IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-00529

UNITED SERVICES AUTOMOBILE ASSOCIATION — APPELLANT/CROSS-APPELLEE

VERSUS

ADMIRAL AND MRS. JAMES LISANBY — APPELLEES/CROSS-APPELLANTS

ON DIRECT APPEAL FROM
THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF FOR APPELLEES/CROSS-APPELLANTS ADMIRAL AND MRS. JAMES LISANBY

ORAL ARGUMENT REQUESTED

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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.

Circuit Court Judge:

Honorable Billy G. Bridges, Special Circuit Court Judge

Parties:

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Gladys Kemp Lisanby
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This 15th day of December, 2009.

Respectfully submitted,

BY: /Don Barrett/
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3. Whether the trial court properly submitted the issue of the Lisanbys' claims for attorneys' fees, as additional *Veasley* damages, to the jury;

4. Whether the trial court properly denied the USAA's motion for change of venue;

5. Whether jury instruction P-16 was a proper statement of Mississippi law;

6. Whether the trial court properly admitted evidence of replacement cost as evidence of fair market value of the Lisanby home;

7. Whether the trial court properly denied USAA's motion for mistrial;

8. Whether the trial court erred in failing to allow the jury to consider the issue of punitive damages in light of overwhelming evidence of wrongdoing by USAA;

9. Whether the trial court erred in capping attorneys' fees one-third and failing to consider the substantial evidence supporting the requested fee under *McKee.*

INTRODUCTION

This Hurricane Katrina case involves what has now come to be known as a wind-water dispute, but is better described as a bad faith insurance case. Following the destruction of the Lisanby home, USAA paid approximately $21,000 on a $555,000

dwelling policy and approximately $19,000 on a $217,000 personal property claim.

After considering the testimony of sixteen (16) witnesses, more than two hundred photographs and other documents, the jury found that USAA negligently adjusted the Lisanby claim, awarding compensatory damages. After the verdict for compensatory damages the trial court ordered that the case should go to the jury on punitive damages. Two days later, during a weekend break, the trial court reversed its ruling. Following post-trial discovery on the issue of the amount of attorneys' fees and expenses, the trial court entered an order setting the amount of attorneys' fees and expenses as additional compensatory damages.

Claiming that the verdict can only be explained as the product of a county-wide "infection" of "hate" and bias, USAA contends that the claimed wind damages were a "physical impossibility." USAA's arguments, however, are at odds with the record, including the testimony of its own witnesses and evidence. USAA's own adjuster and corporate representative admitted that the Lisanby experts' explanation of substantial wind damage was not only plausible, but "probably correct."

USAA received a fair trial before a jury picked after a thorough *voir dire*. The jury's verdict in the case was supported by substantial, credible evidence and testimony and should be affirmed. The record not only supports the verdict, but also the submission of punitive damages to the jury. The trial court erred in denying the Lisanbys the opportunity to present this issue to the jury.

The trial court further erred in capping attorneys' fees at one third of the jury's verdict, disregarding the overwhelming *McKee* factors which supported the requested amount.

This Court should affirm the jury's verdict, reverse the trial court's decision on punitive damages and remand the case for consideration of punitive damages by a jury and reconsideration of attorneys' fees amount in a manner consistent with *McKee*.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

USAA's statement of the procedural history notably omits important facts. Months before trial USAA moved for a change of venue. The trial court conducted a day-long hearing in which USAA's venue "expert" testified and the court heard extensive arguments. The trial court found no evidence that USAA could not receive a fair trial in Jackson County and properly left USAA's concerns to be addressed in *voir dire*.

Bifurcating punitive damages pursuant to statute, the trial court properly instructed the jury to consider all actual damages which resulted from USAA's wrongful denial of the Lisanby claim, including emotional distress damages, attorneys fees and costs.

Following the verdict the trial court denied USAA's motion to prohibit consideration of punitive damages and instructed the parties to return the following Monday for a hearing before the judge on punitive damages. On Sunday, however, the court entered an order reversing that ruling, thereby improperly denying the Lisanbys the opportunity to present the issue of punitive damages to the jury.

The trial court thereafter allowed discovery and briefing regarding the amount of attorneys' fees and expenses to be awarded to the Lisanbys as additional compensatory damages. Following a hearing, the trial court found and held that the Lisanbys were entitled to attorneys' fees in the amount equal to one third (1/3) of the actual damages

awarded by the jury. The trial court's order did not address the substantial evidence that supported the requested amount of attorneys' fees and did not state how it applied the factors outlined in *McKee*.

Following the denial of USAA's Motion For JNOV, Motion For New Trial and Motion For Remittiur, USAA appealed. The Lisanbys' cross-appealed the trial court's refusal to submit the issue of punitive damages to the jury and the trial court's capping of attorneys' fees at one third (1/3).

II. Statements of Facts

A. The Lisanbys' Home Before Katrina

The Lisanbys' two-story home was built in 1897. (T. at 653) This Pascagoula home faced Beach Boulevard and the Gulf of Mexico, protected by a 12-foot high seawall. (T. at 235) The first and second floor were constructed differently. A large screened-in porch on the first floor on the front of the home, facing south, had been replaced during the 1970's with glass windows. (T. at 723) The second floor featured a small porch sitting atop the first floor porch. (T. at 708) The interior walls of the porch consisted of glass windows and doors with decorative old antique shutters. (T. at 743)

The construction of the floors also differed. The glass windows and doors on the first floor walls inside the porch ran from floor to ceiling. (T. at 743) The glass construction of the interior wall inside the first floor porch used less framing and did not have solid corner construction like the second floor. The diagonal cladding/framing on the walls of the second floor made them substantially stronger than the walls on the first floor. (T. at 685-686, 695-697, 699, 710, 712) The home's roof structure was overdesigned and exceptionally strong. (T. at 653)

The first floor of the Lisanby home sat 14.5 feet above sea level. (T. at 739) Admiral Lisanby verified that the first floor was 2 ½ feet above Hurricane George's 12 foot surge level in 1998. (T. at 739-740)

B. Katrina's Impact On The Lisanby Property

1. Wind Speed

Hurricane Katrina is now well known to have been the largest weather related disaster in the United States history. Katrina, unprecedented in size and destructive force, involved a "double eye-wall."

Wind speed, according to USAA's own adjuster, is the most important factor in determining wind damages. (T. at 457, 1269) The Lisanbys introduced substantial, credible evidence and expert testimony of the wind speeds that occurred at the their property during Hurricane Katrina.

Two eminently qualified meteorologists called by the Lisanbys (Colonel Richard Henning and Dr. Keith Blackwell) testified that tornadic and hurricane force winds of at least 130 mph (up to 140 mph) impacted the Lisanby home at least one hour before the water reached the first floor. (T. at 175, 235-237, 280, 305)

The Lisanbys' meteorologist testified that the outer eyewall of Katrina was on top of the Lisanby home at 7:22 a.m., before any water reached the first floor. (T. at 169, 235-236) Radar showed rotating tornadic winds impacted the Lisanby home before the water reached it. (T. at 160-161, 235-238) Dr. Blackwell showed the jury Doppler radar evidence of rotating tornadic winds impacting the Lisanby home at 3:19-3:24, 5:50, 6:00-6:07, 6:22, 6:44, 6:57 and 7:33-7:50 a.m., all before water reached the home. (T. at 258, 260, 263, 265, 270, 289-290)

Dr. Blackwell's and Col. Henning's testimony was consistent with and supported by locally recorded wind speeds and the eyewitness testimony. The Jackson County Emergency Operations Center, located near the Lisanby home in Pascagoula, recorded wind speeds of 140 and 137 mph between 8:00 and 8:30 a.m. (T. at 203) Recordings at the Ingalls Shipyard in Pascagoula measured wind speeds of 117 mph three times that morning at 7:45, 8:00 and 9:15 a.m. (T. at 281, 289)

Eyewitness testimony was similarly supportive. Butch Loper, Director of Emergency Management for Jackson County, Mississippi, testified that sustained winds fluctuated between 90 and 125 mph. (T. at 203) George Sholl, Director of the Jackson County Engineering Commission District, observed wind speeds of 137 mph. (T. at 596-597) Jim Treadway, an eyewitness called by USAA, estimated sustained wind speeds at the Lisanby home of 95 to 100 mph with additional wind gusts beginning at 6:00-6:30 a.m. (T. at 1085, 1117, 1126-1127)

Wind damage is determined based on 3-second wind gust speeds, not sustained wind speed which are average speeds over a minute. (T. at 629-631) Dr. Blackwell, the Lisanbys' meteorologist, explained that sustained wind speeds are converted to 3-second wind gusts by a factor of 1.25 to 1.3. A 100 mph sustained wind speed is equivalent to a 125-130 mph 3-second wind gust. (T. at 279)

USAA did not even hire or consult a meteorologist to determine wind speed before it denied the Lisanby claim. (T. 403-409, 453) In fact USAA's adjuster did not know the wind speed at the Lisanbys' home when he made the decision to deny the claim. (T. 1228-1229) Nor did USAA refute the testimony of Dr. Blackwell at trial.

2. Water Level

Despite its almost singular focus on water at trial, USAA never reached any final conclusion as to the water level in the Lisanby Home. The Lisanbys, however, proved that the water level in their home was less than 24 inches. (T. at 958-960)

Butch Loper, Director for Emergency Management for Jackson County, Mississippi, recorded the surge level of 16.14 feet above sea level at the Pascagoula EOC building. (T. at 205-206) The Lisanby home, 14.5 feet above sea level,[2] received less than 24 inches of water. (T. at 235, 739

Irrespective of the precise level of the first floor, the Lisanbys proved that the water level was less than 24 inches above the first floor. (T. at 958-960) Mrs. Lisanby presented to the jury undamaged napkins and linens which she recovered from a drawer in the home that was 24 inches above the floor. (T. at 958-960, 966) She also presented stamps, business cards and papers she had recovered, undamaged, from a cabinet drawer located 30 inches above the floor. (T. at 966-974) Mrs. Lisanby knows for a fact the water in her home was less than 24 inches. (T. at 959)

Gary Taylor agreed that it was a reasonable assumption that if the items in the drawer 24 inches above the floor were dry, water did not get above 24 inches in the Lisanby home. (T. at 501-502)

A water level of 24 inches or less in the home was also confirmed by the testimony of neighbors. Mr. Steve Loper, who rode out the storm, had 2 ½ feet of water above his lowest floor. (T. at 591-593) The first floor of the Lisanby home was 1 to 2 feet higher than Steve Loper's lowest floor. (T. at 528-529)

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[2]) An old 1977 survey of the property inaccurately described the property. Admiral Lisanby understood the 1977 survey level of 13 feet to be inaccurate. (T. at 738-739)

Jim Treadway, another neighbor, testified that the water was approximately 3 feet deep in Steve Loper's home. (T. at 1121) The Treadway home, built on a slab, was 3 to 3 ½ feet lower than the Loper home and even lower (maybe 4-5 feet lower) than the Lisanby home. (T. at 527-529, 546, 1134) At 8:33 a.m. the water was 6 to 8 inches above the Treadway's slab. (T. at 1087-1088, 1128-1129) Around 9:30 a.m. the Treadways walked to the Loper home next door, carrying their video camera and camera with which they took photographs at 9:52 a.m. (T. at 1099-1100)

3. Waves and Swells

Testimony about waves or swells varied only slightly among the eyewitnesses. Butch Loper, the Jackson County Director of Emergency Management, testified there was no strong current in the water. (T. at 204) He testified that there were no waves sufficient to knock people down. (T. at 204)

Jim Lindgren, a neighbor who lived four-tenths of a mile west of the Lisanby home, testified that the Gulf waters were fairly calm at daybreak. At that time winds were out of the east and were not crashing into the 12 foot seawall. (T. at 349, 351-352) Several hours later Lindgren went back out and saw that the wind had shifted, coming from the southeast. (T. at 353) The Gulf waters had still not reached Beach Boulevard. (T. at 352-353) Lingren observed that the seawall was performing its intended purpose. (T. at 353) Waves were coming in, hitting the seawall and bouncing back. (T. at 353) When water later crossed Beach Boulevard, it was standing water that was rising and there were no waves. (T. at 354) Lindren saw little wave action in the water coming across the properties on the north side of the seawall. (T. at 355-356) Lindgren even got in the cabin of his boat and did not experience any wave action. (T. at 355-356)

Steve Loper testified that while water had occasional swells and some white caps, the biggest wave he saw was 1-1 ½ feet tall. (T. at 534) There were no 10 foot waves. (T. at 536) Treadway described the waves as humps of water similar to those that a boat makes when it slows down and creates a wake. (T. at 1107-1108) Treadway likened them to swells coming over a log in the water. (T. at 1135)

The testimony of eyewitnesses was corroborated by the Lisanbys's expert Dr. Blackwell. Dr. Blackwell testified that the 12 foot seawall between the Lisanby home and the Gulf substantially altered and reduced any wave action at the Lisanby home. (T. at 235) Further, the Pascagoula coastline was sheltered from the waves, which were originating from the east and southeast. (T. at 235-236)

4. Wind Damage

Dr. Ralph Sinno, a structural engineer experienced in hurricane related damages and a Mississippi State professor, testified that the Lisanby home was structurally destroyed by the wind forces before the water reached the first floor of the Lisanby home. (T. at 669) Dr. Sinno explained that there was clear and convincing evidence of wind damage that any engineer could and should have seen. (T. at 669-670) The evidence of wind damage was overwhelming. (T. at 669-670)

Dr. Sinno explained that the glassed-in porch on the first floor was the weakest structural component of the Lisanby home. (T. at 647-648, 695-696) There was a small second floor porch sitting on top of the porch on the first floor. (T. at 708) The corners of the first floor exterior walls were not solid, and were weaker than the second floor.

Dr. Sinno testified that a 70 mph wind was sufficient to destroy the glassed-in porch. (T. at 685-686, 695-696, 708) Sinno testified that the glassed-in porch on the first

floor and the small porch sitting on top on the second floor were blown away early in the storm, exposing the then-unprotected glass windows and doors on the interior front walls of the first floor. (T. at 708, 710-712) The glass windows and doors on the first floor interior wall went from the floor to the ceiling. (T. at 732) The first floor exposed interior wall was substantially weaker than the upstairs exterior wall. (T. at 685, 697, 699, 712) The second floor walls, with diagonal cladding, solid corners and stronger diagonal framing, were much stronger than the first floor. (T. at 685-686, 710-712)

Dr. Sinno explained how the wind blew in the front of the house and entered the weaker first floor. (T. at 685-687) The breach of the first floor by the wind caused a tunneling effect throughout the home, trapping wind inside and causing a suction, a pushing from the inside. (T. at 656-657, 685-687) This tunneling effect increased wind speed and pressure, pushing in all directions inside the home. (T. at 656)

The exterior walls on the west side were pushed outward by the suction created by the east winds. (T. at 649) The stucco and cladding on all the exterior walls of the home were pushed outward by the wind pressure inside the home. (T. at 651-652, 669) The wood floor on the second level was bulging, pushed upward by the wind pressure underneath pushing up from the first floor. (T. at 657) It was clear to Dr. Sinno that the damage to the exterior envelope of the home was due to suction from the wind forces, and could be seen high above any reported waterline. (T. at 669)

Dr. Sinno noted cracks and structural failures on the second floor which were caused by the wind. (T. at 652), He also noted a large hole in the exterior wall on the second floor blown out by wind. (T. at 747, 1271-1276, 1280-1281, Ex. 74)

Dr. Sinno testified that the roof structure failed due to the wind pressures inside

the Lisanby home. (T. at 654) The roof bulged out and ballooned up, causing the chimney to break. (T. at 655) The chimney cracked from the uplift wind forces, causing an opening in the roof. (T. at 655)

Early in the storm the carport was tilted west by the east wind forces. (T. at 660, 663) Wind pressure caused the carport failure and created cracks in the concrete pedestals. (T. at 659, 663) Water does not damage concrete pedestals, but will simply go around them. (T. at 659) Dr. Sinno calculated that 103 mph winds were necessary to cause the damage to the carport and the concrete pedestals, based on the actual strength of the concrete pedestals. (T. at 662-663)

Most significantly, Gary Taylor, USAA's adjuster and corporate representative, agreed that the damage to the second floor, and to walls that had separated from the ceiling and adjacent walls, could have definitely been caused by the pressurization and ballooning effect of the wind. (T. at 1271-1276, Ex. 252, 254, 210, 253) Taylor conceded that it made sense that this type of damage could definitely be caused by the pressurization and ballooning effect of wind and probably would have been caused by wind. (T. at 1271-1276) Taylor also agreed that the ripping off of the exterior cladding, shown in the pictures of the Lisanby home, could have been caused by the wind forces. (T. at 1271-1276, 1281-1288, Ex. 74) Taylor admitted that he saw evidence of dismemberment of wall elements on the first floor of the home, damage that could absolutely be caused by the wind. (T. at 1271-1276, 1287-1288, Ex. 216) USAA documented that the house was moved off its foundation. (T. at 752)

In Dr. Sinno's opinion, the entire structural framing of the home failed before the water reached the first floor. (T. 655, 669) As Dr. Sinno explained, the evidence of wind

damage was overwhelming. (T. at 669) If he had a student in his class that did not see this wind damage he would flunk him. (T. at 670)

5. Eyewitnesses – Wind Damage

USAA made no effort to gather any information from any eyewitnesses before denying the Lisanby claim. (T. at 371) At trial eyewitness testimony regarding wind damage was substantial and supported the verdict.

Steve Loper, an eyewitness who lived directly across the street from the home, saw wind destroy the Lisanby garage. (T. at 536) Loper's hurricane shutters peeled off his house like bananas. (T. at 523-525) A 10" by 10" 19 foot long wooden beam was blown through his front window. (T. at 523-525) Around 6:00 a.m. the wind blew his truck 20 feet across his driveway. (T. at 519-520) On the second floor of his home the wind separated the exterior walls from the floor, leaving a gap of 18 inches to two feet. (T. at 531-532)

Jim Treadway, another neighbor also across the street from the Lisanby home, estimated 100 mph sustained winds with additional gusts. (T. at 1085, 1117, 1126-1127) A limb from a giant oak tree was blown through one of his front windows. (T. at 1129) Wind forces torqued his roof. (T. at 1136) Treadway thought his whole house, ballooning in a way he described as "breathing in and out," was going to explode from the wind. (T. at 1137-1138)

Jim Lindgren, a neighbor located about four-tenths of a mile west of the Lisanby home, saw shingles, roofing materials and siding being blown by the wind from the east. This windborne debris crashed into his home and his windows. (T. at 348-354) Some of his windows were completely blown in. Wind pressure ripped the locking mechanism

out of his door, allowing wind, rain and debris to enter his house. (T. at 348-354) As the wind changed direction from east to southeast, the damage to his home switched from one side of the house to the other. (T. at 351-354)

6. USAA's Expert – Doug Smith

USAA elected not to call the engineer it relied on to deny the Lisanby claim. USAA's decision was not surprising. That engineer, who used preliminary wind data which was incomplete due to power outages, inexplicably mistook the wind direction for wind speed. (T. at 458-461) Instead, USAA hired Doug Smith, who, before Katrina, had never determined the cause of damage to a home that had been subjected to hurricane tidal surge. (T. at 1468) In fact, Smith had never before investigated any structure that had been damaged by water forces. (T. at 1379) Smith's qualifications require further explanation. Before Smith was hired by USAA's counsel, Mr. Copeland, he was asked to prepare a report on his strategy for determining wind damages for a slab. (T. at 1476-1479) After Doug Smith presented his strategy to USAA's attorney, in October 2005, he was hired to work on cases for Mr. Copeland's law firm, including this case. (T. at 1476-1479)

Smith's demonstrated "strategy" was delivered. Smith's conclusions for the Lisanby property (wind damage limited to removal of some shingles) were essentially identical to his opinions in every slab case since being hired by Mr. Copeland (approximately 50 slab cases). (T. at 1490)

Smith, however, admitted that wind speeds of only 81 mph could cause the failure of a porch or carport. (T. at 1547) He testified that the entire house can shift off its foundation from 3-second wind gusts of 103 mph and at wind speeds of 113 mph the

exterior walls can collapse. (T. at 1547-1548) Smith agreed that if you consider the wind speed estimates of any one of the meteorologists, including USAA's trial meteorologist, the entire house could have shifted off of its foundation. (T. at 1548)

Smith also confirmed Dr. Sinno's testimony that the wind forces exploit the weakest areas of a structure. The longer wind blows and changes direction, the better wind's chance to find a weak area in the structure. (T. at 1516-1517)

Doug Smith is not a meteorologist. (T. at 1467) Smith ignored all of the wind speed evidence presented by the meteorologists, including the meteorologist USAA had hired for trial. (T. at 1474) In order to support his calculations that the wind forces did not cause damage to the Lisanby home, Smith used a 3-second wind speed of 99 mph, an unsupported speed far less than any estimate presented by the meteorologists at trial. (T. at 1389)

Smith prepared a wind and water force comparison. (T. at 1519) He assumed the Lisanby home was built to withstand 130 mph wind gusts and assumed the 3-second wind gusts were less than 130 mph (only 99 mph). (T. at 1389, 1519-1520) Based on these incorrect and unsupported assumptions, Smith concluded that 99 mph 3-second wind gusts did not cause any damage to the Lisanby home. (T. at 1492, 1519-1520)

Smith admitted that he had never before done such calculations. (T. at 1493) Smith used the formula and information provided by another engineer, copying his work and accidentally leaving that engineer's name (Donald Slinn) on his calculations. (T. at 1493-1504) Smith himself made no actual calculation or determination of the actual strength of any component of the Lisanby home. (T. at 1521-1523)

Smith admitted that one does not have to be a Ph.D. to determine there is no wind

damage, if you assume all components of the home were built to withstand 130 mph winds and then assume the wind speed did not exceed 130 mph. (T. at 1519-1520)

7. **Imaginary Five Foot Water Line**

At trial USAA attempted to prove a five (5) foot water line. The testimony and evidence on the water level offered no support for that proposition.

Gary Taylor, the USAA adjuster, did not know the water level in the Lisanby home because he was unable to locate any identifiable water line. (T. at 411-412, 439-440) Taylor admitted that he did not think to look in the drawers (dry at 24 inches above the floor). (T. at 411-412) Even though he was unable to locate a water line in the Lisanby home, Taylor represented to the federal government that the water line inside the home was 10 feet. (T. at 446)

Admiral Lisanby also did not see a water line. (T. 918) Admiral Lisanby simply pointed out to the USAA adjuster that he saw water on some dishes in a kitchen cabinet, about 4 ½ - 5 feet. (T. at 912-915, 1033-1034) The source of that water was unknown. He saw no water in the other adjacent cabinets. (T. at 912-915)

Based on that discussion, Laura Music, USAA's personal property adjuster, directed the Lisanbys to specify the personal property above and below an arbitrary five foot line. Based on instructions from USAA, Admiral Lisanby used the wainscoting on the wall (at about 5 feet) as the line for the inventory of personal property. (T. at 912-918, 1034) The five foot water line was an arbitrary water line specified by USAA. (T. at 761-762, 914-915) It is undisputed that USAA never determined the water level in the Lisanby home. Yet USAA used an arbitrary, self-serving mark to deny coverage. (T. at 439-440)

C. USAA's Grossly Negligent Investigation of the Lisanby Wind Damage Claim

Upon receiving information on August 29, 2005 that the "roof of the Lisanby's home had been blown off," USAA internally reported the loss as "flood from hurricane." (T. at 391-394) Two days later, USAA placed into reserve $3,000 for wind damage on a $555,000 dwelling claim before it inspected the loss. (T. at 396-397)

Gary Taylor, the USAA adjuster, inspected the Lisanby home, but took no notes. (T. at 415) Taylor made no effort to determine whether there were any eyewitnesses in the surrounding area. (T. at 371-372) Although he was introduced to Steve Loper, an eyewitness who rode out the storm directly across the street from the Lisanby home, Taylor spoke only briefly with him and could only recall a short conversation about the roof of Mr. Loper's home. (T. at 1212-1213) Taylor never spoke with Steve Loper again. Taylor never spoke with any of the other eyewitnesses, Jim Lindgren, Jim Treadway, Butch Loper or George Sholl. (T. at 371-372)

Taylor, unable to identify a water line, admitted that he never thought of looking in cabinet drawers. (T. at 411-412, 439-440) USAA never surveyed the property to determine the water level in the Lisanby home. Although Taylor did not know where the water line was in the Lisanby home, he lied to the Federal Government, representing that the water line was 10 feet in the Lisanby home. (T. at 446)

Taylor testified that since he was not qualified to determine the cause of damage to the home, he chose an engineering firm, one that he had been pleased with in the past, to do so. (T. at 400-402, 408, 1214) Taylor simply faxed the firm an assignment sheet and never sent the firm any additional information. (T. at 404) Even though this was the

engineering firm's first Katrina report for him, Taylor never spoke to the engineer about the assignment or the report. (T. at 406-407, 455, 472, 494-495) Taylor chose not to be present when the engineer inspected the property. (T. at 406-407) Prior to the engineer's inspection, USAA decided to pay additional living expenses "only until the engineering report is received." (T. at 421-422, 424)

Prior to receiving the engineer's report on causation, USAA's adjuster represented to the federal government that there was no evidence of significant wind damage to the Lisanby home and that the damage to the home had been caused by flood. (T. at 451) After telling the federal government that the cause of damage was flood, Taylor then lied to Admiral Lisanby, telling him no determination of causation had yet been made. (T. at 449-450) Before even receiving the engineer's report, Taylor prepared a wind damage estimate on October 19th, which included only the roof and upstairs hallway as wind damage.

Without ever talking to the engineer, USAA denied the Lisanby claim based on a preliminary, unsigned interim report from the engineer contained as an e-mail. The e-mail had no photos or other attachments. A simple review of the interim report would have revealed that the engineer did not even know that there was a garage and did not know where the guesthouse was located. (T. at 453,466) Had USAA seen the report's attachments prior to denying the Lisanby's claim, USAA would have recognized that the engineer was using a weather report dated September 2, 2005, which he printed off the internet, to determine wind speed. This weather report cautioned that it was based on preliminary wind speeds that were incomplete due to power outages. (T. at 453-466)

A cursory review would also have revealed that the engineer did not know how to

read the weather report. USAA's engineer used the wind direction on the report as the wind speed. (T. at 453-466) Although this was the first Katrina report from the engineering firm Taylor did not even bother to look at the photographs or exhibits supporting the report prior to denying the claim. (T. at 455-456)

USAA denied the claim without a causation determination of the damage to the garage. In fact, USAA had no specific information on the garage. (T. at 480-481, 494-495) USAA did not even consider the garage in making its decision to deny the claim. (T. at 480-481) Steve Loper, one of the eyewitnesses, saw the wind cause the Lisanby garage to implode. (T. at 536)

The engineer's report used to deny the claim also did not give a cause of damage for the guesthouse/cottage, the structure only identified by USAA as being located on piers. (T. at 489-491)

Taylor did not even document or consider the curtains from the first floor of the home, which had been blown into the tops of the trees west of the property. Although he knew this was evidence of significant wind activity, Taylor failed to document or consider the massive oak tree next to the Lisanby home that was blown down directly west. (T. at 441-442)

Wind speed, admitted by USAA to be the most important factor in determining wind damage, was unknown to USAA when it denied the claim. (T. at 457, 1229, 1269) USAA never hired a meteorologist to determine wind speed at the home before denying the claim. (T. at 403-409, 453)

The only wind speed identified by USAA's engineer was at the Trent Lott Airport, nine miles inland, at 4:53 a.m. (T. at 458-465) USAA's engineer thought the

wind direction of "090 degrees" was the wind speed. (T. at 466)

Taylor admitted that the wind speed data at the Trent Lott Airport should not have been used by the engineer to determine wind speed at the home. (T. at 460) Taylor agreed that data that was incomplete due to power outages should not have been used to determine wind speeds at the Lisanby home. (T. at 460-461) Taylor, who admitted that he is not an expert engineer, stated that he was not even sure if the engineer he used to deny the claim was an expert either. (T. at 466)

Taylor, who made the decision to deny the claim, admitted that the pressurization and ballooning effect of the wind described by the Lisanbys' expert could definitely have caused this damage to the home. (T. at 1271-1276 In fact, Taylor admitted it would make sense that these kinds of damages to the Lisanby home could occur from the pressurization caused by the wind, and probably would occur. (T. at 1273) Taylor considered this to be fairly common knowledge. He also admitted that he did not believe 2 feet of water could cause the damage seen at the Lisanby's home. (T. at 1271-1276, 1287-1288)

Despite knowing about pressurization and ballooning, Taylor did not consider them when he denied the claim. (T. at 1271-1276, 1279) Taylor also admitted that he did not think water caused the big hole in the second floor depicted in Ex. 74. (T. at 1280-1281)

When he got the report from the engineer that represented the water level was just five feet in the Lisanby home, Taylor asked himself could five feet of water cause all that damage that high on the ceiling as seen in Ex. 216. (T. at 1288) In an internal e-mail dated October 20, 2005, Taylor acknowledged that he could not believe 5 feet of water

could cause that damage. (Ex. 183, T. at 1352) Taylor certainly did not contend at trial that 2 feet of water could cause all the damages to the first floor of the Lisanby home as depicted in Ex. 216. (T. at 501-502)

Upon receiving the engineer's report USAA, incredibly, allowed additional living expenses for only 7 days for the Lisanbys to repair the home and move back in. (T. at 426-427) USAA described this as a "generous amount" in its internal records. (T. at 426-427) USAA's dwelling adjuster, who denied the claim, never even spoke with Mrs. Lisanby. (T. at 499, 1180)

Professing its need to further its investigation, USAA instructed Mrs. Lisanby to create a very detailed and precise inventory list, instructing her to divide the personal property above and below the "five foot line." (T. at 916, 1016) The list had to be done in a certain way, to include the date it was received and as much information as possible about every item. (T. at 1016) Mrs. Lisanby made phone calls and researched the items on the internet. (T. at 1018) Mrs. Lisanby spent almost five months completing the requested inventory. (T. at 764, 1017) USAA told Mrs. Lisanby that if she prepared the inventory as instructed it would be worth her time. (T. at 1020)

USAA told Mrs. Lisanby she would be paid for all damaged personal property above the five foot line. (T. at 1016, 1311-1312) The USAA adjuster was also encouraging about payment for the contents below the five foot line, telling Mrs. Lisanby that she "would go to bat for her" for items below the five foot line. (T. at 1016)

Mrs. Lisanby inventoried $217,118 of inventory above the five foot line and $259,715 of inventory below the five foot line, not reimbursed by flood coverage. (T. at 1016) USAA lied to the Lisanbys about paying for the content loss above the five foot

line. (T. at 1020) USAA paid $19,746 of a $217,118 wind claim for personal property above the five foot line. (T. at 795) USAA paid nothing on $259,715 of personal property below the five foot line. (T. at 795)

THE IMPACT OF USAA'S NEGLIGENT DENIAL

Starting after USAA denied their claim, Mrs. Lisanby was diagnosed with depression. Her energy level dropped and she was unable to sleep. She suffered very serious attacks of shingles caused by her stress. She developed urticaria, causing hives and rashes which were very painful and disfiguring, also caused by stress. (T. at 800-804) She is currently taking medication for her shingles, urticaria and depression. (T. at 805)

Admiral Lisanby has also been affected by USAA's denial. He has become very nervous, has given up his hobbies and can no longer sleep. He suffers from anxiety and depression. He suffers panic attacks. (T. at 806-808) Dr. Gibson related Admiral Lisanby's medical problems to the problems he was having with USAA. Admiral Lisanby takes medication for the depression and panic attacks and he has been referred to a psychiatrist for therapy. (T. at 806-809)

From this sequence of events, it was clear to that USAA did not investigate the Lisanbys' claim in good faith and had made up its mind to deny the claim before it ever got around to looking at the facts. (T. at 953) USAA acknowledged that it would not have conducted a full and thorough investigation if it denied the claim without having all the necessary facts. (T. at 369)

SUMMARY OF THE ARGUMENT

The record in this case reflects eyewitness testimony, physical evidence and

expert testimony that wind effectively destroyed the Lisanby home before water rose into it. The verdict, coming after a vigorously contested ten day trial, was rendered by a jury that was picked by a thorough *vior dire*. The decision has no earmarks of a runaway verdict, but rather is supported by substantial record evidence and testimony, including that of USAA's own witnesses.

The trial court, applying clear Mississippi law, properly instructed the jury to consider whether USAA negligently adjusted and denied the claim. The verdict was justified in light of overwhelming evidence of wind damage that USAA ignored. USAA's negligent investigation in adjusting the claim warranted additional compensatory damages for emotional distress and attorneys' fees.

The only errors warranting action by this court were the trial court's *sua sponte* order denying the Lisanbys the opportunity to present the issue of punitive damages to the jury and the trial court's failure to apply the *McKee* factors, capping attorneys' fees at one-third of the verdict.

ARGUMENT

I. Applicable Standards of Review

Although review of a trial court's denial of a JNOV motion is *de novo*, this Court will affirm the denial where there is "substantial evidence to support the verdict." *United States Fidelity and Guaranty Co. of Mississippi v. Martin*, 998 So.2d 956, 964 (Miss. 2008), "Substantial evidence" is "information of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions." *Id.*

In reviewing a trial court's denial of JNOV this Court must "'consider the

evidence in the light most favorable to the Appellee, giving that party the benefit of all favorable inferences that may be drawn from the evidence.'" *Martin*, 998 So. 2d. 964, quoting *Spotlite Skating Rink, Inc. v. Barnes*, 988 So.2d 364, 368 (Miss. 2008) (other citations omitted). "The denial of a JNOV will only be reversed if 'the evidence, as applied to the elements of [the] parties' case is either so undisputable, or so deficient, that the necessity of trial of fact has been obviated." *Id.*, See also *White v. Stewman,* 932 So.2d 27, 32 (Miss. 2006).

Review of a trial court's denial of a Motion for a New Trial is, of course, guided by a lower standard of review than a JNOV. *Taggart v. State*, 957 So.2d 981, 987 (Miss. 2007), *Sheffield v. State*, 749 So.2d 1231, 1271 (Miss. 1999). A Motion for New Trial "simply challenges the weight of the evidence" and this Court will reverse only where the trial court has abused its discretion. *Id.* This Court "will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." *Id.*, citing *Sheffield*, 749 So.2d.1271 Mere factual disputes "are properly resolved by a jury and do not mandate a new trial." *Id.*

II. The Record Reflects Overwhelming Evidence of Wind Damage to the Lisanby Home

USAA's brief fails to demonstrate an absence of substantial evidence supporting the verdict. The record contains in excess of 200 photographs of the Lisanby property, before and after the hurricane. These photographs were the subjects of conflicting expert testimony. The Lisanbys' experts testified that the physical evidence, including the photographs, showed damages caused by wind that were uncompensated by USAA. USAA's own witness Gary Taylor admitted that the cause of the damages was not clear,

requiring him to hire an engineer. In this wind-water dispute, Taylor's testimony alone satisfies the standard to affirm the verdict.

USAA's discussion of some of the 200 plus photographs and some of the testimony amounts to argument concerning the relative weight of the evidence. Juries properly weigh conflicting evidence every day in this state.

In arguing "physical impossibility," USAA curiously analogizes this case to *Blossman Gas, Inc. v. Shelter Mut. Gen. Ins., Co.* 920 So. 2d 422 (Miss. 2006). USAA, however, fails to account for the huge difference in facts. In *Blossman* the plaintiff's theory of liability was clearly contradicted by singular physical evidence. While *Blossman* illustrates the "physical impossibility" label, the label simply does not fit here.

In *Blossman* Shelter and Blossman asserted competing theories as to the cause of a house fire. Blossman's theory was virtually unsupported by any physical or other evidence. Shelter presented uncontradicted evidence concerning the placement of gas lines which were alleged to have caused the explosion and fire.

Shelter presented the following facts to demonstrate that Blossman was responsible for the destruction:

(1) The gas fireplaces installed by Blossman were the only gas appliances in the part of the house that was destroyed;

(2) The entire gas system was installed by Blossman;

(3) Blossman employees installed the fireplaces without reading instructions;

(4) Blossman connected the fireplaces improperly with two connectors and a sealant;

(5) Blossman employees pieced together two pipes together improperly;

(6) Blossman did not do a leak check on the fireplace;

(7) The home was vacant at the time of the explosion and all other appliances were shut off;

(8) A witness heard the explosion, which sounded like thunder;

(9) A witness observed flames in the area of one of the gas fireplaces;

(10) Glass blown out from the home showed that there had been an explosion:

(11) Concrete in the fireplace showed the presence of intense heat.

Blossman's experts did not cite any specific evidence to support their theory that Blossman had properly installed the fireplaces. Blossman's defense of an "unknown origin and cause of the fire" was supported by no "specific explanation of why the fire occurred or where it originated." 920 So. 2d. 425.

Affirming the trial court's granting of Shelter's motion for a new trial, this Court also noted clear evidence of jury bias and prejudice. Following the verdict several members of the jury "approached and hugged counsel for Blossman and Blossman's corporate representative." *Id.*

In vivid contrast to *Blossman,* the Lisanbys and their experts presented extensive, substantial evidence and testimony that was consistent with and supported the verdict. This case involves no mystery as to the cause of destruction of the Lisanby home. Unlike the experts in *Blossman*, the Lisanbys' experts testified with precision as to the bases for their conclusions regarding the damages caused by wind. Unlike *Blossman's* experts, the Lisanbys' experts specifically explained the cause of destruction.

Wrestling to make the "physical impossibility" label fit, USAA twists the record, especially the testimony of Dr. Sinno. USAA suggests that Dr. Sinno claimed that there

was no water damage. The record reflects that this is untrue.

Dr. Sinno testified that wind essentially ruined the Lisanby home prior to the arrival of any water. Dr. Sinno testified that wind was the proximate cause of the substantial destruction of the Lisanby home. Dr. Sinno testified that water damaged the Lisanby property, but only after wind had damaged most of the home. On extensive cross-examination, Dr. Sinno explained the bases for his conclusions concerning wind versus water damage.

USAA's essential assertion, that Dr. Sinno's testimony is at odds with "physical reality" is actually a disagreement, albeit predictable, between experts. The jury properly weighed the competing expert opinions.

Neither Dr. Sinno nor any other witness called by the Lisanbys suggested that wind only blew through the first story of the Lisanby home. The jury heard testimony from Dr. Sinno concerning the forces and the resulting destruction that occurred on the first floor and also on the second floor.

Colonel Richard Henning testified that the Lisanby home was subjected to wind gusts in excess of 140 miles per hour, well before any water would have reached the Lisanby home.

Dr. Keith Blackwell testified that the Lisanby home was subjected to three second gusts in excess of 125 miles per hour, long before water arrived.

Butch Loper testified that there were wind gusts of 140 miles per hour in the area in the early morning. According to Loper there were winds in excess of 125 miles per hour at 8:00a.m., well before any water arrived at the Lisanby home.

Using a narrow view of the record, USAA focuses on photographs taken by Jim

and Rebecca Treadway, neighbors of the Lisanbys. The photographs and video do not depict the sequence of events at the Lisanby home or show what effect wind had on the Lisanby home prior to water arriving.

The testimony of the Treadways actually supported the Lisanbys' case. The Treadways testified that they only had six to seven inches of water by 8:30 a.m. Their home, built on a slab, and not three and a half feet above ground like the Lisanby home, was at 11 feet 3 inches. With six to seven inches of water, it is clear that there was no water in the Lisanby home at 8:30 a.m.

USAA notes that the Lisanby home was situated near the Gulf of Mexico. Of course: that is where the two feet of water came from and also where the highest and most damaging winds occurred. (T. at 203)

USAA argues that Admiral Lisanby "admitted the house was damaged by Katrina storm surge." Admiral Lisanby was not present in the home at the time of the storm and had no expertise to determine the cause of damage. USAA seized on this elderly gentleman's off-hand comment to abdicate its own duty to provide him with an adequate and thorough investigation.

USAA claims that the photographs show that the first floor of the house was destroyed and the second floor "remained intact." Dr. Sinno, using these same photographs, showed and explained the extensive damage to the whole house. According to Dr. Sinno, there was substantial damage to the upper level of the house, caused by the very same wind that caused damage on the first floor. According to Dr. Sinno, wind caused the substantial destruction of the structural integrity of the home, rendering it unsafe and useless. Dr. Sinno noted that wind created gaps in the walls on the second

floor and that, but for the strength of the framing supporting the roof, the second floor would have been even more damaged.

USAA challenges the proof regarding the Lisanbys' claims for contents. These challenges are likewise challenges of the relative weight of the testimony and evidence. Dr. Sinno, using photographs of the property, including the interior, testified that wind caused the first floor damage, "early in the game" and caused extensive destruction of the interior, including contents. Dr. Sinno's testimony, coupled with the photographs and testimony from Admiral and Mrs. Lisanby, was more than sufficient to support the verdict for damages for contents.

III. The Trial Court Properly Admitted Evidence of Damages

A. Actual Cash Value/Replacement Cost Evidence was Properly Admitted

USAA contends that the trial court improperly admitted evidence of replacement cost. Although Admiral and Mrs. Lisanby were unable to rebuild their home, due to USAA's failure to properly pay their claim, this evidence was properly admitted. As admitted by USAA in its brief, it is universal practice in the industry to measure actual cash value by replacement cost, less depreciation. See *Penthouse Owners Association, Inc. v. Certain Underwriters at Lloyds* 2009 WL 94835 (S.D. Miss. Jan. 13, 2009.) Admiral Lisanby testified that the actual cash value of all his property immediately before Katrina was $2,000,000 and that deducting the real estate value of $400,000, the total actual cash value was $1,600,000. (T. at 734-735) USAA stipulated the replacement cost value of the Lisanby home was $1,577,324, the garage was $45,463 and the guest house was $88,746. (T. 792-793) Admiral Lisanby testified the replacement cost value of all this property was $1,700,000. (T. 754) Admiral Lisanby testified concerning the

excellent condition of the home. This testimony, along with the photographs, gave the jury evidence of any depreciation. Furthermore, USAA submitted jury instruction D-10, refused by the trial court, which described the measure of dwelling damages in terms of "fair market value." Fair market value proof was put on by the Lisanbys.

B. Additional Living Expenses Were Properly Awarded

Additional living expenses were properly awarded. USAA's policy provided that additional living expenses living expenses were owed if the Lisanbys' house was rendered uninhabitable by a covered peril. The substantial and overwhelming proof supported the verdict that there was a covered loss, entitling the Lisanbys to additional living expenses.

C. The Trial Court Properly Refused to Bifurcate the Lisanbys' Emotional Distress Claims

The trial court's granting of the jury instructions and allowing consideration of emotional distress damages was consistent with well settled law. See *Universal Life Ins. Co. v. Veasley*, 610 So 2d 290 (Miss. 1992) and *United American Ins. Co. v. Merrill,* 978 So. 2d 613 (Miss. 2007). *Veasley* and *Merrill* clearly hold that emotional distress damages may be awarded as additional compensatory damages and are properly considered in the compensatory phase of the trial. USAA's argument in this regard is unsupported in the case law.

USAA cites *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888 (Miss. 2006) arguing that emotional distress claims must be bifurcated and made part of the second phase of trial. The *Merrill* court, however, considered *Hartford v. Williams* and rejected this very argument. Citing *Veasley*, the court noted that it had moved away from the requirement of proof of a "separate independent tort" to allow for emotional distress

and mental anguish damages. Consistent with this Court's ruling, the trial court properly allowed the instruction of the jury to consider emotional distress damages in the first phase.

D. The Trial Court Properly Submitted The Issue Of Attorneys Fees As An Element Of *Veasley* Damages

Attorneys' fees and expenses, like emotional distress damages, are recoverable in a successful breach of contract action against an insurance company where a jury finds negligence. *Veasley,* 610 So.2d at 295 ("[a]dditional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected....It is no more than just that the injured party be compensated for these injuries.") *Merrill*, 978 So.2d at 630 (quoting *Veasley* with approval); *Essinger v. Liberty Mut. Fire Ins. Co.*, 2008 WL 2631047, at*1(5th Cir. July 7, 2008) ("Mississippi law recognizes that negligent conduct of the insurance company can justify recovery of, for example, attorneys' fees"); *Simpson v. Economy Premier Assur. Co.*, 2006 WL 2590620 at *2(N.D. Miss. Sept. 8, 2006) (the Mississippi Supreme Court "has sanctioned the application of a separate tier of damages (often referred to as *Veasley* damages) which may include attorneys' fees and emotional distress damages...").

The jury found that USAA breached its duty to promptly, fairly, fully and thoroughly investigate the Lisanby claim and that this failure caused the denial of their valid claim (See Jury Instruction No. P.16). Consequently, attorneys' fees and expenses were payable as an element of compensatory damages.

USAA cites *In Re: Guardianship of Duckett* 2008 WL 2372830 (Miss. 2008) to suggest that attorneys' fees cannot be allowed in the absence of punitive damages. *Duckett*, however, was not an insurance case and did not involve *Veasley* damages. In

Duckett, the defendant bank was found liable for damages for unauthorized withdrawal of guardianship funds and the court awarded attorneys' fees. This Court reversed, and on the issue of attorneys' fees, found that there was no contract between the plaintiffs and the bank, nor any applicable statute for the award of attorney's fees.

Duckett merely illustrates the application of the general American rule regarding attorneys' fees. Likewise *Tupelo Redevelopment Agency v. Gray Corp. Inc.*, 972 So. 2d 495 (Miss. 2007) is not an insurance case and did not address *Veasley* damages.

USAA contends that *Veasley*'s reference to attorneys' fees was "*mere dicta,*" citing *Miller v. Allstate Insurance Company.* 631 So.2d 789 (Miss. 1994) *Miller,* did not involve claims of extra-contractual damages as in *Veasley.* In *Miller* a passenger injured in a car accident brought a declaratory judgment action against the driver's insurer, seeking a determination of coverage. No claim of wrongful or negligent denial was made. *Miller also* only reflects the general American Rule that attorneys' fees are not ordinarily recoverable in the absence of a contract or statute.

USAA contends that even if *Veasley* applies, that attorneys' fees cannot be awarded without evidence of a lack of arguable reason for the denial of the claim. In *Veasley* the Court noted that it had "moved away" from the requirement of a finding of a "separate independent intentional tort" (i.e. bad faith) 978 So. 2d at 630. The *Veasley* court held that an insurer is liable for all foreseeable consequential damages caused by an insurer's "failure to pay a valid claim through negligence of its employees..."*Id.* An insurer is liable for *Veasley* extra-contractual damages for negligent investigation of a claim. This is clearly reflected in *Merrill,* where the Court affirmed and approved Instruction P-21, which stated:

> "If you find from a preponderance of the evidence that United American failed to conduct a reasonable, prompt and adequate investigation, and if you further find from a preponderance of the evidence in this case that its failure, if any, caused the denial of a valid claim, then your verdict may be for the Plaintiff.

This instruction contained no reference to arguable basis.

This Court has held that the "arguable basis" finding is not necessarily required to submit a claim for punitive damages to the jury. See *Stewart v. Gulf Guaranty Life Insurance Co.*, 846 So.2d 192, 201 (Miss.2002) ("[c]onversely, this court has recognized that the issue of punitive damages may be submitted, notwithstanding the presence of an arguable basis, where there is a question that the mishandling of a claim or the breach of an implied covenants of good faith and fair dealing may have reached the level of an independent tort.") As lack of "arguable reason" is not an absolute prerequisite to punitive damages it is certainly not a prerequisite to extra-contractual compensatory damages under *Veasley*.

The Lisanbys, however, put on substantial proof of lack of arguable reason. The jury made a finding under *Veasley* that the Lisanbys were entitled to extra-contractual damages. The distinction between the types of damages, whether emotional distress or other consequential damages such as attorneys' fees, is not explained in USAA's brief.

In *Merrill* this Court stated that negligence in claims handling which causes foreseeable damages gives rise to compensatory damages such as attorneys' fees. Federal courts have applied this holding, although their pronouncements may not be as clear.

In *Essinger* the Fifth Circuit discussed this "intermediate form of relief" and held that attorneys' fees are among the compensatory damages that may be recovered. 534 F.

3d at 451. *Essinger* reflects a more restrictive view of the law than the this Court's recent pronouncement in *Merrill*, which governs. Even if this obsolete and more restrictive view of the law were applied, however, the Lisanbys still prevail.

In *Essinger* the court noted that "Mississippi case law provides for more than one form of damages when an insurance company tortiously breached its contract." Id. "The equity in Mississippi's approach arises from the fact that an insurance company's financial default under a policy provision may be less that the cost to the insured of judicially enforcing a correct payment. The level of extra-contractual damages an insured may be entitled varies based on the nature of the conduct by the insurance company." 534 F.3d at 451, citing Jeffrey Jackson, Miss. Ins. Law and Prac. Section 13: 21(2007).

The *Essinger* Court further noted that Mississippi law distinguishes between "two separate categories of damages":

(1) Punitive damages for egregious conduct and

(2) The "lesser level of damages ... where the insurer lacks an arguable basis for delaying or denying a claim, but the conduct was not sufficiently egregious to justify the imposition of punitive damages." *Id.*

Federal trial courts have taken the same approach as the trial court. *In Simpson v. Economy Premier Assur. Co.*, 2006 WL 2590620 (N.D. Miss. 2006) Judge Mills denied the Defendant's motion in limine which sought to exclude all emotional distress proof in the compensatory phase of the trial. Denying the motion, Judge Mills found that the "Supreme Court has sanctioned the application of a separate tier of damages (often referred to *Veasley* damages) which may include attorneys' fees and emotional distress

damages, even absent proof of the sort of outrageous conduct which might make punitive damages appropriate." 2006 WL 259620 at p. 2 (emphasis added). *Essinger* and *Simpson* correctly applied the clear rule in Mississippi that an insurer may be held liable for attorneys' fees as an element of *Veasley* damages.

USAA cites *Sports Page, Incorporated v. Punzo,* 990 So. 2d 1193 (Miss. Ct. App. 2005) for its argument that attorneys' fees may not be awarded pursuant to *Veasley.* USAA reliance on *Punzo* for this argument is misplaced. In *Punzo* the Court of Appeals held that attorneys' fees were not proper in a breach of contract case involving a contract to renovate a restaurant. The Court of Appeals held that *Veasley* did not "establish a new, pure foreseeability standard for awarding attorneys' fees in a breach of contract case." 907 So. 2d at 1204. *Punzo* merely states that *Vealely* damages have not been extended to other breach of contract cases not involving insurance.

E. The Trial Court Properly Denied USAA's Motion For Change Of Venue

USAA claims that the jury's verdict was the product of bias and that the trial should have been moved. USAA complains of "negative media coverage" prior to and during trial. USAA's complation of media, unsupported by affidavit, is certainly only a small fraction of media related to the storm and issues of insurance. Much of the media, (including some offered by USAA), favored insurers.

USAA complains that Admiral Lisanby gave an interview after the jury had returned its verdict. Obviously, this report and all reports of the verdict are of no consequence and could not have impacted the jury.

USAA argues "the entire *venire* agreed there is a public sentiment in Jackson County that USAA should lose, regardless of the evidence" and that "not a single *venire*

person disagreed that is a public sentiment in Jackson County that the insured should recover in any Katrina case." USAA's counsel, however, also asked the *venire* if anyone had a problem with the concept that the law treats corporations equally. None of the *venire* indicated that they disagreed with that statement. (p. 49 of condensed transcript) Drawing conclusions and inferences from these types of generalized questions is tenuous and fails to meet the standards for ordering a new trial.

The record reflects that *voir dire* was effective. USAA's counsel asked whether the *venire* could set aside their sympathy for insureds. In response, prospective jurors number 21 and 17 indicated they could not do so. (p. 62) USAA's counsel asked about public sentiment wind versus water issues and whether an insured should recover. (p. 71) The Lisanbys' counsel objected to this improper question, which asked the *venire* to speculate about public sentiment. The existence of public sentiment in the community does not support the conclusion that the jurors had sentiments which they could not set aside.

The trial court conducted a thorough and effective *voir dire* regarding public attitudes. In fact twenty-three members of the *venire* admitted that they could not set aside their sentiments and were struck for cause.

USAA complains about comments allegedly made in the gallery after the reading of the verdict. Obviously, none of these comments had an impact on the verdict. USAA's suggestion that the post-verdict comments show community-wide bias amounts to speculation and circular logic.

USAA's argument relies principally on a post-trial "analysis" by Dr. Allen McConnell. Dr. McConnell's "analysis" of the alleged bias and impartiality of Jackson

County residents amounts to a restatement of USAA's arguments and the same "opinions" that Dr. Craig New gave prior to trial. Dr. McConnell parrots Dr. New's work, concluding that no insurance company can get a fair trial in Jackson County in Katrina cases.

Dr. McConnell makes sweeping and generalized conclusions that "the majority of residents have personal experience with hurricane damage so they must therefore be incapable of fairly weighing the evidence." Incredibly, he concludes that Jackson County residents will always favor homeowners and find against insurance companies. These conclusions are unsupported by any credible evidence.

Interestingly, Dr. McConnell makes only limited reference to the extensive *voir dire* in this case. USAA complains that prospective jurors did not disagree with statements that public sentiment was in favor of the homeowners and against the insurance companies in matters involving wind versus water issues. It would be unlikely that any of the prospective jurors would have disagreed that some sentiments against insurers existed in Jackson County. The issue, however, was whether the prospective jurors themselves had sentiments that they could not set aside. USAA points to no evidence that the jurors did not follow their oath. The trial court, with the best vantage point to observe the venire, reasonably concluded that USAA could get a fair trial.

Dr. McConnell's post-trial "analysis," made months removed from trial, wholly speculative and lacking reliability, was properly rejected by the trial court. Strangely, neither Dr. McConnell nor Dr. New, a jury consultant, were at trial to observe *voir dire*.

USAA cites *Fisher v. State* 481 So. 2d 203 (Miss. 1985) for support that no insurance company could receive a fair trial in Jackson County. *Fisher*, however, was a

criminal case in which pretrial publicity, including reports describing evidence, required a change of venue. The pretrial publicity involving Katrina was generalized. None of the pretrial publicity noted by USAA involved any reporting of any anticipated evidence.

USAA claims that "hatred" and "prejudice" infect Jackson County. This hyperbole is unsupported and inconsistent with a result which has no resemblance to a "runaway" verdict.

F. Closing Arguments Were Proper

USAA complains that the closing arguments warranted a mistrial. This is much ado about nothing. The trial court sustained an objection, overruled another and instructed the jury to disregard one statement made by counsel. USAA's brief fails to show how these few comments were not cured by the trial court's rulings and instructions to the jury.

USAA compares the closing to that in *Janssen Pharmaceutica v. Bailey*, 878 So. 2d 31 (Miss. 2004). *Janssen* is easily distinguished. In *Janssen*, this Court noted that in closing plaintiff's counsel "continuously argued that the company had promoted Propulsid with false and misleading information." 878 So. 2d at 62. Prior to closing arguments, the court had granted the defendant's motion for directed verdict on the plaintiff's claims for alleged misrepresentation. Counsel referred to the defendant as "false and misleading" "lying and cheating" and suggested that the jury base its award of damages solely on the finances of the defendants. 878 So. 2d. at 63. These arguments were essentially punitive damages arguments that did not belong in the closing. The Court also noted that plaintiffs "submitted no quantifiable damages apart from the medical bills ... [but] simply demanded twenty million dollars" apiece. Id. The jury's

verdict for twenty million dollars for each plaintiff evidenced that the verdict was the product of prejudice and bias.

In contrast to *Janssen*, the Lianbys' counsels' closing arguments cannot be characterized as punitive in nature. The verdict, substantially less than what the Lisanbys' sought, was patently reasonable and evidenced no passion or prejudice. The jury awarded contractual damages below the full policy limits, less flood payments.

The Lisanbys' counsel did give a brief interview following closing arguments. The trial court, however, inquired about it the next day and all of the jurors stated that they had not heard any of the comments. (T. at 1817-1820).

G. Jury Instruction P-16. was a proper statement of the law

USAA complains that jury instruction P-16 was given in error. Clearly there was a jury question on this issue and P-16 was a proper statement of the applicable law. Instruction P-16 mirrors the instruction approved in *Merrill*:

> "If you find from a preponderance of the evidence that United American failed to conduct a reasonably prompt and adequate investigation, and if you further find from a preponderance of the evidence in this case that its failure, if any, caused the denial of a valid claim,, then your verdict may be for the plaintiff."

P-16 stated:

> "If you find by a preponderance of the evidence that USAA breached its duty to promptly, fairly, fully and thoroughly investigate Plaintiffs' insurance claim, and if you further find by a preponderance of the evidence that that failure caused the wrongful denial of Plaintiff's valid insurance claim if any then you may find for Plaintiffs on their respective claims for physical injury, mental pain, anxiety and emotional distress."

The trial court's instruction is, therefore, consistent with the instruction approved by the Supreme Court in *Merrill*.

CROSS -APPEAL

I. The Trial Court Erred In Refusing To Submit The Issue Of Punitive Damages To The Jury

Immediately following the jury's verdict in favor of the Lisanbys, USAA moved the trial court to prohibit the issue of punitive damages from going to the jury. The Lianbys moved the trial court to allow the issue to go to the jury. After hearing limited oral argument from counsel, outside the presence of the jury, the trial court granted the Lisanbys' motion and ordered that the jury return on the following Monday to take up the issue of punitive damages. During the weekend break the trial court reversed itself *sua sponte*, entering an order finding and holding that the issue of punitive damages should not go to the jury.

Respectfully, the trial court erred in failing to automatically send the issue of punitive damages to the jury for consideration. Miss. Code Ann. § 11-1-65(1)(a)-(e) specifies the evidentiary process by which a trial court shall proceed when there is a claim for punitive damages. Consistent with the statute, the trial court bifurcated the issue of punitive damages. The trial court's failure to conduct an evidentiary hearing, however, was inconsistent with the clear statutory procedure and controlling caselaw.

Miss. Code Ann. §11-1-65(1)(c) provides that "[i]f ... an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier-of-fact." (emphasis added). Although the trial court heard brief argument by counsel, the trial court did not conduct an evidentiary hearing as required by the statute. The procedural mandates of Miss. Code § 11-1-65 are specific and compulsory.

In *Bradfield v. Schwartz*, 936 So. 2d 931 (Miss. 2006) this court held that where a

jury returns a verdict for compensatory damages in a bifurcated trial, the trial court shall automatically proceed to the punitive damages phase and failure to proper commence an evidentiary hearing is error.

In *Bradfield* the jury returned a verdict for compensatory damages in favor of a former client against an attorney who had improperly charged case expenses. At the conclusion of the trial the circuit court judge denied the plaintiff's motion for punitive damages and the plaintiff appealed. Reversing and remanding, this court noted that Miss.Code Ann. § 11-1-65 specifies the "important evidentiary process by which a trial court proceeds" in the context of a claim for punitive damages. The court noted that Miss.Code Ann. § 11-1-65 1(c) provides that if an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered." The *Bradfield* court expounded on the method of applying the statute:

> If the jury awards compensatory damages, then an evidentiary hearing is conducted in the presence of the jury. At the close of this second phase of the trial, via an appropriate motion for a directed verdict, the judge, as gatekeeper, then ultimately decides whether the issue of punitive damages should be submitted to the trier-of-fact (jury). If the judge, from the record, should not be allowed to consider the issue of punitive damages, a directed verdict shall be entered in favor of the defendant on the issue of punitive damages, and the case will end. If, on the other hand, the judge should allow the issue of punitive damages to be considered by the jury, then the jury, upon being properly instructed by the judge on punitive damages issue, may decide to award punitive damages, and if so, in what amount, or the jury may decide not to award punitive damages.

Although Miss. Code Section 11-1-65(c) was amended to delete the language "before the same trier-of-fact," the evidentiary hearing requirement remains.

The trial court's decision to reverse itself was, more importantly, contrary to the overwhelming evidence that USAA's denial was without arguable and legitimate reason.

The record reflected the following evidence:

(1) On August 29, 2005, USAA, without sending a single representative to view the Lisanbys' property, concluded that the Lisanbys' home was damaged by flood. (T. at 393)

(2) USAA set up a reserve of only three thousand dollars ($3,000.00) out of a nine hundred and fifty thousand ($950,000.00) dollar policy. (T. at 396) USAA representatives clearly took the position, prior to any investigation, that USAA did not and would not owe the Lisanbys money under their insurance policy.

(3) Having already predetermined the outcome, USAA would only agree to pay the Lisanbys the additional living expenses they were owed until its receipt of the engineer's report. (T. at 421) USAA was obviously aware of what the engineering report would conclude.

(4) USAA told the Lisanbys it was relying on an engineering report to determine causation. This was a lie. Before ever receiving the engineering report, the USAA adjuster certified to the Federal Government that the cause of the damage to the Lisanbys' home was flood. (T. at 393)

(5) The USAA adjuster made false representations to the Federal Government that the water level was 10-12 feet in the Lisanby home, because he knew the actual water level was insufficient to cause the destruction of the Lisanbys' home.

(6) The aforementioned USAA adjuster admitted he was not qualified to make a determination of causation. (T. at 400-402)

(7) In addition to the lies USAA told to the Federal Government, USAA directly deceived and misled the Lisanbys. Admiral Lisanby contacted USAA after his

home was destroyed by Katrina and asked for advice regarding whether he should allow the Corps of Engineers to demolish his home free of charge. USAA lied to Admiral Lisanby and told him USAA had not yet made a determination of the cause of damage when in fact, it had certified to the Federal Government that the damage was caused by flood. (T. at 449)

(8) USAA withheld critical information from Admiral Lisanby about his insurance coverage. USAA refused to tell Admiral Lisanby that enlisting the Corps to demolish his home was not necessary because the USAA policy he purchased provided coverage for debris removal. (T. at 451-454)

(9) Gary Taylor, the USAA adjuster, prepared the wind damage estimate for $21,808 before he ever saw the interim engineering report. (T. at 470-471) It is clear that this engineering report was only prepared to support the denial of the claim, which USAA had predetermined on August 29.

(10) After already determining it was going to deny the Lisanbys' claim USAA required Mrs. Lisanby to create a list of all the items in her home above five feet (which represented USAA's inaccurate determination of the level of water in the home) so that she could be compensated for those items. (T. at 916) USAA had already determined to deny her claim when it demanded that Mrs. Lisanby create this list of personal property.

(11) Gary Taylor, USAA's corporate representative, stated in company emails that the damage to the Lisanbys' home could not have been caused by five feet of water. (T. at 1352)

(12) Mr. Taylor testified that the damage to the Lisanby home could definitely have been caused by wind. Mr. Taylor testified that the damage to the Lisanby home

probably would have been caused by wind. Mr. Taylor testified that it would make sense that the damage to the Lisanby home was caused by wind. (T. at 1271-1276) But yet, USAA denied the Lisanbys' claim, because it said the damage could have been "blown water."

(13) USAA denied the Lisanbys' claim based upon an unsigned, preliminary report contained in an email, and USAA never bothered to speak to the engineer prior to denying the claim. (T. at 406-407)

(14) USAA knew the engineer it employed was woefully unqualified to render an opinion on the cause of damage to the Lisanbys's home. (T. at 466)

(15) USAA knew the engineer it employed did not know how to read the weather data that he used to prepare his engineering report. USAA's engineer thought the wind direction was the wind speed.

(16) USAA knew the wind data it relied upon to deny the Lisanbys' claim was very preliminary and incomplete due to power outages. (T. at 460-461)

(17) USAA knew the wind speed data it used to deny the LIsanbys' claim was false because it was measured 9 miles inland and at 4:30 in the morning, long before the highest winds arrived. (T. at 460)

(18) USAA denied the Lisanbys' claim based on maximum wind speeds at the Lisanbys' home of 51 mph; USAA knew these wind speeds were false. (T. at 460-461)

(19) USAA knew its unqualified engineer was not even aware that the Lisanbys's property had a garage, and USAA did not receive a determination on the cause of damage to the garage. (T. at 480-481)

(20) USAA knew its unqualified engineer did not even know the location of the

Lisanbys' guest house, much less that it was on piers. (T. at 489-491)

(21) USAA did not even attempt to determine the actual level of water that entered the Lisanby home. (T. at 411-412)

(22) Further, USAA did not even attempt to determine the actual wind speeds that impacted the Lisanbys' home during Katrina. (T. at 457,1229,1269)

(23) USAA did not ever attempt to locate and interview any eyewitnesses. (T. at 371-372)

The trial court's decision on punitive damages should be reversed and this punitive damages issue remanded for a trial.

II. The Trial Court Improperly Capped The Lisanbys' Attorneys Fees, Ignoring The *McKee* Factors

The trial court properly submitted to the jury the issue of whether the Lisanbys were entitled to additional compensatory damages, including attorneys' fees. The amounts of attorneys' fees and expenses were, by agreement of the parties, reserved for determination by the trial court following trial.

On January 5, 2009, the trial court conducted a hearing as to the amount of attorneys' fees, expenses and interest. On January 6, 2009 the trial court entered a "Final Judgment Upon Jury Verdict" which, among other things, found and held that the Lisanbys were "entitled to an award of reasonable attorneys' fees in the amount of $302,920.44." The trial court's order referenced *McKee v. Mckee,* 418 So. 2d 764 (Miss. 1982) and stated that its decision was also based on the facts and the "court's own observations." The court found that "the contingent fee amount was the reasonable and fair fee" and awarded $302,920.44 for attorneys' fees. Although the trial court referenced the *McKee* case, it made no specific findings relating to individual factors.

Respectfully, the trial court erred by capping attorneys' fees and failing to apply the factors set out in *McKee*. The amount of the attorneys' fee is left to the sound discretion of the trial court. *Mississippi Power & Light Co. v. Cook*, 832 So.2d 474, 486 (Miss. 2002). In exercising this discretion, Miss. Code Ann. § 9-1-41 (1991) instructs courts not to require the party seeking fees to put on proof as to the reasonableness of the amount sought, but to "make the award based on the information already before it and the court's own opinion based on experience and observation." Courts may also allow the moving party to submit evidence. *Regency Nissan, Inc. v. Jenkins*, 678 So.2d 95, 103 (Miss. 1995).

In *McKee*, however, this Court mandated that the trial court consider the following factors in determining a reasonable fee:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent.

McKee, 418 So.2d 764 (Miss. 1982).[3] Mississippi Rules of Professional Conduct 1.5(a);

[3] This Court also described a ninth factor which was "the relative financial ability of the parties." *Id.* at 767.

Courts use the *McKee* factors and Rule 1.5 interchangeably. *See Mabus v. Mabus*, 910 So.2d 486, 489 (Miss. 2005) ("The reasonableness of attorney's fees are controlled by the applicable Mississippi Rule of Professional Conduct 1.5 factors and the *McKee* factors."); *Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n*, 964 So.2d 1100, 1115 (Miss. 2007) (noting *McKee* factors are adopted from Rule 1.5(a)).

In deciding what is "reasonable", an attorney's lodestar is the starting point and is all but presumed reasonable:

> Therefore, a trial court's award of attorneys' fees will be on course for probable affirmance on appeal if the trial judge used as a starting point the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate, after which the issue of attorneys' fees must then be appropriately considered in light of Miss. R. Prof. Conduct 1.5(a) and the *McKee* factors.

Tupelo Redevelopment Agency, 972 So.2d 495, 522 (Miss. 2007) *See also*, *Hensley v. Echerhart*, 461 U.S. 424 (1983); *Bellsouth Pers. Commun., LLC v. Bd. Of Supervisors*, 912 So.2d 436, 446-447 (Miss. 2005) (the lodestar "provides an objective basis on which to make an initial estimate of the value of a lawyer's services"); *Daly v. Bank One*, Slip Copy, 2007 WL 1725426, at *1 (S.D. Miss. June 12, 2007) (J. Guirola) (finding the lodestar is presumptively reasonable and should be modified only in exceptional cases); *City of Burlington v. Dague*, 505 U.S. 557 (1992) ("We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee."). Importantly, though, only a reasonable estimate of hours expended is necessary to arrive at the lodestar. *Heasley v. C.I.R.*, 967 F.2d 116, 123 (5th Cir. 1992) ("Failure to provide contemporaneous billing records, however, does not preclude recovery so long as the Heasleys presented adequate evidence to permit the Tax Court to determine the number of reimbursable hours."); *CWTM Corp. v. AM General LLC*, 2006 WL 1804623, at *3

(S.D. Tex. 2006) (Court used the hours defense counsel billed in order to ascertain a reasonable number of hours for Plaintiff's counsel, who did not keep time records).

In support of their fee request, counsel submitted 3946.10 hours of lodestar time (attorney and paralegal), requesting a fee of $845,317.50 and expenses of $211,069.47. The time submissions reflected the substantial time dedicated by counsel, precluding work on other matters. The lodestar amount was based on hourly rates of $185 to $300, rates customarily charged on the Mississippi Gulf Coast. The trial court made no findings or comment as to the lodestar request.

McKee's fourth factor, also referred to as "degree of success", and "[t]he most critical factor in determining the reasonableness of an award of attorneys' fees," supported the requested fee. See *Amite County School Dist. v. Floyd*, 935 So.2d 1034, 1046 (Miss. Ct. App. 2005) (citing *Cruse v. Nunley*, 699 So.2d 941, 944 (Miss. 1997)

While the fee requested was an amount less than the verdict, this Court, the Fifth Circuit, and other courts have all upheld fee requests that are even larger than the underlying damage awards. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986), (fees of $245,000 where the plaintiff received $33,350 verdict); *Reneau v. Mossy Motors*, 622 F.2d 192, 196 (5th Cir. 1980) ("While an award greatly in excess of a client's recovery requires strong support from the particular circumstances of the case, the ceiling on the client's recovery should not operate as an impenetrable barrier to reasonable compensation. ***Righteous campaigns are not always won at modest cost.***").

The remaining *McKee* factors also supported the requested fee but were not addressed in the trial court's order. The time submissions provided by counsel reflected significant time limitations imposed in readying this case for trial. Counsel had no prior

professional relationship with the Lisanbys who were forced to hire counsel due to USAA's wrongful denial of their claim. Counsel for the Lisanbys, very experienced and able trial lawyers, provided excellent services, as evidenced by the verdict.

Although the court considered that the fee in this matter was contingent, it misapplied the factor. The trial court apparently adopted USAA's argument that the Lisanbys would be "made whole" by an award equal to one third of the jury verdict ($303,223.66). This argument and the trial court's reliance on it, however, improperly displaced the required analysis and consideration of the *McKee* factors.

This Court has rejected the approach taken by the trial court. In *Merrill*, 978 So.2d at 630, this Court, in a 9-0 decision, affirmed an award of $527,479.69 in fees and expenses. The Court plainly stated that in determining fees in this context, "[t]he reasonableness of an attorney's fee award is determined by reference to the factors set forth in Rule 1.5 of the Mississippi Rules of Professional Conduct." *Id.* at 636 (citing *Miss. Power & Light Co. v. Cook*, 832 So.2d 474, 486 (Miss. 2002).

This court explicitly rejected sole reliance on the amount of the contingency in *Miss. Power & Light Co. v. Cook*, a bad faith case involving denial of worker's compensation benefits. The jury awarded punitive damages, warranting attorneys' fees. The trial court awarded the plaintiff $2,060,000 in fees, equal to 40% of the combined compensatory and punitive damage awards. This Court rejected the award, stating:

> The *McKee* factors should have been applied by the trial judge in determining the amount of attorneys' fees to be awarded....The award of attorneys' fees should be vacated and remanded to the trial court. The trial judge should reconsider this issue in light of the *McKee* factors and support a new award, if any, based on findings of fact and conclusions of law concerning those specific factors.

Id. at 487.

This Court has noted the necessity of a "complete Rule 1.5 (A) analysis." *Bellsouth Personal Communication v. Board of Supervisors of Hinds County*, 912 So. 2d 436, 446 (Miss. 2005). In *Bellsouth* this court reversed the trial court's award of attorneys' fees to Hinds County, finding that the trial court failed to apply the *McKee* factors in determining the proper and reasonable amount of the attorneys' fee award. *Id.* at 447. The *Bellsouth* court remanded the case to the trial court for further findings and conclusions applying the *McKee* factors.

By capping the attorneys' fees at 1/3 of the contingency contract and failing to address each factor, the trial court abused its discretion. This Court should reverse and remand this issue for further consideration and analysis consistent with *McKee*.

CONCLUSION

The verdict in this case rests on a record that, when viewed in its totality, clearly supports the finding that USAA acted with gross negligence in denying the Lisanbys' claim. The verdict, patently reasonable as to damages, evinces no suggestion that it was the mere product of bias. The only errors that warrant action by this Court were the failure of the trial court to allow the jury to consider punitive damages and capping attorneys' fees in contradiction of *McKee*. This Court should affirm the verdict, reverse and remand on the issue of punitive damages for trial and reverse and remand the issue of the amount of attorneys' fees for further consideration by the trial court.

Respectfully submitted this 15th day of December, 2009.

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CERTIFICATE OF FILING

I, Don Barrett, do hereby certify that I have this day caused to be hand-delivered for filing, via courier, the original and three correct paper copies and an electronic disc of the Brief for Appellees Admiral and Mrs. James Lisanby to:

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Gartin Justice Building
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This 15th day of December, 2009

Don Barrett, (MBN [redacted]

CERTIFICATE OF SERVICE

I, Don Barrett, do hereby certify that I have this day caused to be hand delivered via courier, and mailed via United States Mail, first class, postage pre-paid, a true and correct copy of the Brief for Appellees Admiral and Mrs. James Lisanby to the following:

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