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

REPLY BRIEF FOR 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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This the 8th day of March, 2010.

Respectfully submitted,

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INTRODUCTION

This Court has recognized the special relationship that arises out of an insurance contract. In the event of a loss the insurer has unilateral and exclusive control over the investigation and determination of an insured's claim. Insurers must act with the same care as they would if it were their own loss. Where they do not they are liable for all of the reasonably foreseeable damages that they cause by the improper denial.

In this case there was clear and substantial evidence that the denial of the Lisanbys' claim was grossly negligent, such that the issue of punitive damages should have been submitted to the jury. In addition, the trial court's capping of attorneys' fees improperly gave USAA a windfall that it did not deserve.

ARGUMENT

I.. The Trial Court Failed To Follow The Procedure of Miss. Code Ann. § 11-1-65 And Erred in Refusing to Allow Consideration of Punitive Damages

In its Response to the the Lisanbys' cross-appeal USAA claims that the trial court followed the punitive damage bifurcation statute's strict procedural requirements and that there was insufficient evidence to support punitive damages. Neither is correct.

First, USAA suggests that the procedure described in *Bradfield* v. *Schwartz*, 936 So. 2d 931 (Miss. 2006) has been superceded by the amendment of the statute. This is incorrect. The requirement of a separate evidentiary hearing remains and this court has continued to apply *Bradfield.* Mississippi Code Section 11-1-65 (1)(c), as amended, plainly states that "[i]f, but only 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 by the same trier of fact." (emphasis added).

USAA contends that the trial itself was the evidentiary hearing required by 11-1-65. (USAA Brief at p. 43). This argument is inconsistent with the statute and well-settled case law. In *Causey* v. *Sanders*, 998 So. 2d 393, 407 (Miss. 2009) this Court reversed a punitive damages verdict, finding that the trial court had failed to follow the statutory procedure which "*Bradfield* clearly lays out..." The *Causey* court, noting the bifurcated statute, as amended, required a separate evidentiary hearing and found that the trial court had failed to conduct one. *Id.* The Court explained that the trial judge must commence a separate evidentiary hearing and "at the conclusion of this evidentiary hearing in the second phase, the trial court has available all of the tradition options for determining whether or not the punitive damages issue should be submitted to the jury." 998 So. 2d at 407.

The importance of a separate evidentiary hearing is clear. The evidentiary hearing allows the trial court to focus on the evidence presented during the compensatory phase and to consider additional evidence supporting punitive damages. The trial court's hearing did not meet this procedural standard.

USAA claims that the trial court did not reverse its ruling on punitive damages. This is incorrect. At the conclusion of the proceedings on June 27, 2008, the trial judge stated:

> The Court: Can you get them here? (To Mr. Copeland, USAA's counsel). I am going to overrule your motion. **I grant your motion for the matter to go to the jury on punitive damages**, but I need- - I need them back in here to be sure that they can all be here Monday.
> Mr. Copeland: You don't want briefs on that then?
> The Court: It would be good to have them if you can do them.

(T. At 1836). It is clear that the trial court had ruled and that the subsequent "Findings of the Court Regarding The Issue of Punitive Damages" was a reversal of that ruling. While the court stated that it had reserved a final ruling "until it had reviewed the law relevant to such motions," the ruling on the record was that the Lisanbys be allowed to proceed with the claim.

The trial court's findings in granting USAA's motion for directed verdict also reflect that the trial court did not follow the substantive standard for directed verdict motions. As this court held in *Bradfield*, at the close of the evidentiary hearing,

> "via an appropriate motion for 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 determine as a matter of law, that the jury 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."

Bradfield, 936 So. 2d at 939 (emphasis added). See also *Causey*, 998 So. 2d at 407.

When considering a motion for directed verdict "the court should proceed along the same guidelines and standards that have governed prior peremptory instruction and directed verdict practice in Mississippi: the court should look solely to the testimony on behalf of the opposing party: if such testimony, along with all reasonable inferences which can be drawn therefore, could support a verdict for that party, the case should not be taken away from the jury." Comment MRCP 50; *Entergy Mississippi, Inc. v. Bolden*, 854, So. 2d 1051, 1055 (Miss. 2003). As noted in the comment, Rule 50 "is a device for the court to enforce the rules of law by taking away from the jury cases in which the facts are sufficiently clear that the law requires a particular result."

Consistent with the Rule 50 directed verdict standard, this Court has held that "[t]he jury should be allowed to consider the issue of punitive damages if the trial judge determine[s] under the totality of the circumstances and in light of defendant's aggregate conduct, that a reasonable, hypothetical juror could have identified either malice or gross disregard to the rights of others." *Paracelous Health Care Corp. v. Willand*, 754 So. 2d 437, 442 (Miss. 1999); See also *Causey*, 998 So. 2d at 408.

In its "Findings of the Court Regarding The Issue of Punitive Damages" of July 2, 2008 the trial court's only finding regarding the evidence was that "[t]his court is not saying the defendant was not negligent in failing to pay the Lisanbys the amount found to be owing by the jury, but said negligence was not gross nor was there malice or actual fraud in handling the claim." The trial court did not make any findings regarding the evidence described above or the inferences that could be drawn.

The trial court's findings suggest it misapprehended the directed verdict standard. The trial court did not find that there was no question of fact raised by the evidence of gross negligence and that a "verdict other than one directed would be erroneous as a matter of law." Comment, MRCP 50. See also *Forbes v. General Motors Corp.*, 935 So. 2d 869, 873 (Miss. 2006). The trial court appears to have instead substituted its own judgment of the relative weight of the conflicting evidence.

The record evidence submitted by the Lisanbys and all reasonable inferences drawn from it was sufficient to support a jury verdict for punitive damages. Respectfully, it appears that the trial court assumed the place of the trier of fact instead of weighing the conflicting evidence as a gatekeeper.

To recap, the following evidence supported consideration of punitive damages:

(1) On August 29, 2005, USAA concluded that the damage was caused by flood, before sending anyone to inspect the property. (T. at 393).

(2) USAA reserved three thousand dollars ($3,000.00) out of a nine hundred and fifty thousand ($950,000.00) dollar policy. (T. at 396).

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

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

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

(7) When Admiral Lisanby called USAA about the impending demolition of the home 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 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, USAA's adjuster, prepared the wind damage estimate for $21,808, before seeing the interim engineering report. (T. at 470-471).

(10) USAA had already determined to deny her claim when it demanded that Mrs. Lisanby create the list of personal property. (T. at 916) .

(11) Taylor 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) 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).

(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 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 on to deny the Lisanbys' claim was 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 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 know the location of the Lisanbys' guest

house or that it was on piers. (T. at 489-491).

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

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

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

USAA contends that during the first phase of the trial the jury had considered whether USAA acted with "callous disregard." This is incorrect. Properly applying *Merrill* and *Veasley*, the Court instructed the jury to decide whether the "USAA breached its duty to promptly, fairly, fully and thoroughly investigate Plaintiffs' insurance claim." (See Jury Instruction P-16). The jury did not consider whether the denial of the claim was in bad faith.

USAA contends that the photographs of the Lisanbys' damaged home are all that is needed to show that USAA had an arguable basis to deny the claim. As demonstrated in their principal brief, USAA's own adjuster admitted that he could not determine a water line, that he was not competent to do so, and that an engineer was needed to determine the wind damage and water damage. USAA , with gross negligence, relied on obviously flawed weather data. USAA attempts to explain all of this away, as it did in a limited fashion during the compensatory phase. This "explanation" does not negate the evidence, but only shows that there was a genuine issue of fact to be decided by the jury.

USAA argues that the evidence of bad fath amounts to no more than arguments by the Lisanbys' counsel. This argument ignores the Rule 50 standard that governs. The evidence, and all inferences to be reasonably drawn from it, are what the trial court must consider in determining whether there is a jury issue as to punitive damages.

The Lisanbys not only argued but also put on substantial credible evidence that USAA lacked an arguable basis to deny the claims. USAA contends that the evidence put on by the Lisanbys amounted to "accusations" which it explained away or denied. Arguments regarding the meaning, importance or context of evidence or testimony are arguments that reflect a factual dispute "for which a jury determination was necessary and proper." *United American Ins. Co. v Merrill*, 978 So. 2d at 613 (Miss. 2007).

In *Merrill* the plaintiff argued that United did not have an arguable basis to deny her claim and disputed United's evidence of arguable basis and good faith. The *Merrill* Court, affirming the $9000,000 punitive verdict, stated:

> [W]here the parties dispute the existence and legitimacy of the carrier's reason for delay or denial, these issues are of material fact, and the plaintiff is entitled to have a jury pass upon his claim for punitive damages if reasonable minds could differ as to the legitimacy of the carrier's reason.

Id., quoting *Murphrey v. Federal Ins. Co.,* 707 So. 2d 523, 528 (Miss. 1997).

As in *Merrill*, the Lisanbys put on substantial evidence that USAA conducted its investigation in a grossly negligent manner.

USAA argues that if there was any credible evidence to support denial then punitives cannot be considered. Contrary to USAA's arguments, it is well-settled that the "denial of a claim without proper investigation may give rise to punitive damages." *Id.*, quoting *Lewis v. Equity Life*, 637 So. 2d 183,187 (Miss. 1994). A proper investigation means an insurer obtains all available information relevant to an insured's claim. See *Merrill*, 978 so. 2d at 635.

In *Merrill* the insurer United was found to have been grossly negligent in its claim investigation relating to the death of its insured. Like United, USAA failed to fully and properly

investigate the Lisanby claim, such that reasonable jurors could have found it to have been grossly negligent.

USAA claims that it conducted a reasonable and sufficient investigation. The Lisanbys, however, offered clear proof that USAA relied on obviously flawed weather data, lacked basic information on the Lisanby property (i.e. location of the garage), relied on an unqualified engineer and made no efforts to determine wind speeds at the Lisanby home. These failures constitute "gross negligence."

This Court has recognized the heightened duties imposed on an insurer when investigating a claim:

> An insurance company has exclusive control over evlauation, processing and denial of claims. For these reasons, a duty is imposed that '[a]n indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business."

Merrill, 978 So. 2d at 636-37, quoting *Andrew Jackson v. Williams*, 566 So. 2d at 1172, 1189 (Miss. 1990).

USAA's duty to investigate a nearly $1.0 million loss clearly includes gathering credible and relevant weather data, talking to eyewitnesses, hiring qualified engineers and then making an informed decision on the claim. Certainly in managing its own business USAA would have taken these steps if it had lost $1.0 million in property. These lapses in investigation reflect a level of negligence that is gross negligence.

Black's defines "gross negligence" as an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." Black's Law Dictionary, 5th Ed. (1979). In the context of an insurer's investigation of a claim, a minimum

threshold of gathering all relevant facts and relying on them applies.

Richard Dreyfus famously exclaimed in Jaws "This is no boating accident," exasperated with the local authorities who were attempting to ignore the obvious so as to save their town's profitable summer. USAA ignored the obvious lapses in its investigation hoping that its insureds would be satisfied with its explanation of why $21,000 of wind damage was reasonable. This no "clerical error or honest mistake" as described by this Court in *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss. 1990) or *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290 (Miss. 1992), where the mistakes did not support punitive damages.

Simple negligence, or "ordinary torts, the product of forgetfulness, oversight, or the like" do not rise to the level of gross negligence. *Veasley*, 610 So. 2d at 295 (Miss. 1992). The lapses in USAA's investigation are clearly more than the product of oversight or forgetfulness. The investigation reflected a willful recklessness.

USAA was not only reckless in its investigation, it made material misrepresentations which alone warranted submission of punitive damages to the jury. USAA's agents and employees made material misrepresentations to the Lisanbys during the investigation. Gary Taylor told the Lisanbys that USAA was relying on an engineering report to determine causation when evidence showed that it had already attributed the loss to flooding (T. At 393). Taylor also effectively misrepresented and concealed benefits under the policy by failing to inform the Lisanbys of the availability of debris removal.

Misrepresentations by an insurer create a jury issue of whether the denial was arguable. See *Merrill; Andrew Jackson Life Ins. Co. V. Williams*, 566 So. 2d 1172 (Miss. 1990); *Lewis v. Equity Life*, 637 So. 2d 183, 186 (Miss. 1994). The trial court made no findings regarding this evidence of misrepresentations in directing a verdict for USAA.

In sum, the trial court's handling of the issue of punitive damage did not conform to the strict procedural or substantive requirements of the governing statute and case authority. The issue of punitive damages should be considered by a jury.

II. USAA has Failed to Show any Justification for the Trial court's Disregard of the *McKee* Factors and Capping of Attorney's Fees

The Lisanbys hired attorneys when they were forced to do so by the wrongful denial of their claim by USAA. The Lisanbys agreed to a contingency contract that provided for attorneys fees in amount of 1/3 of all amounts recovered through settlement or judgment. The contract does not address fees awarded by the court.

USAA's brief cites us no authority that supports the trial court's substitution of this contingency contract percentage for the analysis required by Miss. Rule Of Professional Conduct 1.5 and *McKee v. McKee,* 418 So. 2d 764 (Miss. 1982). Instead, USAA cites two decisions, *Upchurch Plumbing, Inc. v. Greenwood Utilities Comm.,* 964 So. 2d 1100 (Miss. 2007) and *Tupelo Redevelopment Agency v. The Gray Corp.* 972 So. 2d 495 (Miss. 2007) to claim that the trial court need not apply the *McKee* factors. Neither *Upchurch* nor *Tupelo* displace *McKee* or support capping of fees.

In *Upchurch* this Court affirmed a trial court award of attorneys' fees based on lodestar time submissions. Greenwood, the prevailing party, submitted its counsel's itemized attorney records for time and expenses. Triconex challenged the finding of the trial court, arguing that the trial court failed to make substantial findings in accordance with *McKee,* and claiming that the trial judge gave an improper "blanket endorsement" of Greenwood's attorneys' fee application.

Noting that it was "clear from the language of the trial judge's order that the judge did in fact apply the *McKee* factors even though he did not detail his reasoning," this court affirmed the award.

964 So. 2d at 1116. *The Upchurch* court did not excuse the trial court from considering the *McKee* factors, but rather affirmed because the trial court clearly relied on the detailed time submissions and considered the other *McKee* factors. The *Upchurch* court held that "where a trial judge relies 'on substantial credible evidence in the record regarding attorneys' fees,' the trial judge has not abused his discretion." *Id.*, quoting *Mabus v. Mabus*, 910 So. 2d 486, 489 (Miss. 2005). The trial court in *Upchurch* had clearly given great weight to the lodestar time submissions, the starting point under *McKee*.

Unlike the trial court in *Upchurch*, the trial court did not adopt or even mention the amount reflected on the detailed lodestar time submission. The lower court merely adopted the contingency percentage. *Upchurch*, therefore, is distinguishable.

The trial court did, however, award the requested litigation expenses of $211,069.47, noting that the request was supported by "credible evidence" and "detailed back-up documentation of these expenses." The Lisanbys' submissions for their counsel's time and customary hourly rate were equally detailed but the trial court did not address them.

USA's reliance on *Tupelo Redevelopment* is also misplaced. *Tupelo Redevelopment* actually supports reversal of the trial court's decision. In *Tupelo Redevelopment* this court stated:

> The United States Supreme Court adopted the 'lodestar' method of calculating reasonable attorneys'fees. In calculating the 'lodestar' fee, the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of a lawyer's services...

Tupelo Redevelopment, 972 So. 2d at 521-22, quoting *Bellsouth Pers. Commun., LLC v. Bd. of Supervisors*, 912 So. 2d 436, 446-47 (Miss. 2005) and citing *Hensley v. Eckerhart,* 461 U. S. 424

(1983).

In *Tupelo* the Plaintiff sought fees in the amount of $411,488.8 The trial court awarded $340,220.53, an amount equal to forty percent of the judgment. The defendant appealed, contending that the award was excessive. In reviewing the reasonableness of the amount, the *Tupelo* Court noted that Prewitt's fee application, supported by affidavit, included time reports of $172,326, but that Prewitt's counsel explained that accurate time records were not kept in the period immediately prior to trial and that the amount was over $300,000.

Reviewing the record, this Court affirmed, finding that the trial court had obviously considered all of the *McKee* and *Hensley* factors and did not abuse its discretion. Most importantly, however, this Court stated:

> If the record before us indicated that the trial court made a *carte blanche* assessment of attorneys' fees based on a forty-percent contingency basis, we would unhesitatingly reverse and remand for an evidentiary hearing...

972 So. 2d at 522.

Unlike the trial court in *Tupelo*, the trial court here simply based the award on the contingency contract. There is no indication in the court's order that it weighed and considered the other *McKee* factors, especially the hourly time submission. The trial court's carte blanche reliance on the underlying contingency amount requires reversal and remand as prescribed in *Tupelo*.

This case is more analogous to *Patterson v. Holleman*, 917 So. 2d 125 (Miss. 2005). In *Patterson* the Court of Appeals reversed an award of attorneys' fees where the trial court failed to make factual determinations sufficient to permit appellate review. The trial court awarded $15,000 in attorneys' fees, but plaintiff's counsel had submitted detailed time records and evidence supporting a fee of $27,924.84.

Noting that a trial court "must support an award of attorneys' fees with factual determinations as to the reasonableness of the fee award," the court found that there were no such factual determination to explain the decision. The court held that the absence of these findings (or any indications that it had considered the *McKee* factors) left it with "no alternative but to reverse and remand for the Chancellor to determine a reasonable attorneys' fee award considering the factors in Rule 1.5 and *McKee*, and to make supporting findings of fact and conclusions of law concerning those factors." 917 So. 2d at 137, citing *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 487 (Miss. 2002).

As in *Patterson,* the trial court made no factual determinations that explain the departure from the lodestar time or lack of consideration of the other *McKee* factors. The lower court's order should be reversed and this issue remanded with instructions that it consider and apply all of the *McKee* factors.

USAA contends that *Veasley* and *Merrill* support the capping of attorneys' fees. Neither case supports this argument. *Merrill* and *Veasley* hold that insureds may recover attorneys' fees, and do not hold that fees should be capped.

USAA contends that allowing any amounts over the contingency would result in a windfall for the Lisanbys. This is in error. Where the Court awards attorneys' fees, that amount should be paid to counsel, irrespective of the fee contract. By capping attorneys fees at one third of the verdict the trial court gave USAA a windfall. The trial court's award allowed USAA to avoid the true costs of the effort required to recover what USAA owed.

Capping attorneys' fees in the manner proposed by USAA not only ignores the *McKee* factors and Rule 1.5, it violates public policy. Capping fees would limit the liability of negligent and grossly negligent insurers such as USAA and encourage wrongful denial of claims. Such limits

would likely have a chilling effect on lawyers taking on such claims, especially cases involving smaller contractual benefits. The *McKee* factors insure that the true costs of litigation are borne by the responsible defendant.

CONCLUSION

The only errors by the trial court were directing the verdict for USAA on punitive damages and failing to apply the *McKee* factors. For the reasons stated herein and in the principal brief of the Lisanbys, this Court should affirm the jury's verdict, reverse and remand the issue of punitive damages to the trial court for a new trial by jury and reverse and remand the issue of attorneys' fees for further consideration in accordance with *McKee*.

Respectfully submitted this 5th day of March, 2010.

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CERTIFICATE OF FILING

I, David McMullan, Jr., do hereby certify that I have this day caused to hand-delivered for filing, via courier, the original and three correct paper copies and an electronic disc Reply Brief For Cross-Appellants Admiral and Mrs. James Lisanby.

Ms. Kathy Gillis
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This 8th day of March, 2010.

David McMullan, Jr. (MBN [redacted])

CERTIFICATE OF SERVICE

I, David McMullan, Jr., 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 Reply Brief For Cross-Appellants Admiral and Mrs. James Lisanby to the following:

Hon. Billy G. Bridges
Special Circuit Court Judge
520 Chuck Wagon Drive
Brandon, MS 39042

Charles Copeland
Janet Arnold
COPELAND COOK TAYLOR & BUSH
P.O. Box 602
Ridgeland, MS 39158-6020

This 8th day of March, 2010.

David McMullan, Jr. (MBN [redacted])