi Insurance Commission. The Commission has in no way precluded ACC clauses in homeowners policies. Mississippi case law recognizes that insurance contracts can, through exclusions, negate applicability of the efficient

proximate cause rule. The ACC clause does nothing to improperly change the parties' burdens of proof as prescribed by Mississippi law.

The trial court also properly ruled that the Corbans' have admitted their property sustained at least some flood damage. Although the Corbans did not include the trial court's Order in that regard as part of their Petition for Interlocutory Appeal, they seek to challenge it now.

The Corbans made a claim under their flood insurance policy after Katrina. They accepted flood insurance benefits under that policy for flood damage. This was not a collateral source with regard to the damages they seek in this case. Here, they seek separate damages caused by a separate peril – wind. Because they have made a flood insurance claim and have accepted flood insurance benefits, the Corbans cannot disavow those acts and proceed to trial in this case claiming that 100% of the damage to their property was caused by wind. Fundamental fairness and justice preclude such blatantly inconsistent positions for the prospect of gain. Just as with any other admission by a party, USAA is entitled to point to this admission as part of the evidence that sustains its burden of proof regarding excluded damage from storm surge flooding. The trial judge's decision in that regard should be affirmed should this Court choose to review it.

ARGUMENT

I. The Standard of Review

A lower court's grant of summary judgment is given *de novo* review by this Court. *Webb v. Braswell*, 930 So. 2d 387 (¶ 12) (Miss. 2006). A grant of summary judgment is appropriate when the motion and supporting materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c).

Decisions to admit or exclude evidence are generally reviewed for abuse of discretion. *Delashmit v. State*, 991 So. 2d 1215 (¶ 9) (Miss. 2008). However, if a question of law is involved

in the decision to admit or exclude evidence, the issue of law is reviewed *de novo*. *Id.*

II. The ACC Clause Contained in USAA's Homeowners Policy Is Clear and Unambiguous.

A. Mississippi Law on Insurance Policy Interpretation

An insurance policy is nothing more than a contract, and Mississippi law requires interpretation of insurance policies under the same law as other contracts. *Noxubee County Sch. Dist. v. United Nat'l Ins. Co.*, 883 So. 2d 1159 (¶ 16) (Miss. 2004); *Boteler v. State Farm Cas. Ins. Co.*, 876 So.2d 1067 (¶ 12) (Miss. Ct. App. 2004). If a provision of an insurance policy is clear and unambiguous, it is to be interpreted and applied as written, according to its plain meaning. *Noxubee*, 883 So. 2d at ¶ 13; *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So.2d 990 (¶ 18) (Miss. 2006).

Whether a policy provision is unambiguous is judged by its own language, and is a question of law for the Court, not a fact question for a jury. *Noxubee*, 883 So. 2d at ¶ 13 (question of law for the court); *State Auto. Mut. Ins. Co. of Columbus v. Glover*, 253 Miss. 477, 176 So. 2d 256, 258 (1965) (provision judged by its own language).

> Ambiguity . . . can not be forced into a policy where there is none. This Court has held that it will not rewrite or deem a contract ambiguous where the language is clear and indicative of its contents.

Mississippi Farm Bureau Mut. Ins. Co. v. Walters, 908 So. 2d 765 (¶ 14) (Miss. 2005).

That parties to a case may advance differing interpretations of a policy provision does not make that provision ambiguous or unenforceable. *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So.2d 400, 404 (Miss. 1997); *Cherry, Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss. 1987). That courts have issued differing interpretations of a policy provision does not make the provision ambiguous. *Wooten v. Mississippi Farm Bureau Ins. Co.*, 924 So. 2d 519 (¶¶ 10-11) (Miss. 2006) (differing judicial interpretations of phrase within policy did not make the phrase ambiguous).

Policy provisions are adjudged as either clear or unclear based solely on their own language. *Glover*, 253 Miss. 477, 176 So. 2d at 258. Use of a term in a policy provision that is not specifically defined elsewhere in the policy does not render that term ambiguous. Rather, such terms are afforded their "ordinary and plain meaning." *Wooten,* 924 So. 2d at ¶¶ 11, 13 (Miss. 2006).

A policy provision is not ambiguous unless (a) one of its terms is susceptible to multiple **reasonable** meanings; or (b) there is an internal conflict between policy provisions that makes the meaning of the policy as a whole uncertain. *Walters*, 908 So.2d 765 (¶¶ 11-12) (Miss. 2005). Neither of these types of ambiguity exists with regard to the water damage exclusion and ACC clause in USAA's homeowners policy. The exclusion and ACC clause are clear.

B. The Trial Court Correctly Held That USAA's ACC Clause Is Clear and Unambiguous and To Be Enforced As Written.

The water damage exclusion and ACC clause contained in USAA's homeowners policy provide:

> **SECTION I – EXCLUSIONS**
>
> 1. We do not insure for loss caused directly or indirectly by any of the following. *Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.* [emphasis added as to ACC clause]
>
> c. **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 . . . .

(RE at 40, 27; RV2 at 151.) These provisions are clear. In the context of a hurricane's wind and water, they only exclude coverage of property damage caused or contributed to by water damage as

defined in the policy.[2] This is easily demonstrated by insertion of the relevant terms regarding water damage, as follows:

> d. We do not insure for loss caused directly or indirectly by any of the following *[in this instance, water damage]*. Such loss *[caused directly or indirectly by water damage]* is excluded regardless of any other cause or event *[in this instance, wind]* contributing concurrently or in any sequence to the loss *[caused directly or indirectly by water damage]*.

The policy then goes on to define "water damage," as follows:

> c. **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 . . . .

There is nothing at all unclear about this. That is exactly what the trial judge recognized when she held the ACC clause to be clear and unambiguous, based on its own language. (RV10 at 1499-1500.)

The Corbans' Brief wrongly suggests that the trial court did not address or consider their argument that the ACC clause was ambiguous. *See* Appellants' Brief at p. 20. In contrast to this suggestion, the trial court directly addressed the allegation of ambiguity in the ACC clause and found the allegation to be without merit. *See* Trial Court Order of March 27, 2008. (RV10 at 1499-1500.) In doing so, Judge Dodson properly applied Mississippi's rules of contract construction, looking to the language of the policy itself to determine that it was, in fact, clear. (RV10 at 1499.) Specifically, the trial court held:

> In looking to the language at issue in the Corbans' policy, the exclusionary provision of the policy appears to this Court to be

---

[2] The policy and its ACC clause exclude coverage of other causes of property damage besides water damage. Those other excluded causes, to which the term "loss" also refers in other contexts, are not at issue here.

unambiguous. Certainly, this Court is aware of the differing interpretations of this language made by the parties to this and other litigation as well as the differing interpretations given by the federal courts. This does not, however, render the language ambiguous. *See, e.g., Wooten v. Mississippi Farm Bureau Insurance Co.*, 924 so. 2d 519, 520-21 (Miss. 2006); *Delta Pride Catfish, Inc. v. Home Insurance Co.*, 697 So. 2d 400, 404 (Miss. 1997). The majority of policyholders are not lawyers. A plain common sense reading of the policy, without resort to legal jargon or theories, would seem to be the proper means to interpret provisions in an insurance policy that average citizens are expected to read and understand.

"However, this Court has followed the plain meaning and common sense approach when interpreting insurance clauses. *Noxubee County School Dist. v. United Nat. Ins. Co.*, 883 so. 2d 1159 (Miss. 2004); *Blackledge v. Omega Ins. Co.*, 740 So. 2d 295 (Miss. 1999); *Allstate Ins. Co. v. Chicago Ins. Co.*, 676 So. 2d 271 (Miss. 1996)." ***

* * *

"Further more, this Court traditionally applies the ordinary and plain meaning of words and concludes that the disputed phrase must be construed as written."

Wooten, supra, at 522-23, ¶¶11, 13. *See also South Carolina Insurance Co., supra*, at ¶12 quoting *Naifeh v. Valley Forge Life Ins. Co.*, 204 S.W.3d 758, 768 (Tenn. 2006). Using the simple rules learned in middle or high school English classes, the exclusion provides that it does not cover a loss caused by water damage. The second sentence refers to "[s]uch loss being excluded even if in combination with or in any sequence to other causes. The term "[s]uch loss can only refer to the loss caused by water damage mentioned in the first sentence of the exclusion. It is that loss and that loss only that is excluded by the plain language of the provision. The remainder of the second sentence goes on to elaborate on the exclusion by providing that the water damage is excluded no matter what other causes exist and whether the water damage occurs, first, last, or simultaneously with some other cause. This simple, basic interpretation of the language used and sentence structure used bars coverage for water damage and **only** the water damage, whether occurring alone or in any order with another cause.

(RE at 16-17; RV10 at 1499-1500.)

As is evident, the trial court addressed the Corbans' ambiguity argument and rejected it. That

decision was correct, based on the plain language of the policy. It should be affirmed. Only damage caused or contributed to by water (storm surge flooding) is excluded. Rather than supporting some wholesale denial of the Corbans' claim, the ruling recognizes that damage caused solely by wind is covered. This is the only reasonable interpretation of USAA's ACC clause, and it is exactly how USAA has consistently interpreted and applied its policy.

C. Decisions of Courts Applying Mississippi Law Regarding ACC Clauses

1. ACC Clauses In General

Prior to Hurricane Katrina, courts applying Mississippi law on insurance contract construction have held that various ACC clauses in insurance contracts are unambiguous and enforceable. *Boteler v. State Farm Cas. Ins. Co.*, 876 So.2d 1067 (Miss. Ct. App. 2004); *Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F. Supp.2d 606 (S.D. Miss. 2001); *Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp.2d 907 (S.D. Miss. 1998). Each of these cases dealt with earth movement exclusions rather water damage exclusions, but they applied general rules of contract construction – as did Judge Dodson – to reach their conclusions that the ACC clauses in issue were clear and unambiguous. *Boteler*, 876 So.2d at ¶ 12; *Eaker*, 216 F. Supp. 2d at 623-24; *Rhoden*, 32 F. Supp. 2d at 912-13.

The Corbans wrongly suggest that this Court's recent decision in *United States Fid. & Guar. Co. v. Martin*, 2008 WL 4740031 (Miss. 2008) held ambiguous an ACC clause similar to the one contained in USAA's policy. *See* Appellants' Brief at pp. 23-25. That is not the case. This Court held that USF&G's policy, as a whole, was ambiguous about whether sewage and drain back-up were covered perils. The holding was expressly based on language that is NOT contained in USAA's policy issued to the Corbans. *Martin*, 2008 WL 4740031 at ¶¶ 9, 14-16. This Court reached its conclusion based solely on consideration of the specific contract language in the USF&G

policy, in light of traditional rules of contract construction. *Id.* at ¶¶ 13-16.

In *Martin*, the insured sued USF&G, seeking to recover under an insurance policy covering her art gallery. The gallery flooded following a heavy rain. The insured maintained that the flooding and damage to the art gallery resulted from sewer or drain backup. USF&G maintained that its water damage exclusion precluded coverage for flood damage, whether or not it occurred because of sewer or drain backup. *Id.* at ¶¶ 2-4.

The USF&G insurance contract contained a water damage exclusion with an ACC clause that was worded as follows:

> C. Exclusions.
>
> > 1. We will not pay for loss to Covered Property caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. *Unless otherwise stated, the following exclusions apply to all SECTION I-Coverages.*
> >
> > a. Water.
> >
> > (1) Flood, surface water, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.

Id. at ¶ 9 (The emphasized language is NOT contained in USAA's policy at issue in this case.). The USF&G contract also contained a separate provision in another section of the policy, purporting to provide coverage for sewer or drain backup, as follows:

> v. Sewer or Drain Backup.
>
> We will pay for direct physical loss to Covered Property at the premises described in the Schedule of Premises if the loss is caused by water that:
>
> (1) Backs up through sewers or drains, or
>
> (2) Enters into and overflows from within:

(a) A sump pump,

(b) A sump pump well, or

(c) Any other system, designed to remove subsurface water from the foundation area.

The most we will pay for this Additional Coverage is $25,000 or the Limit of Insurance shown in the Property Coverage Part Declarations for Sewer or Drain Backup, whichever is greater.

Id. at ¶ 9.

Based on the "unless otherwise stated" language contained in the USF&G water damage exclusion, this Court held that the policy did provide coverage for flooding caused by sewer or drain backup. Although the USF&G policy generally excluded damage caused or contributed to by flooding, it also contained a separate and additional coverage that expressly provided up to $25,000 in insurance benefits for damage caused by sewer or drain backup. *Id.* at ¶¶ 14-16.

This is in sharp contrast to the water damage exclusion and ACC clause language contained in the USAA policy at issue here. USAA's policy contains no "unless otherwise stated" language in its water damage exclusion and ACC clause. Damage caused or contributed to by water is flatly excluded from coverage. There is no other section of USAA's policy that purports to provide any coverage whatsoever for water damage caused by storm surge flooding or any other type of flooding. Such flooding is expressly excluded from coverage regardless of whether the flooding is driven by wind. Rather than supporting the Corbans' position, the *Martin* decision actually points out the flaw in that position.

In *Martin*, this Court provided some discussion of the decision by the United States District Court for the Southern District of Mississippi in *Eaker v. State Farm Fire & Cas. Ins. Co.*, which validated an ACC clause contained in an exclusion of coverage for earth movement. *Martin*, 2008

WL 4740031 at ¶ 11 (discussing *Eaker*, 216 F. Supp.2d at 622). While this Court noted that the *Eaker* decision was distinguished by the trial court in *Martin* because of differences in the policy language under consideration, the *Eaker* decision was not criticized. *Martin*, 2008 WL 4740031 at ¶ 11. The State Farm policy language considered in *Eaker* was distinguishable from the USF&G policy language considered in *Martin*, because the State Farm policy language expressly excluded from coverage any damage from sewer or drain backup. There was no separate section of the policy that purported to provide any such coverage. *Martin*, 2008 WL 4740031 at ¶ 11 (discussing *Eaker*, 216 F. Supp. at 622).

USAA's water damage exclusion and ACC clause differ from the USF&G policy language considered by this Court in *Martin* for the same reasons that the policy language considered by the federal court in *Eaker* differed and were held to be clear and unambiguous. *Martin*, 2008 WL 4740031 at ¶ 11 (discussing *Eaker*, 216 F. Supp. at 622). There is no reasonable reading of USAA's policy under which damage caused or contributed to by water – in this case storm surge flooding – could be deemed covered. The Corbans have not pointed to – and cannot point to – any contradictory section of USAA's policy that purports to provide coverage for such damage.

2. <u>ACC Clause Decisions After Hurricane Katrina</u>

In the context of claims following Hurricane Katrina, the United States Court of Appeals for the Fifth Circuit has held that ACC clauses contained in policies issued by two other insurance companies not parties here are not ambiguous.[3] *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007); *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007). In doing so, the Fifth Circuit applied Mississippi law on contract interpretation and considered the language

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[3] While not a party to this case, State Farm has appeared as *amicus curiae*.

of the policies at issue. *Tuepker*, 507 F.3d at 353-54; *Leonard*, 499 F.3d at 429-31.

The Nationwide policy language considered in *Leonard* was quite similar, although not identical, to the language contained in USAA's policy. Specifically, the Nationwide policy provided:

> Property Exclusions
>
> (Section I)
>
> (...)
>
> (b) Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly, to cause the loss. Water and water-borne material damage means:
>
> 1. flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind ....

Leonard, 499 F.3d at 424. Just as with USAA, no other portion of the policy purported to provide coverage for water damage caused by storm surge flooding. *Leonard*, 499 F.3d at 424.

The State Farm ACC language considered by the Fifth Circuit in *Tuepker* is quite different from the ACC language contained in USAA's policy. State Farm's water damage exclusion and ACC clause stated as follows:

> "2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these."
>
> ....
>
> "c. Water Damage, meaning:
>
> (1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by

wind or not; . . . .

Tuepker, 507 F.3d at 351. The State Farm policy also contained an endorsement and specific deductible denominated as a "hurricane deductible." *Tuepker*, 507 F.3d at 351-53. USAA's policy issued to the Corbans does not. However, just as with USAA, no other portion of the State Farm policy purported to provide coverage for water damage caused by storm surge flooding. *Tuepker*, 507 F.3d at 351.

Per the Fifth Circuit's decisions in *Leonard* and *Tuepker*, such ACC clause language, in conjunction with those policies' water damage exclusions, simply served to limit coverage under the Nationwide and State Farm homeowners policies to damage caused solely (or "exclusively") by wind. *Leonard*, 499 F.3d at 424; *Tuepker*, 507 F.3d at 351-53. That is exactly what USAA's water damage exclusion and ACC clause do in the context of damage that occurs during a hurricane. Coverage is limited to damage caused solely by wind – nothing more and nothing less.

This has consistently been USAA's interpretation and application of its policy language. That this is so is demonstrated by USAA's adjustment of the Corbans' claim with regard to the first floor roof that sagged downward when the structure underneath it was washed away by storm surge. USAA's adjuster, Joe Howell, read the Haag Engineering report to state that, after a structural portion of first floor roof sagged due to storm surge flooding, wind damaged the shingles and sheathing. Mr. Howell therefore included those shingles and sheathing in his wind damage estimate, and USAA paid for them. This was despite that the roof structure was previously damaged because of storm surge. The engineering report indicated that wind, alone, damaged the shingles and sheathing. *See* USAA RE at Tabs 3 & 4; RV6 at 772, 774.

This is exactly consistent with the United States District Court for the Southern District of Mississippi's post-*Leonard* opinion in *Dickinson v. Nationwide*, 2008 WL 1913957 (S.D. Miss.

April 25, 2008). While the Corbans' brief discloses and discusses a prior opinion issued on April 4, 2008, by Judge Senter in *Dickinson* (2008 WL 941783), the Corbans' counsel do not disclose to this Court that Judge Senter issued an April 25, 2008, clarifying opinion. *See* Appellant's Brief at pp. 19, 23, and 26 (discussing only the initial opinion of April 4, 2008).

While the initial April 4, 2008, opinion in *Dickinson* appeared to contradict *Leonard* and hold that the Nationwide ACC clause had no application whatsoever in a Katrina case, Judge Senter's April 25, 2008, clarifying opinion made clear that the ACC clause does have application. The clarifying opinion correctly noted that the ACC clause simply serves to make sure that the homeowners policy coverage extends only to damage caused solely by wind. The homeowners insurance coverage does not extend to damage caused or contributed to by storm surge flooding. *Dickinson*, 2008 WL 1913957 at *3, 4 (separate wind damage is covered; damage caused or contributed to by storm surge flooding is not). Damaged caused or contributed to by storm surge flooding is covered under the separate regime of NFIP flood insurance policies. The *Dickinson* clarifying opinion, consistent with Judge Dodson's ruling and USAA's position in this case, states:

> It is readily apparent that the ACC provision appies only to damage to a specific item of insured property that is attributable to *both* the excluded peril of flooding and *also* another cause (in this instance wind). Any loss in which the excluded peril of flooding plays no part, i.e., wind damage that occurs in the absence of this type of excluded water damage, does not fall within the ACC provision because it is not part of the 'the loss' the ACC provision refers to. 'The loss' the ACC provision refers to is 'any loss resulting directly or indirectly from [the peril of flooding],' and this provision cannot be fairly read to exclude any loss which occurs in the absence of the excluded peril of flooding.
>
> The ACC clause operates to preserve the listed exclusions in the event some other factor operates *with* the excluded peril to cause a loss. The ACC is not operative and has no application to damage that is in no way caused (directly or indirectly) by an excluded peril.

. . . .

> The ACC provision does not purport to apply to losses caused separately by two forces (wind and water) acting sequentially but separately. The provision only applies to 'the loss' it defines as a loss caused, directly or indirectly, by an excluded peril. Damage to an item of insured property that occurs without the effect of storm surge flooding playing any part is not within 'the loss' defined by this provision.

Dickinson, 2008 WL 1913957 at * 2, 3 (emphasis in original).

The USAA water damage and ACC clause are clear and unambiguous on their face. The USAA policy is capable of only one reasonable interpretation – damage caused solely by wind is covered, while damage caused or contributed to by storm surge is not.

D. Matters Concerning Contentions By Other Insurance Carriers Are Completely Irrelevant.

At pages 20-23 of their brief, the Plaintiffs primarily seek to litigate against the ACC clauses and ACC clause contentions advanced by insurance companies other than USAA. However, USAA is not responsible for ACC clause language in any insurer's policy other than its own. As demonstrated above, although inclusion of such clauses is common, their language differs from company to company. USAA is similarly not responsible for contentions advanced by other insurers concerning the reach of their ACC clause language. USAA's water damage exclusion and ACC clause must, under Mississippi law, be judged on their own language. *Wooten*, 924 So. 2d at ¶¶ 10-11; *Delta Pride Catfish*, 697 So. 2d at 404; *Glover*, 176 So. 2d at 258. Positions taken by other insurers in litigation over the reach of their policy language says nothing whatsoever about USAA, USAA's policy language, or USAA's positions concerning its policy language.

For example, Judge Senter's *Dickinson* opinions, discussed *supra*, had their genesis in a contention by Nationwide that "the ACC provision precludes recovery for wind damage to any item

of insured property that was later damaged by storm surge flooding. Nationwide contend[ed] that because the wind damage preceded the damage from storm surge flooding, and therefore occurred in the sequence of events, the 'in any sequence' language in the ACC invalidates the plaintiffs' claim for wind damage." *Dickinson*, 2008 WL 1913957 at * 1. **This is not a position that has ever been espoused or advanced by USAA.**

As USAA pointed out in the hypotheticals contained in its Response to the Petition for Interlocutory Appeal, that is not the way USAA applies its ACC clause. For example, if an insured's roof is breached and rainwater comes in, damaging a carpet, USAA pays for rainwater damage to the carpet. This is so, even if storm surge subsequently breaches the walls of the house and floods it, destroying the carpet. USAA would still owe for drying and cleaning the carpet to repair the rainwater damage. It would not owe for a replacement carpet, since the destruction of the carpet resulted from excluded storm surge flooding.[4]

Similarly – and not hypothetically – USAA paid for wind damage to shingles and sheathing on the Corbans' first floor roof, even though storm surge flooding damaged the structural members of it and caused it to sag downward before the wind damage occurred. The damage to the structural members was excluded from coverage because it was caused by storm surge. The damage to the shingles and sheathing was covered because it was caused solely by wind.

Likewise, USAA is not responsible for statements made by counsel for other insurers. Desire

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With regard to this example, the Corbans complain at footnote 23 of their brief that USAA did not pay them for carpet cleaning. However, there was no damage to the interior of the second floor, carpet or otherwise, because the roof was not breached. (RV1 at 81, 82, 84; RV2 at 225.) The Corbans' own expert has testified that the first floor wood floors and carpeting were destroyed by storm surge. (RV5 at 743.) The parties dispute whether wind or water opened the first floor walls and thus dispute whether there was any wind damage to the first floor interior before the storm surge entered. That will be a question for the jury.

as they may to criticize statements made or positions taken by State Farm counsel or Nationwide counsel, that has nothing to do with USAA and has no place in this case. Any alleged problem with such statements or positions needs to be addressed by other insureds in other cases involving those insurers. They are totally irrelevant here.

The claims adjusting practices of insurance companies other than USAA are similarly irrelevant. The Corbans' brief discusses a Special Target Examination of State Farm performed by the Mississippi Department of Insurance. The Corbans place a copy of the exam report in their record excerpts, despite that the exam report is nowhere to be found in the record of this case. *Compare* Record on Appeal (*passim*) with Appellants' Record Excerpts at 86-138. While the examination report concerning State Farm is a matter of public record, and this Court would be empowered to judicially notice it, such judicial notice is pointless here. USAA and State Farm are not related. They adjusted their claims differently. Their policy language is different. State Farm is not a party here. The State Farm examination report is simply irrelevant.

Finally, the Corbans wrongly criticize statements made by USAA counsel during oral argument before the Circuit Court regarding the ACC clause, contending that USAA took a position similar to Nationwide's position in *Dickinson*. It is simply not true. A reading of the transcript of the exchange between the Court and counsel for USAA demonstrates that USAA counsel was attempting to answer a question from Judge Dodson concerning a hypothetical given by the Fifth Circuit in its *Leonard* opinion. (RV11 at 1543-44.) Neither the question asked, nor the answer given, spoke to USAA's position or the manner in which it actually adjusted the Corban claim.

The hypothetical provided by the Fifth Circuit in *Leonard* which has been the subject of much discussion is:

> If, for example, a policyholder's roof is blown off in a storm,

> and rain enters through the opening, the damage is covered. Only if storm-surge flooding – an excluded peril – then inundates the *same* area that the rain damaged is the ensuing loss excluded because the loss was caused concurrently or in sequence by the action of a covered and an excluded peril.

Leonard, 499 F.3d at 419. If this hypothetical poses that only the "ensuing" loss – i.e., storm surge loss – is excluded, while the prior roof and rainwater damage is covered, then the hypothetical is consistent with USAA's position. Any reading of the hypothetical to state that the roof damage and prior rainwater damage would not be covered simply because storm surge later impacted the area is not consistent with USAA's ACC clause language or USAA's position. Counsel for USAA cannot, however, be faulted for attempting to answer a question from the Circuit Judge about what the Fifth Circuit said. That the Fifth Circuit may have given a less than clear hypothetical statement does nothing to render USAA's policy language unclear.

Regardless of any attempts at hypotheticals, the Fifth Circuit's legal holdings in *Leonard* and *Tuepker* accurately reflect the point of ACC clauses in general – to insure that homeowners policies only provide coverage for damage caused solely, or "exclusively," by wind. That is what the trial court in this case held, and it is consistent with the Fifth Circuit. Judge Dodson's decision is correct, and it should be affirmed.

The manner of adjustment of the Corbans' claim, discussed above, clearly reflects USAA's position. That position is consistent with the plain language of USAA's water damage exclusion and ACC clause. It is consistent with the *Dickinson* court's April 25, 2008, clarifying discussion of the function of the ACC clause. There is nothing unclear or ambiguous about the USAA homeowners policy ACC clause or water damage exclusion. The policy should be enforced as written.

III. ACC Clauses Are Not Against Public Policy in Mississippi.

If provisions of an insurance policy are clear and unambiguous, they are valid and

enforceable, unless some other Mississippi law or public policy precludes them. *Leonard*, 499 F.3d at 431. There is no Mississippi law or public policy that precludes water damage exclusions or ACC clauses.

The Corbans contend incorrectly that Mississippi requires insurance policies to follow an efficient proximate cause rule for coverage of damage. Mississippi imposes no such requirement. At the heart of the Corbans' argument is an attempt to invalidate the entire water damage exclusion and achieve coverage of storm surge damage under homeowners policies because storm surge flooding is caused by wind. They contend that, because wind is the efficient proximate cause of a hurricane's storm surge, Mississippi law requires storm surge damage to be covered by homeowners policies, making ACC clauses invalid.

Mississippi law does not limit insurance policy exclusions based on an efficient proximate cause rule where the policy contains an ACC clause. Mandating use of an efficient proximate cause rule in all policies will wreak havoc for both the homeowners insurance market and Mississippi's Wind Pool, erasing the difference between flood insurance and homeowners insurance. All homeowners insurance would become flood insurance for storm surge. There would be double coverage for storm surge damage by homeowners policies and NFIP policies.

A. There is No Legislative Public Policy in Mississippi That Would Preclude ACC Clauses.

The Mississippi legislature has not enacted any statute precluding ACC clauses in insurance policies. It has not enacted any statute requiring that insurance policies follow an efficient proximate cause regime. The Corbans do not direct this Court to any such statute because they cannot do so.

The Corbans, instead, argue that the Mississippi Windstorm Underwriting Act ("MWUA") somehow evinces a Mississippi public policy against ACC clauses. The proposition is fatally

flawed. If the statutory language quoted by the Corbans at pp. 32 and 33 of their brief, when combined with the actual MWUA policy form Mississippi No. 4001, is to be taken as an indicia of Mississippi public policy, then this State approves of water damage exclusions with ACC language.

The MWUA as quoted by the Corbans states that "[i]t is the purpose of this act to provide a mandatory program to assure an adequate market for windstorm and hail insurance in the coast area of Mississippi." Miss. Code Ann. § 83-34-1. At the time of Katrina, the Act went on to state that "essential property insurance" is defined as "insurance against direct loss to property as defined and limited in the Windstorm and Hail Insurance form approved by the commissioner." Miss. Code Ann. § 83-34-1(a). The Corbans acknowledge that the MWUA policy form Mississippi No. 4001 contains a water damage exclusion. They wrongly represent that the water damage exclusion contains no ACC language. The Mississippi No. 4001 water damage exclusion says, in relevant part:

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

(USAA RE at Tab 6; RV3 at 337) (emphasis added to ACC language).

Just as the USAA homeowners policy contains an ACC clause that excludes damage caused or contributed to by water, the Wind Pool policy form in use by the MWUA excludes damage "caused by, or resulting from, contributed to, or aggravated by . . . ." water, including flooding from storm surge. (USAA RE at Tab 6.) Only damage caused solely by wind is covered. If the MWUA and its policy form have set Mississippi's public policy on what constitutes essential homeowners insurance with regard to water damage exclusions and ACC clauses, then USAA's water damage exclusion and ACC clause are precisely in line with that policy. Mississippi public policy in respect to coverage provided through the State's Wind Pool recognizes that damage in which water plays

> The Federal Government has requested we notify you that coverage for Flood is available from the National Flood Insurance Program through USAA Flood Operations. If you do not already have a Flood Policy and would like information, call Flood Operations at 1-800-531-8444.

(RE at 23; RV1 at 134.)

There is nothing in Mississippi law that dictates an efficient proximate cause rule and that precludes ACC clauses in homeowners insurance contracts. Mississippi is in line with the majority rule on this point. This Court should reject the Plaintiffs' invitation to join a minority rule that would be a departure from Mississippi precedent.

IV. Enforcement of the ACC Clause Does Not Change the Burdens of Proof That Apply in Katrina Cases.

A. USAA Does Not Contend That the ACC Clause Relieves It of the Burden of Proving Excluded Damage.

The Corbans' brief proceeds on a false presumption that a valid ACC clause would mean an insurer could avoid payment of any wind damage simply by proving a property was impacted by storm surge. This is not what USAA's water damage exclusion and ACC clause provide. This is not something USAA has contended.

It is clear that storm surge flooding impacted the Corban property. The Corbans made a claim under their flood insurance policy because of damage from that storm surge flooding and were paid their flood insurance policy limits. Nevertheless, USAA evaluated the Corbans' homeowners insurance claim and paid for damage USAA found that was caused solely by wind, even after storm surge impacted the property. USAA never attempted to deny the Corbans' homeowners insurance claim for damage caused solely by wind, simply because the property also incurred damage from a separate and distinct peril – storm surge flooding – covered under a separate flood insurance policy.

The ACC clause in USAA's homeowners policy does not affect the traditional burdens of

proof that the parties will bear in this case, which were outlined by the Fifth Circuit in its decisions in *Tuepker* and *Broussard v. State Farm Fire and Cas. Co.*, applying Mississippi law as previously announced by this Court.

"Under Mississippi law, a plaintiff has the burden of proving his right to recover under the insurance policy' sued on, and this basic burden never shifts from the plaintiff." *Broussard v. State Farm Fire and Cas. Co.*, 523 F.3d 618, 625 (5th Cir. 2008) (quoting *Britt v. Travelers Ins. Co.*, 566 F.2d 1020, 1022 (5th Cir. 1978) and citing *Home Ins. Co. v. Greene*, 229 S0.2d 576, 579 (Miss. 1969)); *Tuepker*, 507 F.3d at 356. The parties' burdens of proof then differ as between the "all risk" portion of the policy that covers the dwelling and other structures and the "named peril" portion of the policy that covers personal property (contents of the dwelling and other other structures). *Broussard*, 523 F.3d at 625-26; *Tuepker*, 507 F.3d at 356.

Under the "all risk" dwelling and other structures coverages of the homeowners policy, "plaintiff still has this basic burden of proving his right to recover." *Tuepker*, 507 F.3d at 356. However, policy exclusions constitute affirmative defenses, and an insurer has the burden to show that any particular peril falls within a policy exclusion. The insurer must prove by a preponderance of evidence the applicability of the policy exclusion. *Id.* at 356-57; *Broussard*, 523 F.3d at 625-26. In other words, as to the "all risk" dwelling and other structures coverage, once the Corbans demonstrate a direct, physical loss to their property, USAA bears the burden to prove by a preponderance of evidence that any part of the damage it excluded from coverage was caused or contributed to by storm surge flooding. As the *Broussard* decision makes clear, USAA bears the burden by a preponderance of evidence to show applicability of its ACC clause to any particular item of damage. *Broussard*, 523 F.3d at 626 n.2.

The burdens of proof are different, however, under the "named peril" portion of the policy

regarding coverage of contents of the dwelling and other structures. As to these named peril coverages, the Corbans bear the burden to prove by a preponderance of evidence that any damages they seek were caused solely by a peril covered under the policy – in this case wind (not simply a "windstorm," i.e., a hurricane). *Broussard*, 523 F.3d at 625-26; *Tuepker*, 507 F.3d at 356 (citing *Lunday v. Lilitz Mut. Ins. Co.*, 276 So. 2d 696, 699 (Miss. 1973)).[5]

There is nothing out of the ordinary about these burdens of proof. Even under the ACC clause, as to the "all risk" portion of the policy, USAA bears the burden to prove by a preponderance of evidence the damage that is excluded from coverage because it was caused or contributed to by storm surge flooding. The statement in *Tuepker* about which the Corbans complain is not contradictory. *Tuepker* simply says the ACC clause and water damage exclusion clearly provide that "indivisible" damage (damage "indivisible" as between wind and water) is not covered. *Tuepker*, 507 F.3d at 354. The term "indivisible" is simply another way of describing damage contributed to by water, as opposed to damage caused wholly by water. Both are validly excluded under the ACC clause and water damage exclusion.

The Corbans' arguments that the ACC clause has somehow impermissibly changed traditional burdens of proof are without merit and provide no reason for reversal of the trial court's decision. The Corbans cannot use the burdens of proof to impose an efficient proximate cause regime in the face of a valid ACC clause.

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United Policyholders, as amicus, suggests the insured should only have the burden under "named peril" coverage to show loss because of a "windstorm," i.e., a hurricane. Based on prior Mississippi case law, the *Broussard* court considered and squarely rejected this argument. *Broussard*, 523 F.3d at 624-25 (relying on *Lunday v. Lititz Mut. Ins. Co.*, 276 So.2d 696, 699 (Miss. 1973)). While it is true that USAA's policy uses the term "windstorm" in the section regarding coverage of contents, the policy plainly excludes coverage of water damage and limits its named peril coverage to the peril of "wind."

B. Plaintiffs' Flood Damage Admissions Are Admissible As Evidence, Regardless of the ACC Clause, And USAA Can Properly Rely on Those Admissions as Part of Meeting Its Burden of Proof.

The Corbans argue that their admission of flood damage through making a flood insurance claim and accepting flood insurance proceeds for that damage should be precluded from evidence at trial.[6] They wrongly contend that, in meeting its burden of proof, USAA cannot point to this admission as evidence that excluded flood damage occurred. The Corban's contention is contrary to law and contrary to basic fairness. The Plaintiffs seek to obtain the benefit of flood insurance coverage for their property damages that were caused or contributed to by storm surge flooding, yet then deny in this case that any flood damage whatsoever occurred. The Corbans seek to argue here that 100% of the damage to their house and outbuildings was caused by wind.

Settled law on admissions and judicial estoppel prevents such blatant contradictions, which are advanced in order to gain an advantage in litigation that is contrary to truth. As the trial court correctly held, the collateral source rule does not apply to preclude introducing evidence of the Corbans' admission of flood damage. Because flood insurance benefits are paid for damage distinct and different from the property damage covered by a homeowners insurance policy, the collateral source rule does not apply. This admission by the Corbans of at least some flood damage is probative, admissible evidence. Just as with any other admission by a party, USAA is entitled to rely

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The trial court's ruling that the Corbans' acceptance of flood insurance benefits constituted an admission of flood damage was the subject of a March 27, 2008, Order separate from the Order upon which the Corbans sought an interlocutory appeal. (RE at 58-64.) Although this Court normally limits consideration of issues on interlocutory appeal to those raised by a timely petition, the Court is free, in its discretion, to entertain other issues. *R.J. Reynolds Tobacco Co. v. King*, 921 So. 2d 268, ¶ 7 (Miss. 2006) (Court would only consider issues raised by timely petition for interlocutory appeal); *but see, Public Employees Ret. System of Mississippi v. Hawkins*, 781 So. 2d 899, ¶ 4 (Miss. 2001) (appellate jurisdiction not limited to issues presented in petition for interlocutory appeal, but extends to "full scope of interests of justice").

on it as part of meeting the burden of proof on the extent of excluded flood damage.

1. Making a Flood Insurance Claim And Accepting Flood Insurance Benefits Constitutes an Admission of Flood Damage.

Judicial estoppel applies under these circumstance to prevent the Corbans from denying that their house and its contents were extensively damaged by storm surge, at least up to the amount of flood insurance benefits they themselves admittedly claimed and accepted – $250,000 for the house and $100,000 for its contents. A party who admits facts or takes a position on a material matter cannot subsequently deny the fact or change positions. In *Mississippi State Highway Comm'n v. West*, 179 So. 279 (Miss. 1983), the Court held that "a party is estopped from taking a position which is inconsistent with one previously assumed in the course of the same action or proceeding. He is bound by allegations or admissions in his own pleadings, and by admissions or agreements on the facts." *Id.* at 283.[7] In *In re Estate of Richardson*, this Court stated:

> Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation. *Dockins v. Allred*, 849 So. 2d 151, 155 (Miss. 2003). Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation.

In re Estate of Richardson, 903 So. 2d 51 (¶ 17) (Miss. 2005).

In *Letoha v. Nationwide Ins. Co.*, 2007 WL 2059991 at * 2 (S.D. Miss. July 12, 2007), Judge Senter addressed the issue of the judicial admission resulting from an insured's claim for and acceptance of benefits for flood damage under a flood insurance policy, as follows:

> By accepting benefits tendered under a flood insurance policy, an insured makes a judicial admission that the insured property sustained

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Evidence of reliance and injury are not required for judicial estoppel to preclude a change in position. *Thomas v. Bailey*, 375 So. 2d 1049, 1052 (Miss. 2005).

> flood damage at least equal to the flood insurance benefits he accepts. The insured is thereafter estopped to deny that this flood damage has occurred. The maximum the insured may thereafter recover is difference between the pre-storm value of the insured property and the flood insurance benefits he has accepted.

Letoha, 2007 WL 2059991 at * 2. Similarly, in *Ruiz v. State Farm Fire and Cas. Co.*, 2007 WL 1514015 at * 5 (S.D. Miss. May 21, 2007), the court similarly held that:

> By offering and accepting the flood insurance policy limits, the parties have indicated their agreement that at least to the extent of these benefits the damage to the insured property was caused by flooding, and the parties are now judicially estopped from denying this.

Ruiz, 2007 WL 1514015 at * 5. Likewise, in *Aiken v. USAA Cas. Ins. Co.*, Judge Senter ruled that evidence of acceptance of flood insurance benefits is admissible and instructed the jury on that admission, as well as on USAA Casualty Insurance Company's admission that some wind damage occurred to the plaintiffs' property up to at least the amount of homeowners insurance benefits paid for damage caused solely by wind. (RV9 at 1268-69, 1271-72.)

This is only fair. The Corbans cannot take a blatantly inconsistent position by denying that significant flood damage occurred to their house (at least $250,000) and its contents (at least $100,000). Allowing the Corbans to exclude their admission of flood damage and advance an completely contradictory position would not be consistent with the Court's goals of determining and advancing the truth. The trial judge recognized this when she held that the Corbans' acceptance of flood insurance benefits constituted an admission of flood damage. Judge Dodson correctly decided the question of the legal effect of the Corbans' actions as an admission, and did not abuse her discretion in determining that evidence of the admission would be admitted. The decision should be affirmed.

That the Corbans were not required under streamlined FEMA procedures to sign a formal

proof of flood loss is of no moment. They made a claim after Katrina under their flood insurance policy. They voluntarily sought and accepted flood insurance benefits. They were satisfied with the way their flood claim was handled. (RV1 at 81.)[8]

2. The Collateral Source Rule Does Not Apply to Bar Evidence of Plaintiffs' Flood Admission.

The trial judge also correctly ruled that the collateral source rule does nothing to bar the Corban's admission of flood damage from evidence in this case. (RE at 58-64; RV10 at 1398-1401.) "The collateral source rule is well established in Mississippi." *Geske v. Williamson*, 945 So. 2d 429 (¶ 18) (Miss. Ct. App. 2006) (citing *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (¶ 23) (Miss. 2001)). "A tortfeasor cannot introduce evidence of a plaintiff's collateral sources of recovery in order to mitigate the damages" the tortfeasor owes. *Geske*, 945 So. 2d at ¶ 18 (citing *Busick v. St. John*, 856 So. 2d 304 (¶ 14) (Miss. 2003)).

This is not a case in which a tortfeasor seeks to mitigate damages. Moreover, this Court has expressly held that the collateral source rule only applies when the compensation is for the same injury for which the damages at issue are sought. In this case, the Corbans compensation for flood damage is for different damage than that at issue in this case. In this case, the Corbans seek to recover more than they were originally paid under their homeowners policy for completely separate damage caused by wind.

Mississippi federal courts have instructed that flood insurance benefits and homeowners insurance (insuring damage from wind) are two separate and distinct coverages designed to insure against two separate forms of damage. *Espinosa v. Nationwide Mut. Fire. Ins. Co.*, 2008 WL

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At the very least, the Corbans' actions concerning their flood insurance claim constitute an admission against interest. Miss. R. Evid. 801(a), (d)(2).

276534 at * 1 (S.D. Miss. 2008). In *Espinosa*, the court properly found and explained that "the types of damage insured under these two policies [flood and homeowners] are mutually exclusive." *Id.* "The flood policy insures only damage caused by flooding, and the homeowners policy excludes damage caused by flood waters." *Id.* The court reasoned that a "property owner who is insured under both a flood policy and a homeowners policy may be entitled to all or part of each of these coverages, depending on which storm force or forces damaged his property and also depending on the extent of his total losses." *Id.*

The Corbans' flood insurance policy insured and paid for separate damage that is distinct from the damage for which the Corbans' seek to recover under their USAA homeowners policy. Therefore the collateral source rule is inapplicable because "the compensation is [not] for the same injury for which the damages at issue are sought." *Geske*, 945 So. 2d at ¶ 18.

Additionally, the collateral source rule never applies when evidence is offered for some purpose other than an attempt to mitigate damages. *Geske*, 945 So. 2d at ¶ 23. The trial court correctly found that USAA does not seek to use the Corbans' admission of flood damage to mitigate damages caused by wind. It is an admission that some of the Corbans' damage was caused by flood, but the amounts paid under the Corban's flood insurance policy do not offset or somehow mitigate the homeowners insurance policy limits for wind damage.

Judge Dodson's decision that the Corbans' have admitted flood damage to their house and its contents up to the flood insurance limits claimed and accepted should be affirmed, as should the decision that this is admissible in evidence and to be considered by the jury at trial. The trial court did not err in holding that this is an admission and did not abuse its discretion in holding that the evidence would be admitted at trial.

V. There Is Nothing About USAA's ACC Clause or Its Application That Is Unclear or Violative of Mississippi Law, and the Trial Judge's Ruling Should Be Upheld.

In summary, the ACC clause contained in the Corbans' USAA homeowners policy is clear and unambiguous when judged in the only relevant manner – by its own language. It simply serves to preserve the fact that the policy provides coverage for damage caused solely by wind. The policy does not cover damage caused by or contributed to by water. There is nothing about this coverage exclusion or ACC clause that contradicts Mississippi public policy.

This Court's has held that an insurance contract may negate use of an efficient proximate cause rule to define what is covered and what is not covered. *Grain Dealers Mut. Ins. Co.*, 269 So. 2d at 640. There is no special public policy stemming from Mississippi case law or other sources that changes this rule in the context of hurricane damage. In fact, the MWUA (Wind Pool) coverage that the Corbans' point to as "essential property insurance" likewise covers damage caused solely by wind and excludes damage caused, contributed to, or aggravated by storm surge flooding.

The ACC clause contained in the Corbans' USAA homeowners policy is clear, valid, and enforceable. As this Court has noted:

> [I]nsurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions in order to receive the benefit of their bargain and to ensure that rates have been properly calculated. [citation omitted] Thus, [the insurance company] must be able to rely on the exclusions set forth in this policy to receive the benefit of its bargain with [the insured].

Noxubee, 883 So. 2d at ¶ 16. The trial court's decision should be affirmed.

VI. USAA's Water Damage Exclusion Is Valid and Includes Exclusion of Damage Caused By Storm Surge Flooding.

Tucked away in footnote 13 at page 25 of the Corbans' brief is an argument that the trial court rightly rejected but which has been central to this litigation – the contention by the Corbans'

that the water damage exclusion contained in the USAA policy does not include an exclusion of "storm surge." Once again, the trial judge properly analyzed the policy according to its plain meaning and found that storm surge flooding is excluded from coverage under the USAA homeowners policy. (RV11 at 1503.) In so finding, the trial judge was in line with every other court that has considered the question under similar policy provisions. *See Leonard*, 499 F.3d at 438 (collecting cases from Mississippi and other jurisdictions).

The water damage exclusion in USAA's policy excludes the following from coverage: (1) flood; (2) surface water; (3) tidal water; (4) overflow of a body of water; (5) or spray from any of these. **It expressly excludes all of the foregoing whether or not they are driven by wind.** (RE at 40, 27; RV2 at 151.) "Storm surge" is synonymous with flooding (whether or not it was wind driven) and tidal water (whether or not it was wind driven). The "storm surge" that occurred during Hurricane Katrina was an overflow of the Gulf of Mexico ("overflow of a body of water") that was driven by wind. Plaintiffs' suggestion that "storm surge" does not fall within any of the terms contained in the "water damage" exclusion is meritless.

The Fifth Circuit has explicitly found that water damage exclusions indistinguishable from the one at issue here excluded storm surge from coverage under a homeowners insurance policy. *See Leonard v Nationwide Mutual Insurance Company*, 499 F. 3d 419 (5th Cir. 2007)(Miss.) and *Tuepker v State Farm Fire and Casualty* Company, 507 F. 3d 346 (5th Cir. 2007)(Miss.). In *Leonard,* the Fifth Circuit explained that the "phrase 'storm surge' is little more than a synonym for a 'tidal wave' or wind-driven flood, both of which are excluded perils." *Leonard*, 499 F.3d at 437. The Leonards argued, much like the Corbans, that omissions of the precise term "storm surge" created an ambiguity in the policy. The Fifth Circuit, however, found that "omission of the specific term "storm surge" does not create ambiguity in the policy regarding coverage available in a hurricane and

does not entitle the Leonards to recovery for their flood-induced damages." *Id.* at 438. In fact, the Fifth Circuit noted that it was unable to locate any court case that endorsed the "view that storm surge is a unique meteorological phenomenon not contemplated by water-damages exclusions like Nationwide's." *Id.* at 437.

In *Tuepker*, the plaintiffs argued that, despite *Leonard*, "storm surge" was not excluded by the "water damage" exclusion. The Fifth Circuit again disagreed, concluding that, "under Mississippi law, the Water Damage Exclusion is valid and that the storm surge that damaged the Tuepkers' home is a peril that is unambiguously excluded from coverage under State Farm's policy." *Tuepker*, 507 F.3d at 352-53.

In *Buente v. Allstate Property & Cas. Ins. Co.* 2006 WL 980784, *1 (S.D.Miss. April 12, 2006), the plaintiffs argued that "storm surge" is not excluded by the "water damage" exclusion because it is not specifically named in the exclusion. The United States District Court for the Southern District of Mississippi disagreed, explaining:

> Hurricane Katrina moved tidal waters from the Mississippi Sound on shore and inundated thousands of homes, some within and some beyond the ordinary flood plane established by responsible agencies of the United States government. Since the water that entered and damaged the plaintiffs' home was tidal water, I find that the damage caused by this inundation is excluded from coverage under the Allstate policy. The inundation that occurred during Hurricane Katrina was a flood, as that term is ordinarily understood, whether that term appears in a flood insurance policy or in a home owners insurance policy. The exclusions found in the policy for damages attributable to flooding are valid and enforceable policy provisions. Indeed, similar policy terms have been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions. *Fireman's Insurance Co. v. Schulte*, 200 So.2d 240 (Miss.1967); *Lunday v. Lititz Mutual Insurance Co.*, 276 So.2d 696 (Miss.1973); *Lititz Mutual Insurance Co. v. Buckley*, 261 So.2d 492 (Miss.1972); *Home Insurance Co. v. Sherrill*, 174 F.2d 945 (5th Cir.1949); *Grace v. Lititz Mutual Insurance Co.*, 257 So.2d 217 (Miss.1972); *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777 (Miss.1971); *Litiz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss.1971).

Buente, 2006 WL 980784 at *1. Similarly, in *Judy Guice v. State Farm Fire and Cas. Co.*, 2007 WL

912120, *2 (S.D.Miss. March 22, 2007), Judge Senter held that the "water damage" exclusion "covers damage from storm surge flooding, the incursion of tidal water driven on shore during this windstorm." *Id.*

It is baseless to argue that storm surge is a covered peril under the USAA homeowners policy. It is an excluded peril, even apart from the ACC clause. The water damage exclusion, itself, expressly precludes coverage of "(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.*" (emphasis added). (RV2 at 151.)

The trial judge's decision based on the plain language of the USAA policy should be affirmed.

CONCLUSION

The necessary division between coverages of homeowners insurance policies and flood insurance policies should be maintained and upheld by this Court. The necessity of that division for purposes of maintaining an affordable insurance market was recognized by the United States Congress when it created the National Flood Insurance Program. A ruling which does not maintain the intended division between the two types of coverages would result in requiring the USAA homeowners policy to cover perils it was never intended to cover and a risk for which premiums have never been paid – property damages caused or contributed to by surface water.

The Corbans essentially ask this Court to rule that the private insurance market should bear a risk that the United States Congress has recognized it cannot. This is despite that the Corbans have received the benefit of the flood insurance program put in place by Congress. As a result of that program and of their private homeowners insurance they have claimed and received over $400,000 in insurance benefits for their Katrina loss.

Respectfully, this Court should not fall into the trap of legislating and creating a separate

flood insurance program mandated by state case law. Traditional Mississippi law principles of insurance contract construction and enforceability preclude the relief the Corbans seek. The trial court's decision should be affirmed.

Respectfully submitted this 10th day of February, 2009.

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CERTIFICATE OF FILING

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Betty Sephton
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This 10th day of February, 2009.

Janet G. Arnold

CERTIFICATE OF SERVICE

I, Janet G. Arnold, do hereby certify that I have this day caused to be mailed via United States Mail, first class, postage pre-paid, a true and correct copy of the Brief of Appellee United Services Automobile Association to the following:

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