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

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 CROSS-APPELLEE
REPLY BRIEF FOR APPELLANT
UNITED SERVICES AUTOMOBILE ASSOCIATION

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES ON CROSS-APPEAL

1. Did the trial court correctly grant USAA's motion for directed verdict regarding punitive damages, in the face of overwhelming and uncontradicted evidence that USAA possessed an arguable reason for its actions and acted without malice?

2. If attorneys' fees and expenses were recoverable absent punitive damages, did the trial court properly limit such fees to compensatory damages – i.e., the amount of Plaintiffs' alleged loss, which was the one-third contingent fee amount Plaintiffs would owe their attorneys?

REQUEST FOR ORAL ARGUMENT

This appeal presents issues important to the administration of numerous insurance claims in this state – not simply those regarding Hurricane Katrina. USAA respectfully submits that oral argument would be of assistance to the Court in its consideration of these issues and in its understanding of the facts on appeal.

INTRODUCTION

In an attempt to retain an unsustainable verdict against USAA, the Lisanbys' brief to this Court on USAA's appeal relies on numerous misrepresentations of the facts and evidence. Likewise, the facts relating to the Lisanbys' cross-appeal are largely misrepresented by the Plaintiffs in an attempt to gain a punitive damages hearing where none is warranted. Many of the "facts" recited in the Lisanbys' brief are actually statements out of the mouths of their own counsel – not statements out of the mouths of the witnesses. Those statements contradict the physical, photographic, and video evidence presented at trial and contradict the evidence presented by the witnesses. Not surprisingly, these same misrepresentations were argued to the jury by the Lisanbys' counsel in order to inflame the jurors in a venue where significant bias and prejudice already existed against USAA. USAA demonstrated that bias at a hearing on its motion for change of venue before trial. Voir dire

served to confirm that bias which was exacerbated in this case by Admiral Lisanby's standing in the community.

Just as the jury verdict in *Johnson v. City of Pass Christian*, 475 So. 2d 428 (Miss. 1985), could not stand, the verdict in this case cannot stand. No number of witnesses in *Johnson* who wrongly testified there was a hole in the road could overcome the clear photographic evidence that there was no hole. *Id.* at 431. Likewise, expert testimony that contradicts the physical facts cannot sustain a verdict that is contrary to physical evidence clearly demonstrated by photos and video. *Blossman Gas, Inc. v. Shelter Mut. Gen. Ins. Co.*, 920 So. 2d 422, ¶¶13-20 (Miss. 2006). If the verdict rendered in this case can stand, then *Johnson* and *Blossman* were wrongly decided. If these Plaintiffs are held entitled to present a case for punitive damages in the face of the eyewitness, photo, and video evidence of storm surge damage to their property, then there is no evidence in existence that will ever qualify as an arguable reason for an insurance company's claims decision.

As demonstrated below, the jury's verdict should be reversed and rendered or, at the least, the case should be reversed and remanded for a new trial. Any new trial should be held in a different venue in which jurors can be seated who can fairly evaluate the evidence. The Lisanbys' claim for punitive damages should remain dismissed. The awards of emotional distress damages, attorneys' fees and expenses in their favor should be reversed and rendered.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below Regarding the Cross-Appeal

The Plaintiffs make multiple misrepresentations in their statements regarding the course of proceedings. Two of the most blatant are as follows. First, Plaintiffs misrepresent that Judge Bridges denied USAA's motion for directed verdict on punitive damages and then reversed himself *sua sponte*. *See* Plaintiffs' brief at pp. 2, 22, 39. Second, Plaintiffs misrepresent that the trial court

failed to address substantial evidence concerning attorneys' fees and did not properly state its consideration of factors under *McKee v McKee*, 418 So. 2d 764 (Miss. 1982). *See* Plaintiffs' Brief at pp. 4, 22, & 24.

The issue of punitive damages was first raised at trial when counsel met for motion hearings and a jury instruction conference following close of the evidence. USAA moved for a directed verdict on punitive damages. The Plaintiffs correspondingly moved the court to allow the jury to consider punitive damages. (T. at 1606-07.) The court indicated that, in its opinion, the case was not one for punitive damages, stating as follows:

> THE COURT: Okay. I'm inclined, at this time, to deny the punitive damages motion.
> MR. DON BARRETT: Your Honor, could I give you the facts?
> THE COURT: You can put whatever you want to in the record. I'm not going to change my mind.
> MR. DON BARRETT: So there are not going to be any punitive damages?
> THE COURT: I don't see it. I just don't see where there has been sufficient reason for it.

(T. at 1617.) After further argument by the Lisanbys' counsel, Judge Bridges announced he would defer a final ruling on the question of punitive damages until after the jury verdict, stating: "I'll certainly see what the jury does and reconsider my . . . ." (T. at 1624.)

Following the jury's verdict on Friday, June 27, 2008, USAA again sought a directed verdict on punitive damages, and the Plaintiffs again moved for a hearing on punitive damages. (T. at 1827-1837.) The court stated that it desired to reserve its ruling and have the parties submit briefs on the punitive damage question. (T. at 1828.) Judge Bridges, again, stated he was not going to rule on the motions at that time and that the parties were to submit further briefs and argument. (T. at 1834.) Following that, the court indicated it would allow the hearing on punitive damages to go forward because of juror scheduling issues. However, on request of USAA's counsel, the court again

reserved its final ruling pending briefs and authorities from the parties. (T. at 1836-37, 1839.)

Pursuant to Judge Bridges' ruling, both parties submitted briefs and authorities. After considering these materials, the court issued its ruling the next day, granting USAA's motion for directed verdict. Judge Bridges then memorialized these circumstances in a written opinion, signed June 28, and entered on July 2, 2008. (R. at 3848-50.) In that opinion, Judge Bridges stated:

> Upon the jury returning its verdict in this case, the Plaintiffs moved the Court for a hearing on punitive damages. At the same instant, the Defendants moved the Court for a directed verdict as to Plaintiffs' claim for punitive damages.
>
> The Court responded to these motions by reserving a final ruling on either motion until it had reviewed the law relevant to such motions.
>
> Each party presented to the court memoranda and authorities supporting its motion and the Court has reviewed all supporting materials.

(R. at 3848.) Thus, the Plaintiffs' representations that the court reversed itself and acted *sua sponte* are just not true. The court acted on cross-motions after briefing of the issues by both parties.

Regarding the amount of attorneys' fees awarded, the Court expressly stated in its final judgment entered on January 8, 2009:

> The Court has also, alternatively, considered the factors in *McKee v. McKee*, 418 So. 2d 764 (Miss. 1982) based on the facts and the Court's own observations. The Court finds that the contingent fee amount is the reasonable and fair fee.

(R. at 4921.) Thus, the suggestion that Judge Bridges did not consider the evidence presented regarding fees or properly state his consideration of the *McKee* factors is simply not so.

II. Statement of Facts[1]

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[1] Facts regarding construction of the house and the damage to it relate to both the direct appeal and to the question on cross-appeal of USAA's arguable reason for its claims decision, propriety of its

A. The Lisanbys' Home Before Katrina

The Plaintiffs misrepresent that the first and second floors of the Lisanby house were constructed differently. They were not. As Admiral Lisanby testified, both floors of the house were constructed and laid out similarly. (T. at 733.) Photographs from both before and after Katrina demonstrate that the first and second floor windows were, for the most part, identical in size and placement. (RE at Tabs 12 and 13.)

Just as the first floor wall behind the glassed-in front porch had floor-to-ceiling doors and windows, the wall behind the second floor porch had a floor-to-ceiling french door and transom. (RE at Tab 14, Exh. D6-82.) Despite Plaintiffs' suggestion at p. 4 of their brief that only the second floor of the house had diagonal cladding/framing in its walls, the photographs of the house conclusively show that both floors had this same diagonal cladding and concrete stucco, even on the wall inside the front porch. (RE at Tab 13, Exhs. D5-95, 97, 101, 102; *see* Pl. Exh. 36.) Admiral Lisanby testified that the first floor walls of the house had diagonal bracing before Katrina just as did the second floor, as follows:

> Q: I'm going to show you a close-up of it in a minute. And we see this diagonal bracing here.
> A: Yes.
> Q: Your understanding that all of that would have been filled in with diagonal bracing before it was enclosed?
> A: That's correct.
> Q: Except where the windows were?
> A: That's correct.
> Q: So it would have been all in this hole and all in this hole?
> A: Yes.
> Q: Next, 102, please, D 102. Now it looks like it's just a few seconds later. Looks like we've been looking to the left; now we're looking

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investigation, and lack of malice.

to the right. [2]
A: Correct.
Q: And the same thing, these diagonal boards would have all been filled in here?
A: Correct.

(T. at 838; RE at Tab D5-101, D5-102.)[3]

With regard to elevation of the first floor of the house, Plaintiffs largely ignore that the official surveyor's certificate attached to the Lisanbys' deed showed the first floor sat only 13 feet above sea level. (T. at 738-39, 894-95.) Admiral Lisanby's estimate of 14.5 feet above sea level was based on hearsay that, in 1998, Hurricane Georges had a surge level of 12 feet. (T. at 739-40.) However, as USAA demonstrated, even if the floor level was14.5 feet, there was still over 9 feet of water in the first floor of the Lisanby house during Katrina. This was established by a FEMA high still-water mark near the property (T. at 1403-04) and by the testimony of Jim Treadway and Steve Loper. *See infra* at pages 8-12.

B. Katrina's Impact on the Lisanby Property

1. Wind Speed

At pages 5-6 of their brief, Plaintiffs make much of the fact that USAA did not contest the testimony offered by meteorologists (particularly Dr. Keith Blackwell), regarding wind speeds. This is because USAA did not disagree with Dr. Blackwell's testimony that only Katrina's Category 2

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2 Upon returning to the house after Katrina, Admiral Lisanby walked around the house and took a series of digital photographs of it. (T. at 816, 831.)

3 Thus, Plaintiffs' citations to Dr. Sinno's testimony at p. 4 of their brief that the first floor was weaker have no support in the actual evidence regarding construction of the house. Dr. Sinno never saw the house. (T. at 639-40.) His testimony about construction of the house contradicts that of Admiral Lisanby and also contradicts the photos of the house. Dr. Sinno admitted that, if the first and second floor wall cladding was the same, then wind could not have caused failure of the first floor walls. (T. at 687-88.)

outer eyewall impacted the area of the Lisanby property. The stronger Category 3 inner eyewall did not impact it. (T. at 303-04.) As Dr. Blackwell testified:

> Q. And the outer eye wall, did it, in fact, contain Category 2 winds?
> A. I think it's likely that it contained sustained one-minute winds, Category 2 intensity.
> Q. And I just want to make sure that I understood correctly, but if I understood your testimony, it was only the outer wall of Hurricane Katrina, the outer eye wall, that actually went over Pascagoula; is that correct? Am I right?
> A. The outer eye wall, yes.
> Q. So when you talk about the wind speeds and the damage that may have been caused by the inner eye wall, or the Category 3 eye wall, those are not winds that would have impacted the Pascagoula area, are they?
> A. The sustained winds, no, not likely.

(T. 303.)

> Q. Now, Dr. Blackwell, if I understood your testimony today also, in your professional opinion, did I understand that you believe that the maximum sustained winds that would have reached the Lisanby property were between 100 and 105 miles per hour?
> A. I believe it reached the Lisanby property between 100 and 105 miles per hour. That's correct.

(T.304)

The Plaintiffs' representation that USAA had no meteorological information when it rendered its decision on the Lisanbys' claim is untrue. The report presented to USAA by its engineering consultant, EFI Global, expressly stated the wind speed ranges for different hurricane categories, including a Category 2 range of 96-110 mph and a Category 3 range from 111-130 mph. (Exh. D6-1.) The EFI report expressly stated: "The winds experienced on the coast were from that of a Category 3 hurricane." (Exh. D6-1.) USAA's adjuster, Gary Taylor, noted the statement about Category 3 winds and the Category 3 wind speed range upon receiving the EFI report. (T. at 1228.) Specifically, Taylor testified:

> Q. And tell me what you thought about wind speeds that were referenced in the report.
> A: He mentioned, in his report, that the winds experienced on the coast were that of a Category 3 hurricane, which he list as – in the Saffir-Simpson scale, from 111 to 130 miles an hour.

(T. at 1228.) The range of winds at the Lisanby property, given to Taylor by the report, was from 80 miles-per-hour to 130 miles-per-hour. (T. 1228.) That Taylor did not draw a conclusion as to the exact wind speed at the property is not surprising. (T. 1229) Plaintiffs' own meteorologists could do nothing more than provide ranges for wind speeds at the property. (T. 155, 304.) Further, as Taylor testified, wind speed is an important factor in evaluating damage, but not the only factor:

> Q: Okay. Now, then, do you also understand that wind speeds that may have been – that the Lisanby home may have been subjected to is an important factor in determining wind damage? Do you know that?
> A: It would be one of the important factors, yes.

(T. at 370.) Taylor testified that physical evidence at the site is important in determining what damage was done by wind and what damage was done by water. (T. at 370, 464, 482, 502-06.)

In sum, the engineering report on which USAA's adjuster relied gave a higher applicable Category 3 wind speed range than Plaintiffs' own expert, Dr. Blackwell, who testified that only the Category 2 eye wall impacted the area of the Lisanby house. Importantly, regardless of wind speeds, the remains of the house clearly tell the story of what the wind did and did not do. The first floor and its contents were destroyed by storm surge. The second floor – through which Katrina's winds undisputedly tunneled down the central hallway through open french doors – remained largely undamaged, as did its contents.

2. Water Level, Waves, and Swells

Amazingly, despite the Lisanbys' own admissions, the testimony of eyewitnesses, and photographs of the house, the Plaintiffs' brief at p. 7 continues the contention that the water level

in the house during Katrina was less than 24 inches. Plaintiffs rely on Mrs. Lisanby's testimony that, after Katrina, she found dry linens, business cards, and stamps in drawers 24 inches above the floor of the house. *See* Plaintiffs' brief at p. 7. Photographs of the house impeached Mrs. Lisanby's testimony. Even the jury did not accept it, as the jury awarded the Lisanbys' only the value of their contents above 5 feet, less the amount already paid by USAA. (RE at Tab 4; R. at 3827; T. at 765.) Photos of the kitchen drawer where Mrs. Lisanby claimed to have found dry stamps and cards showed plainly that the contents of the drawer could not have been dry after Katrina. (Exhs. D4-26, D4-27.) A photo of the area where Mrs. Lisanby claimed to have found the bachelor's cupboard with dry linens showed there was no cupboard there and nowhere for any such cupboard to have stood after the Hurricane. (T. at 1048-49; Exhs. D5-158, D5-159.)[4]

Plaintiffs next misrepresent that the testimony of Steve Loper supported a water level of less than 24 inches in the Lisanby house. *See* Plaintiffs' brief at p. 7. Although Steve Loper initially testified that he thought the floor level at the Lisanby house was higher than the floor level at his own house, Loper then gave the actual figures for the ground and floor level elevations at his own house. (T. at 529, 546-47.) The ground level at his house was 16 feet 3 inches above sea level, and the floor level was 19 feet 9 inches above sea level. (T. at 546-47.) This made it clear that both the ground and floor levels at Loper's house were actually higher than those at the Lisanbys' house.

The lowest floor level evidence concerning the Lisanby house came from the official survey attached to the Lisanbys' deed – 13 feet above sea level. The highest floor level evidence came from Admiral Lisanby's testimony that his first floor level was 14.5 feet above sea level. (T. at 738-39.)

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4 There was no flooring left in the spot where Mrs. Lisanby claimed she found the cupboard standing. Despite the many photos of the interior and exterior of the house taken by the Lisanbys after Katrina, there was no photo whatsoever of the bachelor's cupboard after Katrina. (T. at 1042, 1048-49; Exhs. D5-158, D5-159.)

Loper testified that, at one point, he had 4 feet of water inside the first floor level of his house. (T. at 557.) Without question, the 19 foot 9 inch floor level to which Loper testified, plus the 4 feet of water inside his house, equals a storm surge 23 feet 9 inches above sea level. (T. at 574.) If one accepts the surveyor's certificate for the actual first floor level of the Lisanby house, this means that the Lisanbys' first floor incurred 10 feet 9 inches of storm surge. If one accepts the Admiral's floor level testimony of 14.5 feet, this means the Lisanbys' first floor incurred 9 feet and 3 inches of storm surge.

These figures were consistent with the FEMA high still-water mark near the Lisanby property of 18 feet above sea level. With waves, this would have resulted in a minimum of 10 feet of water inside the Lisanby house. (T. 1403-05, 1524-25.)[5] These figures were also consistent with the photos and video taken at the Lisanby property during Katrina and with eyewitness testimony. Jim Treadway, who took the photos and video, testified that there were 10 foot by 20 foot swells. (T. at 1107-08.) The photos and video he took showed those swells on the Lisanby property. (*See* Exhibits with "D13" prefix.) Steve Loper attempted to favor the Lisanbys and say there were only 1 ½ foot waves, but this was belied by what he admittedly told EFI Global's engineer; by what he previously testified; and by photos and video of storm surge on the Lisanby property (taken from a vantage point in Loper's house). Loper admittedly told Mark Voll, the EFI Global engineer, that there were 8 to 10 foot waves during Katrina. (T. at 534-35, 583-86; Exh. D6-1.) In previous testimony, Loper admittedly stated there were 8 to 14 foot waves. (T. at 573-74.) Plaintiffs' attempt in their brief at p. 8 to deny the existence of this testimony and video is useless. This clear evidence

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Still-water height is the water height without waves. FEMA calculates the increase from the still water height to height with waves by adding 50%. (T. at 1403-04.) Dr. Smith used a smaller wave height in his calculations in order to give the Lisanbys the benefit of the doubt. Even so, calculated with only 3-foot waves, there was at least 10 feet of water inside the house. (T. at 1405-06, 1524-25.)

of a storm surge depth of 10 feet or more inside the Lisanby house was presented to the jury via testimony, photographs, and video. It was simply – and wrongly – ignored by the jury.[6]

Significantly, even Admiral Lisanby recognized that this huge amount of storm surge destroyed the first floor of his house. Within 3 weeks of Katrina, the Lisanbys gave a newspaper interview in Princeton, Kentucky. The Admiral admitted storm surge destroyed the first floor of the house; that 20 to 24 feet of surge pushed through the first floor; and that surge stripped light fixtures off the 12-foot ceilings and destroyed first floor fireplaces. (RE at Tab 18; Exh. D-19; T. at 893-95.) The Plaintiffs' characterization of this as the "off-hand" comment of an elderly man is, once again, misrepresentative. The newspaper interview was quite detailed – not an "off-hand" comment. (RE at Tab 18; Exh. D-19.) The Admiral, a naval engineer, plainly recognized the primary source of damage to his house. Moreover, his description of storm surge in the article was consistent with the Treadway video and photos, as well as the description given by Steve Loper (before Loper tried to minimize that description in the context of this lawsuit.)

Consistent with this knowledge, the Lisanbys made a flood insurance claim, desired their flood insurance money, and were glad it was paid. (T. at 773, 919-21.) By accepting $250,000 in flood insurance proceeds for the dwelling and $100,000 for the contents of their house, they admitted the house and contents incurred at least this much surge damage and that 100 % of the damage was

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That Butch Loper testified the surge level only reached 16.14 feet above sea level in downtown Pascagoula does nothing to negate the evidence presented from the Lisanby property. In fact, that the surge level reached 16.14 feet in downtown Pascagoula only emphasizes the greater depth it reached at the Lisanby property, which was only 100 feet from the Mississippi Sound. Photo D5-101 aptly demonstrates the Lisanby house proximity to the water. (RE at Tab 13.) Video from the Jackson County EOC shows a significant current in the surge – significant enough to drive a boat onto the steps of the Jackson County Courthouse. (RE at Tab 14.) Testimony by another witness, John Lindgren, that there were no significant waves at his property nearly a mile from the Lisanbys' does nothing more than limit the relevance of his testimony. The witnesses, photos, and video regarding the Lisanby property clearly establish significant wave action.

not caused by wind. The trial court correctly ruled that this was an admission, and Plaintiffs have not appealed that ruling. (R. at 1720, 1722.) Plaintiffs' criticism at p. 7 of their brief that USAA never reached a final conclusion about the water level at the property is an empty one. USAA clearly demonstrated through eyewitness testimony, the Plaintiffs' admissions, and uncontroverted photos and video that the surge level inside the Lisanby house was approximately 10 feet and likely higher.

3. The Testimony of Plaintiffs' Engineering Expert, Dr. Sinno, Directly Contradicts the Physical Evidence of the House, Itself.

To try to explain why the testimony of their engineering expert, Ralph Sinno, made sense in light of the physical evidence, Plaintiffs rely on a theory, stated at p. 9 of their brief, that "[t]he corners of the first floor exterior walls were not solid and were weaker than the second floor." However, there is no physical evidence to support the idea that the first floor was weaker in construction than the second. As demonstrated previously, both the first and second floors had 2 x 6 studs in the exterior walls. They are shown in photos of the house taken after Katrina. (RE at Tab 13.) Photos demonstrate that both floors had diagonal 1 x 6 sheathing. (RE at Tab 13.) Testimony by Admiral Lisanby established that same point. (T. at 838.) Both floors also had the same lathing and 2 ½ inch concrete stucco on the outer walls. (RE at Tab 12 & 13.)

The idea that first floor walls were blown away because their windows were a different size than windows on the second floor is directly refuted by photos of the house before and after Katrina. Photo D-21 shows the east wall of the house before Katrina. The first and second floor windows are identical in size. (RE at Tab 12.) Post-Katrina photos of the house show that the first floor east wall is gone, while the second floor east wall remains. (RE at Tab 13.) Thus, a theory of construction differences provides no basis for this difference in damage to the first and second floors. (T. at 1453-54.) The post-Katrina difference between the first and second floors quite obviously lies in the fact

that the first floor was exposed to storm surge, while the second floor was not.[7]

An analysis of wind damage on the second floor demonstrates precisely why Dr. Sinno's testimony defies physics when he says that wind entered the house through the first floor doors and windows, tunneled through the first floor, and ballooned and destroyed its walls. The second floor had a set of floor-to-ceiling french doors and transom, just as the first floor had floor-to-ceiling doors and windows. (RE at Tab 14.) According to Admiral Lisanby, these french doors blew open during Katrina, and wind tunneled through the second floor of the house. (T. at 744-45, 1193-94.) Yet, the french doors were still intact. (RE at Tab 14.) The wall in which they were mounted, along with windows on either side, were still intact. (RE at Tab 13 & 14.) The glass in the french doors and transom above them was not broken. The walls in the second floor hallway were not destroyed and entirely missing, but remained. (RE at Tab 14.) Glass in the transoms over the other doors in the second floor hallway remained intact. (T. at 1198-99, 1201.) The second floor furniture remained intact. It was moved to Kentucky for continued use, and the Lisanbys' made no claim for loss of that furniture. (T. at 886-890.)

While Dr. Sinno contended that wind tunneled through a bathroom at the back of the second floor hall, blowing a hole in the wall, photos of that bathroom show that Dr. Sinno's testimony in this regard is utterly absurd. Following Katrina, the interior of that bathroom looked like this:

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According to Plaintiffs' meteorology experts, Katrina's winds initially blew from east to west. (T. at 234-35.) The east wall was, therefore, the windward wall – not the front of the house, which was on its south side.

(Exh. D6-1, Photo 35; also Pl. Exh. 253.)[8] The fixtures are intact. The soap is still in the dish. Curtains are still hanging in the window and around the sink. Even the toilet paper remains on the roll. Obviously, the wind was not strong enough to blow a hole in the wall. The only expert testimony that matches the physical evidence was provided by USAA's engineering expert, Doug Smith. The cracks in the second floor walls and the hole in this bathroom wall occurred when the first floor washed away and storm surged torqued the house. (T. at 1447-51.)[9]

Dr. Sinno's testimony that the roof of the house failed because uplift wind forces bulged it and ballooned it, causing a chimney to break, was proven untrue when Dr. Sinno had to admit there was no wind in the attic of the house. (T. at 690-91.) None of the attic bracing was displaced. The

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Admiral Lisanby testified that the second floor hole in the wall was in what he called the "antique bathroom." (T. at 747.)

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Plaintiffs make a significant misrepresentation when they state at page 11 of their brief that USAA's adjuster, Gary Taylor, agreed cracks in second floor walls could have been caused by pressurization and ballooning from wind. Rather, Taylor testified that, while ballooning can cause such damage, it can also be caused by other events **such as removal of first floor support**. (T. at 1273.) Taylor clearly testified he was not an expert on ballooning and would have to rely on an engineering opinion to tell him if particular damage was caused by ballooning. (T. at 1273-75.) Of course, removal of first floor support is exactly what happened at the Lisanby house. Pictures of the second floor rooms such as that of the bathroom, above, are not consistent with 100-plus mile-per-hour wind blowing through them.

attic dormer window was not broken. Blown-in insulation in the attic was not out of place. (T. at 690-91.) Photos clearly showed the chimney sank because its first floor support was washed away. (Exh. D5-141.)

In sum, the second floor of the Lisanby house and the photos of it are key. Wind blew on the entire house. Storm surge directly impacted only the first floor, not the second. The first floor is gone. The second floor remains. The second floor storm shutters (identical to those on the first floor) did not succumb to the wind. Even in the second floor hallway, where wind did tunnel through an open floor-to-ceiling french door, the damage is relatively minimal. (RE at Tab 14.) Dr. Sinno's testimony flatly contradicts the physical evidence and, therefore, cannot support the verdict. The only engineering testimony that matched the physical evidence and that was supported by engineering calculations was that given by Doug Smith, the engineer proffered by USAA.

4. Plaintiffs' Attack on the Testimony of Doug Smith Is Misrepresentative

Because they have no physical evidence to sustain their claims, the Plaintiffs have resorted to a personal attack on Doug Smith. That attack, at pp. 13-15 of their brief, is largely based on misrepresentations. Plaintiffs suggest that, before examining the Lisanby house, Dr. Smith was not experienced in determining the cause of damage to a home that had been subjected to hurricane tidal surge. Dr. Smith testified:

> Q: Now I think you told us earlier that before Hurricane Katrina, you had never determined the cause of damage to a home that had been subject to hurricane tidal surge. You have never done that?
> A: That's correct. However, I had done some previous work with combined wind and surge loads.
> Q: Okay. In the laboratory?
> A: No, sir.
> Q: All right. We'll get to that.
> A: Okay.
> Q: You've never – before Katrina, you've never done any hurricane-related catastrophe work at all, have you?

A: I don't think that's true.

(T. at 1468.) In relation to his experience of evaluating wind damage from hurricanes, Dr. Smith testified:

> Q: In your process of studying the effect of winds on buildings, approximately how many hurricanes have you gone in behind, as you say, and looked at the buildings and did your analysis and reported on it?
> A: Either through me, personally doing it, or my graduate students, we have done every major hurricane since 1990.
> Q: And approximately how many would that be?
> A: 10, maybe, 12. I don't know.
> Q: And what about other wind events; do you follow other wind events?
> A: We go to major tornados, also, that's correct.
> Q: Now, in the process of working on these forensic analyses of buildings that have been in severe wind, do you also have to deal with sorting out other forces?
> A: Yes.
> Q: And such as storm surge.
> A: In this case, storm surge, yes.
> Q: And how long have you been doing that?
> A: Since Hurricane Katrina.

(T. 1377.) By the time of his testimony at the Lisanby trial, Dr. Smith had examined nearly 100 buildings that underwent storm surge and/or wind damage from Hurricane Katrina. (T. at 1378.)

Plaintiffs suggest Dr. Smith was hired, in some way related to this case, to prepare a report on strategy for determining wind damages to a slab. *See* Plaintiffs' brief at p. 13. Actually, Dr. Smith testified he was hired by an unrelated insurer – the Mississippi Windstorm Underwriting Association – to develop a methodology to adequately compensate people who had only slabs left. It involved looking at nearby houses of various construction that did not have surge damage, developing a database of the type of wind damage those houses sustained, and using that database to determine the type of wind damage that houses left as slabs would have sustained before they washed away. (T. at 1556-57.) Dr. Smith's database concept was never actually developed or used

by anyone, as far as he knew, and it had nothing whatsoever to do with the Lisanby property, which was not a slab. (T. at 1557-58.) The assertion that Dr. Smith had a strategy to limit reported wind damage to removal of some shingles was actually nothing more than an accusation by Plaintiffs' counsel, with which Dr. Smith disagreed, as follows:

> Q: Yes, sir. Now, so your strategy for paying slab claims is the water did the damage, and there might be some loose shingles that were caused by the wind; that's your strategy, is that not correct?
> A: No. I explained to you what the strategy developed for the wind pool was. We was going to develop a statistical database. All I'm reporting here is what I believe to be the truth, and by observations of the damage in the hurricane.

(T. at 1490.)

Plaintiffs claim that Dr. Smith copied the work of another engineer, Don Slinn, and could not personally perform the calculations he presented. *See* Plaintiffs' brief at p. 14. Again, Plaintiffs confuse their counsel's accusations with the actual testimony of the witness, as follows:

> Q: Now, then, when you first started doing the Katrina reports back in October of 2006, you got a gentleman named Don Slinn, down in Florida, to show you how you would do these elaborate calculations and that you put in your report, did you not?
> A: That's not true.
> Q: The first report you did, back in October of 2006, Don Slinn did all those calculations for you, didn't he?
> A: Absolutely not.
> Q: And, in fact, he sent them to you in an e-mail dated October 8th of 2006?
> A: He sent me information on surge height, significant wave height, et cetera, et cetera, the base data that my calculations are based on. He did not show me how to do calculations.

(T. at 1493.) In performing calculations for this case, Dr. Smith used data applicable to houses built to then-current code requirements on the Coast, which required that a house be built to withstand a 130 mile-per-hour wind. (T. at 1520-21.) This assumption favored the Lisanbys. Their house (with its 6-inch thick wall studs, diagonal sheathing, lathing, and 2 ½ inch concrete stucco) was stronger

than code requirements. (T. at 1520-21.) Dr. Smith performed his own calculations (T. at 1429, 1493-94, 1496, 1497, 1561-62). He even performed water velocity calculations in the presence of the jury when asked to do so by Plaintiffs' counsel. (T. at 1510-13.) After that, Plaintiffs' counsel stopped asking about calculations. (T. at 1513.) Dr. Smith's calculations are in evidence for the Court's examination. (Exh. D8-157, D8-158.)

At page 14 of their brief, Plaintiffs criticize the wind speed of 99 miles-per-hour used by Dr. Smith for his calculations to determine whether wind or water caused the first floor damage found at the Lisanby house. However, an almost identical wind speed of 100 miles per hour was used by Dr. Sinno. (T. at 644.)[10] Dr. Smith, although not a meteorologist, was qualified as an expert in wind science engineering (T. at 1370-71, 1385), and he obtained his wind speed from the H-wind database developed by NOAA's Hurricane Research Division. (T. at 1392-93, 1395.) According to this NOAA data, that is the wind speed specific to the site of the Lisanby house. (T. at 1395.)

C. USAA's Adjustment of the Lisanby Claim

1. A 5-Foot Water Line Was Advanced By Plaintiffs – Not By USAA.

In one of their more astounding misrepresentations, Plaintiffs claim USAA "attempted to prove a five (5) foot water line." *See* Plaintiffs' brief at p. 15. As demonstrated above, nothing could be further from the truth. USAA established conclusively – based on eyewitness, physical, photographic, and video evidence – that a minimum of 10 feet of storm surge entered the first floor of the Lisanby house.

At trial, just as in their brief, the Lisanbys attempted to portray that the idea of a 5-foot water line originated with USAA. However, it did not. It originated with Admiral Lisanby, in his pursuit

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10 In his written report produced before trial, Dr. Sinno used a wind speed of 99 miles per hour. (T. at 1389.)

of insurance benefits. On September 24, 2005, Admiral Lisanby told Mark Voll, the EFI Global engineer who examined the property, that he found a 5-foot water line in the house,[11] as follows:

> Mr. Lisanby stated that they noticed a water line (approximately five feet above the floor) between dishes in the kitchen cabinet (photos 23 & 24). The insured has since removed the dishes. Mr. Lisanby stated that the first floor is 14.5 feet above the mean sea level. Therefore, the water line was 19.5 feet above mean sea level.

(Exh. D6-1 at pp. 1, 2.) Thus, the EFI Global report was quoting Admiral Lisanby's statements about the alleged 5-foot water level – not making any independent finding of a 5-foot water level. (Exh. D6-1; T. at 1292.) The subject was addressed at trial with Mrs. Lisanby, as follows:

> Q: All right. Now during the course of dealing with your house and your possessions after the hurricane, you had heard your husband talk about finding what he felt like was a five-foot demarcation line, hadn't you?
> A: Five foot was the wainscoting that I remember he showed, that that was the height of five foot. The wainscoting was gone, but that was a five-foot marker in the house.
> Q: Okay. Do you also recall that he discussed and showed some things about a kitchen cabinet that he felt indicated a five-foot watermark?
> A: Actually, it would have been more like four-and-a-half foot. It had water in a cup or two on one shelf.
> Q: But do you recall that?
> A: Yes.
>
> . . . .
>
> Q: I understand that it was upsetting. And when Laura Music came to your house to go with you to look at the various contents that were on the first floor that were damaged, Admiral Lisanby told her about the five feet, didn't he?
> A: He testified that he did.

(T. at 1033.)

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11 The newspaper article in which the Admiral admitted that 20 to 24 feet of water destroyed the first floor of the house and swept light fixtures off the 12-foot ceilings ran on September 21, 2005. (RE at Tab 18.)

> Q: Rather than being an arbitrary figure that was pulled out of the air, this was something that the Admiral felt he had observed and he's the one that told people five feet; is that right?
> A: I think he said five feet and he showed them the marker for the wainscoting.

(T. at 1034.) The Admiral also told Dr. Sinno there was 4 or 5 feet of water in the house. (T. at 683.)

Gary Taylor, USAA's dwelling adjuster, noted the 5-foot remark in the EFI Global report, but believed based on physical evidence that the water level in the house was greater than 5 feet. He expressly so stated in an email to USAA's contents adjuster, Laura Music:

> The report eludes to a water line inside the house of 5 feet or so above floor level, as reported by the insured. The physical evidence would seem to indicate that it was even higher than that.

(Pl.'s Exh. 183.) Laura Music testified clearly at trial that the 5-foot water line originated, not with her, but with the Lisanbys. (T. at 1311-12.) She did not instruct the Lisanbys that they were required to fill out a contents list based on a 5-foot water line. Rather, she assisted them with a way to fill out their contents report that matched what they told her they believed concerning the water line. (T. at 1322-24, 1338, 1351.) USAA did not use a self-serving, arbitrary mark to deny coverage, as Plaintiffs allege. Rather, USAA's dwelling adjuster believed there was more than 5 feet of water in the house and, as demonstrated above, the evidence bears out his opinion, represented on FEMA flood insurance forms, that there was at least 10 feet of water inside the house. (T. at 446-47.)

2. USAA's Investigation of the Claim Was Proper And Was Not Conducted Negligently or in Bad Faith.

In support of their allegation that USAA's investigation was negligent and conducted in bad faith, Plaintiffs rely on a litany of some 23 or more alleged bad acts by USAA that are, once again, misrepresentative of the evidence at trial. *See* Plaintiffs' brief at pp. 16-21, 41-44. Many of the allegations are nothing more than re-statements of accusations made by Plaintiffs' counsel during

questioning of witnesses. They do not represent the answers given, which constitute the actual evidence. Other allegations are twisted snippets of larger portions of testimony and documentary evidence that, when viewed as a whole, do not support the Plaintiffs' contentions.[12]

Plaintiffs first contend that USAA wrongfully internally listed the loss as "flood from hurricane" after receiving the call from Admiral Lisanby that the roof of the house had blown off. In fact, when Karen Bell, USAA's representative took Admiral Lisanby's call, he reported to her that the asphalt shingle roof was gone, all interior rooms of the two-story house were damaged, **the first floor was under 6 feet of water**, and all contents were damaged. (Exh.D3-98, D3-99; T. at 1578-79.) Based on what the Admiral reported, Ms. Bell opened **both** a homeowners insurance claim **and** a flood insurance claim for the Lisanby property. (T. 1581-82; Exh.D3-98, D3-99.) Thus, in trying to claim that USAA predetermined the damage to be from flood, Plaintiffs quote only the flood insurance claim log. They completely ignore the existence of the companion wind claim log opened by Ms. Bell. (T. 1581-82; Exh.D3-98, D3-99.)

Plaintiffs criticize USAA's adjuster for placing a preliminary $3,000 reserve on the wind damage claim. However, USAA's adjuster clearly testified it was simply a preliminary reserve until the house could be examined, and reserves change over the life of a claim. (T. at 396.) When Mr.

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For example, at p. 11 of their brief, Plaintiffs state that Gary Taylor "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." Actually, Taylor testified:

> A. I said – you know, under the theory of pressurization – and, again, I'm not an engineer, so I can't tell you this with any authority, but it would make sense to me that these type of damages could occur during this pressurization that you're talking about. But what I said, there are many other things that can cause this. This is on the second story, and one of them is loss of support on the bottom story. . . . .

(T. at 1273.)

Taylor tried to explain how setting a preliminary reserve relates to opening a claim under USAA's computer system, Plaintiffs' counsel cut him off and moved to another subject. (T. at 396.)

Plaintiffs criticize Mr. Taylor for not taking handwritten notes when he first inspected the Lisanby property. They ignore that Mr. Taylor took numerous photographs of the house on his visits to the property. They ignore that Mr. Taylor diagramed the property. (T. at 414-15, 1183, 1186-90; Pl. Exh. 176.) They ignore that Mr. Taylor logged claim activity after his visits to the property. (Pl. Exh. 98.) Plaintiffs also represent that Mr. Taylor did not talk to eyewitnesses. Mr. Taylor did, in fact, talk with Steve Loper (T. at 1212-14), as did the EFI Global engineer, whom Loper told there were 8 and 10 foot waves on the Lisanby property. (T. at 534-35, 584-86; D6-1.) No one told Mr. Taylor that Jim Treadway, another eyewitness, existed. (T. at 1213-14.) The other persons enumerated by the Plaintiffs – Jim Lindgren, Butch Loper, and George Scholl – were not eyewitnesses to what occurred at the Lisanby property. *See* Plaintiffs' brief at p. 16.

It is true that Mr. Taylor could not personally identify a still-water line in the Lisanby house. (T. at 411.) Based on this, Plaintiffs claim that Mr. Taylor lied to the federal government when he represented that 10 feet of water entered the house. However, Mr. Taylor's figure for the water level in the Lisanby home was based on the physical evidence he saw at the site and in the neighborhood. (T. at 439-40, 446-48.) It matches the evidence from (a) the FEMA high still-water mark near the property; (b) from the eyewitnesses regarding 8 to 10 foot waves; (c) from Steve Loper's testimony about his property elevation and the level of water in his house; (d) from the Admiral's own admissions in his newspaper interview; (e) and from photos and video of storm surge on the property. Rather than being false, Mr. Taylor's judgment that at least 10 feet of water entered the house was correct.

Mr. Taylor did not say he was unqualified to make all determinations regarding damage to

the Lisanby property. Rather, he testified he was not qualified to give a "professional" opinion, i.e., an engineering opinion. (T. at 401-02, 435.) Plaintiffs criticize Mr. Taylor for simply faxing the engineering firm an assignment sheet but do not indicate any additional information that was needed. The assignment sheet expressly told the engineering firm to examine the property and report on what damage was caused by wind and what damage was caused by water. (T. at 402-04).

Mr. Taylor did, in fact, speak to the engineer, Mark Voll, about his report. (T. at 1224; Exh. D-39.) Although Mr. Taylor did not remember the conversation, he documented in a letter to Admiral Lisanby that he talked with Mark Voll at the Admiral's request. Mr. Taylor testified that, if he represented that he spoke with the engineer, then he did speak with the engineer. (T. at 1224; Exh. D-39.)

Additional living expenses ("ALE") were covered under the Lisanbys' homeowners policy only if a covered loss caused the house to be untenantable. (Exh. D1-1 at p. 3 of 17.) USAA's decision to authorize payment of additional living expenses until the engineering report was received was not a decision predetermining the claim. Rather, it allowed payment of some ALE prior to a determination of whether a covered loss made the house untenantable. The engineer's report would indicate whether any further ALE was owed, based on the engineer's determination of causes of damage to the property. (T. at 419-24.) Plaintiffs' attempt to leave the impression that they were paid only 7 days of ALE. *See* Plaintiffs' brief at p. 20. Actually, they were paid two months' rental expenses. (T. at 757.) USAA did not stop paying ALE until it received the engineer's findings that flood was the primary cause of damage and the reason the house was untenantable. (T. at 419-24.)

Based on the physical evidence he saw at the house, Mr. Taylor did determine – before receiving the engineering report – that there was flood damage that was at least equal to the Lisanbys' flood insurance limits. (T. at 443-44, 448, 451, 1214-19.) Therefore, Mr. Taylor

authorized payment of the Lisanbys' flood insurance claim. (T. at 1214-19.) He did so in conformity with FEMA guidelines concerning payment of Katrina flood claims. (T. at 1214-19.) Admiral Lisanby did not disagree that the flood claim should have been paid in full, quickly. (T. at 919-21.)

Plaintiffs claim Mr. Taylor "admitted he did not think water caused the big hole in the second floor depicted in Exh. 74." *See* Plaintiffs' brief at p. 19. This is the same hole shown in the interior picture of the second floor bathroom, *supra*. Taylor actually testified:

> Q: So you would agree with me, though, would you not, that pressurization and ballooning of the second floor could cause a hole like that to be blown out on the back side of the house, would you not?
> A: I have no authoritative reason to agree with that. I mean, is that a possibility? I would be speculating.
> Q: Okay. So you don't think water did that, do you?
> A: The water did not get that high. I don't believe that the water would have directly affected that, but it's possible that it could have been a chain of events that affected that.

(T. at 1281.) Doug Smith testified the hole occurred when surge torqued the house. (T. at 1448.)

Mr. Taylor did not lie when he wrote to Admiral Lisanby on October 17, 2005, and told him causation determinations were not complete. They were not. The engineer's report had not been received regarding wind damage or regarding the full extent of flood damage. (T. at 1214-19.)[13] Mr. Taylor correctly advised the Admiral that it was to the Admiral's advantage to have the house preserved until causation determinations were made. (T. at 450-54.) The Admiral's own engineer, Ralph Sinno, testified it was unfortunate the house was torn down before he could examine it. (T. at 640.)

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13 Plaintiffs confuse being able to tell that flood damage to the house was at least $250,000, with being able to tell the full extent of flood damage versus wind damage.

Plaintiffs claim Mr. Taylor prepared his wind damage estimate on October 19, before receiving the text of the EFI Global engineering report. Mr. Taylor testified directly to the contrary. Mr. Taylor did not prepare the estimate until after he received the text of Mark Voll's engineering report via email. (T. at 1266-67.)

> Q: And on October 19th, 2005, you had already prepared the wind damage amount that included the central hallway, hadn't you?
> A: No.
> Q: Okay. So did somebody else prepare that on October 19th?
> A: Nobody did.
> Q: All right. Well, did you send the October 19th one to Admiral Lisanby?
> A: I didn't prepare an estimate on October 19th.
> Q: Okay. Well, somebody did.
> A: Nobody did.
> Q: Well, it says it's entered on October 19th, 2005.
> A: Can I explain?
> Q: Sure.
> A: Okay. Our estimating program, Xactimate, requires that you enter some basic data in a parameter screen, which is the person's name, address, deductible, that sort of thing. It's not uncommon for me to go in ahead of time and enter those on my files before I ever start working on them. So the first date that you do any activity in the Xactimate program, that becomes the date entered. That date could have been September 3rd, when I got the file, if I did it then. I did not prepare this estimate until I got the engineer's report on the 20th.

(T. at 1266-67.) The trial court finally sustained an objection that Plaintiffs' counsel was mischaracterizing Mr. Taylor's testimony in continuing to accuse him of preparing the estimate before receiving the engineering report. (T. at 1268-69.)

Plaintiffs criticize Mr. Taylor for preparing his wind damage estimate based on the text of the engineering report, which he received by email, and maintain Mr. Taylor should have waited until he received the identical text on a signed, hard-copy document, with attached photos and wind information. *See* Plaintiff's brief at p. 17. This makes little, if any, sense. Mr. Taylor had personally seen the property several times and extensively photographed it himself. He testified he recognized

everything the engineer referenced and did not need to see additional photos. (T. at 455-56, 1188-89, 1190.) Mr. Taylor's adjustment based on the text of the report relied on the engineer's wind speeds given for Category 2 and 3 hurricanes. (T. at 1225-29.) This was consistent with the testimony of Plaintiffs' own witness, Dr. Blackwell, that Katrina's Category 2 eyewall impacted Pascagoula. (T. at 303-04.) Plaintiffs do not show any way that the EFI engineer's mistake in reading an attachment regarding wind speed at the Trent Lott airport had any adverse impact on adjustment of the claim.

Contrary to Plaintiffs' allegations, the engineer did know where the guesthouse was located. It was at the back of the property. (Exh. D6-1; T. at 495.) The engineering report did not mention the garage, but USAA adjusted the claim regarding the garage consistent with the information concerning the guesthouse and concerning the flood damage to the remainder of the property. (T. at 481-82, 489-91.) The allegation that USAA had no information regarding the garage is flatly false. Mr. Taylor examined, diagramed, and photographed the area where the garage had stood and witnessed the physical damage to the surrounding area. (T. at 412-13.) While Steve Loper claimed the garage imploded from wind, Jim Treadway took a photo of the garage roof, with at least part of the garage still attached, floating away on Katrina's storm surge. (RE at Tab 15.)

Plaintiffs criticize Mr. Taylor for not considering an oak tree that blew down. *See* Plaintiffs' brief at p. 18. This tree was on the line of the neighboring property. It did not hit the Lisanby house. (T. at 441-42, 844-45.) Plaintiffs overlook that the question is not whether there was significant wind activity at the Lisanby property, or not. There was. There was a hurricane. The question is, what did the wind do? The house remained standing to provide its own evidence in that regard. That cloth curtains blew into the top of a tree says absolutely nothing about whether wind blew down a wall that was at least 9 inches thick and made of wood and concrete.

Plaintiffs criticize USAA for making its decision on the Lisanbys' claim before hiring a

meteorologist. This ignores that the EFI Global report supplied the correct wind speed ranges for Category 2 and Category 3 hurricanes. (Exh. D6-1.) It ignores that these ranges are consistent with those provided by Plaintiffs' own expert, Dr. Blackwell. (T. at 303-04.)

Plaintiffs misrepresent Mr. Taylor's testimony about ballooning and pressurization. As noted previously, Mr. Taylor acknowledged that, although ballooning can cause similar damage, so can removal of first floor support (T. at 1273). Removal of first floor support is exactly what happened at the Lisanby house. The first floor was washed away and no longer supported the second floor, so the house torqued, causing cracks and a hole in the second floor walls. (T. at 1447-51.) While Mr. Taylor agreed that 2 feet of water would not do the damage seen on the first floor of the Lisanby house, it is clear he believed there was more than 2 feet of water. (T. at 501-02; Pl. Exh. 183.) Taylor also questioned that 5 feet of water could do the damage. However, it was Admiral Lisanby – not Taylor – who claimed to USAA's adjuster and the EFI engineer that there was only 5 feet of water. (T. at 1033, 1304, 1307; Pl. Exh. 183.) Taylor believed the physical evidence showed the water was higher. (Pl. Exh. 183.)

Plaintiffs complain that USAA instructed Mrs. Lisanby on how to create a detailed contents inventory. As previously addressed, USAA did not instruct Mrs. Lisanby to divide the contents on the property based on a 5-foot water line. Rather, USAA's contents adjuster, Laura Music, showed Mrs. Lisanby how to do that if it reflected the Lisanbys' belief about the water line. It was the job of USAA's adjuster to assist the Lisanbys to present their claim consistent with their beliefs, after which USAA would reach its claims decision. (T. at 1323-24, 1328, 1332-33.) Plaintiffs try to leave the impression that USAA imposed something on Mrs. Lisanby that was an empty exercise. That impression is false. Based on the contents list provided by Mrs. Lisanby, Laura Music adjusted the flood insurance claim. The Lisanbys were paid the $100,000 flood insurance policy limit regarding

contents below 5 feet. (T. at 1317-21.) Ms. Music then left the USAA catastrophe site, and another adjuster, Andrew Snyder, handled the contents wind damage claim. (T. at 1326.) Mr. Snyder authorized payment for items in the second floor hall (such as computer equipment) that were destroyed by wind-blown rain through the french doors. USAA also paid for the Lisanbys to remove the furniture from the second floor and move it to Kentucky. (T. at 471, 496, 768.)

While Mrs. Lisanby initially testified Laura Music told her she would be paid for all damaged personal property above the 5-foot line, she later testified:

> Q: When you met with Laura Music and she explained to you about making your inventory list, you were making one inventory list for the claim on both your flood policy and your homeowners policy: is that correct?
> A: I followed her form. I wasn't told what it was for. It had separate columns and I was to do certain things and I did exactly what I was asked to do because I thought they would do the same.
> Q: You knew you had a flood insurance policy, didn't you?
> A: I did.
> Q: And you knew you had a homeowners insurance policy?
> A. Correct.
> Q: And you knew that you were making one inventory list for all the contents; is that right?
> A: Correct.
> Q: Now, isn't it correct that Ms. Music told you to make the list and show the items that you felt were under the waterline and the items you felt that were above the waterline.
> A: Yes. I answered that.

(T. at 1043.) Laura Music testified that she did not make any representation to Mrs. Lisanby that contents items above 5 feet would be covered. (T. at 1327-28.) As noted above, Laura Music told Mrs. Lisanby to make the list based on the Lisanbys' beliefs about items below and above the waterline. No one from USAA lied to the Lisanbys about what would or would not be covered. No one from USAA acted negligently or in bad faith.

D. <u>The Lisanbys' Testimony Regarding Emotional Distress</u>

Both of the Lisanbys testified that they had medical problems caused by stress. They claimed that they were stressed by USAA, but tried to claim they were not particularly stressed by Katrina, itself. Although Plaintiffs state at p. 21 of their brief that "Dr. Gibson related Admiral Lisanby's medical problems to the problems he was having with USAA," there is no trial testimony in this case from Dr. Gibson.[14] Admiral Lisanby did not go so far as to say that Dr. Gibson related all of his stress directly to USAA. Instead, he skirted his lawyer's direct questions and testified:

> Q: Has Dr. Gibson related these panic attacks to the problems you've had with USAA?
> A: I read her reports and she says I suffer from extreme anxiety and depression.
> Q: Did she relate it to USAA?
> A: She related it to the stress that I've been under because of the situation I'm in.

(T. at 808.) Obviously, the Admiral's situation included the experience of Katrina's aftermath – a stressful situation in and of itself, not attributable to USAA.

SUMMARY OF USAA's ARGUMENT ON CROSS-APPEAL ISSUES

The trial court did not dismiss Plaintiffs' claim for punitive damages *sua sponte*. Rather, the trial judge acted properly based on USAA's motion for directed verdict and on briefs submitted by the parties on the issue of punitive damages. All of the accusations relied on by Plaintiffs to support their claim for punitive damages were actually put before the court in the initial, contract phase of the trial. This is demonstrated by Plaintiffs' brief to this Court, in which their arguments regarding emotional distress damages and punitive damages rely on the same litany of 23 or more "bad acts" they accuse USAA of committing. Plaintiffs argued this same list of bad acts to the trial court and never intimated there was any evidence they were precluded from presenting. In fact, Plaintiffs'

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14 Dr. Gibson was deposed (R. at 2662-63), but Plaintiffs did not offer her testimony at trial.

counsel represented their presentation to the jury on punitive damages would take less than 30 minutes. (T. at 1835.) Thus, the trial court correctly recognized there was no need for a further evidentiary hearing pursuant to Miss. Code Ann. §11-1-65.

USAA possessed an arguable and legitimate reason for its claims decision. The evidence of storm surge destruction of the Lisanby property was, and is, overwhelming. No further investigation could have negated that arguable reason or shown it to be illegitimate.

If the trial court was correct in abandoning the American Rule and awarding attorneys' fees and expenses under *Universal Life Ins. Co. v. Veasley*, then the trial court was also correct in limiting the fee award to the amount of the Plaintiffs' contingent fee contract. *Veasley* damages are compensatory. The Lisanbys could have suffered no loss beyond the amount owed under their contingent fee contract. They would only be entitled to the amount necessary to make them whole. Anything more would constitute a windfall to them and their counsel – something outside the purpose of compensatory damages.

The trial court expressly noted it considered the *McKee* factors in determining that the contingency fee was a reasonable and fair fee. Under this Court's current jurisprudence, a trial court is not required to painstakingly make individual *McKee* factor findings. It is simply required to consider the factors and note that the consideration was performed. *Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n*, 964 So. 2d 1100, ¶36, 39 (Miss. 2007).

REPLY ARGUMENT ON DIRECT APPEAL

I. The Trial Court Erred By Denying USAA's Motion for JNOV or New Trial Regarding the Lisanbys' Claim for Additional Homeowners Insurance Benefits

In arguing that their evidence was sufficient to withstand USAA's motions for JNOV or new trial, Plaintiffs do not address *Johnson v. City of Pass Christian*, 475 So. 2d 428, 431 (Miss. 1985),

at all. They attempt to distinguish *Blossman Gas, Inc. v. Shelter Mut. Gen. Ins. Co.*, 920 So. 2d 422 (Miss. 2006), but do little more than demonstrate distinctions without a difference. As evidenced by the Lisanbys' brief to this Court, they desire to shift the focus of this case away from the photos of the house and the photos and video of storm surge taken on the Lisanby property during Katrina. This is because the photos and videos directly contradict their claims. All of the complaints about claims adjusting and all of the opinions of meteorologists about wind speed cannot erase the clear evidence provided by the photos and video. The first floor of the Lisanbys' house was washed away. The second floor – with its central hallway that shows the maximum effect of any wind tunneling – demonstrates this conclusively.

Plaintiffs say that *Blossman* is different because, in *Blossman*, "the plaintiff's theory of liability was clearly contradicted by singular physical evidence." *See* Plaintiff's brief at p. 24. That, however, is exactly the Lisanbys' problem in this case. The testimony of their expert, Dr. Sinno, directly contradicted the physical facts. While Dr. Sinno testified that the roof ballooned and uplifted, he had to admit on cross-examination that photos demonstrated there was no wind in the attic. Photos of the attic showed all of the bracing intact, no insulation displaced, and the attic dormer window intact (despite lack of hurricane shutters). Though Dr. Sinno testified wind entered the first floor of the house through floor-to-ceiling windows and doors, tunneled through the house, and blew out first floor walls from the inside, the photos of the second floor hallway totally disprove this. Wind tunneled through the second floor, and the walls are not gone like those on the first floor.

Dr. Sinno's testimony that wind tunneling through the second floor blew a hole in the wall in the second floor bathroom is completely belied by the photo of the interior of that bathroom after Katrina. There is no evidence of any significant wind disturbance in the bathroom – not even enough wind to blow the toilet paper off the roll or the soap out of the dish. The only evidence consistent

with the physical facts is that the cracks and hole in the second floor walls occurred when the house torqued on its foundation because surge washed out the first floor.

At p. 26 of their brief, the Plaintiffs try to reconcile Dr. Sinno's testimony with the photographs of the house by claiming Dr. Sinno acknowledged some flood damage to the property. However, Dr .Sinno testified, quite clearly, that:

> Q: Now, Dr. Sinno, in your opinion, was the Lisanby home totally destroyed before the water reached the first floor of the Lisanby house?
> A: Yes. It was. Structurally speaking, now. The house was completely condemned, completely failed, and useless, and it was correct to remove the house from the site by the owner.

(T. at 669-70.) As this Court recognized in *Corban v. United Services Auto. Ass'n*, 20 So. 3d 601, ¶32 (Miss. 2009), the same loss cannot be caused twice, and Plaintiffs cannot have Dr. Sinno's testimony both ways.[15]

Finally, Plaintiffs try to distinguish this case from *Blossman* by saying that USAA's adjuster took the position the cause of damage to the house was not clear, requiring him to hire an engineer. *See* Plaintiffs' brief at pp. 23-24. This argument begs the question. Both sides hired engineers.[16] Plaintiffs cannot sustain a verdict by relying on the testimony of an engineer that defies logic, the laws of physics, and the physical and photographic evidence. The judgment awarding the Plaintiffs further insurance contract benefits cannot stand. Dr. Sinno's testimony about damage to the Lisanby

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At p. 27 of their brief, Plaintiffs claim that a photo of 6 to 7 inches of water in the Treadway house at 8:30 a.m. supports Sinno's theory that wind destroyed the Lisanby house before water reached it. USAA never claimed that the Lisanby house was destroyed by 8:30 a.m. Storm surge rose rapidly after 8:30 a.m. Maximum surge occurred about 10:15 a.m. (T. at 1402-03.) Photos and video show 8 to 10 foot waves. (RE at Tabs 15 and 16; T. at 1099-1108.)

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Had USAA adjusted Plaintiffs' claim without obtaining an engineering opinion, Plaintiffs would no doubt have claimed that was bad faith.

house is not sufficient to sustain the verdict for dwelling damage. Plaintiffs do not point to any testimony Sinno gave that would sustain a verdict for damage to their personal property (contents). Photos demonstrate that the verdict regarding the garage and its contents is not sustainable. Unquestionably, the award for contents of the cottage cannot be sustained. There is no sufficient testimony that wind (as opposed to storm surge) made the main house untenantable; therefore, the verdict for ALE is not sustainable. The verdict for the Lisanbys should be reversed and rendered. At the least, USAA should receive a new trial, and it should be held in a different venue.

II. Replacement Cost Evidence Should Have Been Excluded

At p. 28 of their brief, the Lisanbys contend that replacement cost evidence was properly admitted even though they did not rebuild their home. They state they were unable to rebuild because USAA did not properly pay their claim. However, Admiral Lisanby's statement that the Lisanbys were not going to rebuild the house was made on or before September 21, 2005 (RE at Tab 18), before USAA reached any decision on their homeowners insurance claim. Regardless of why the Lisanbys did not rebuild, the policy is express that they are not entitled to recover replacement cost unless they actually do rebuild. (Exh. D1-1 at p. 9-10.) Yet, they were allowed at trial to present evidence of a value which they were not entitled to recover under the policy. *Aiken v. Rimkus Consulting Group, Inc.*, 2007 WL 4245906, *2 (S.D. Miss. Nov. 29, 2007); *Penthouse Owners Assoc., Inc. v. Certain Underwriters at Lloyd's*, 2009 WL 94835, * 1 (S.D. Miss. Jan. 13, 2009). That Admiral Lisanby was also allowed to give his own opinion of fair market value of the property does not change this.[17] Plaintiffs were not required by the trial court to restrict their evidence to actual cash value of the loss, i.e., replacement cost less depreciation of damaged

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17 The Lisanbys did not present any expert testimony regarding the actual cash value of the house. They simply presented the Admiral's opinion of fair market value.

components. The error requires reversal. It allowed Plaintiffs' counsel to argue that the jury should render a verdict for remaining dwelling limits under the policy, even in the absence of any evidence that further dwelling components equaling that dollar amount were damaged by wind.

III. Failure to Bifurcate the Emotional Distress Claims Wrongly Allowed Plaintiffs to Focus the Jury on Alleged Claims Handling Wrongs, Rather Than on the Actual Evidence Regarding Wind Damage Versus Water Damage.

Based on *United American Ins. Co. v. Merrill*, 978 So. 2d 613 (Miss. 2007), the Lisanbys argue that the trial court appropriately allowed the jury to consider their claim for emotional distress damages at the same time it considered the Lisanbys' wind versus water claim for contract damages. *See* Plaintiffs' brief at pp. 29-30. While it is true that the *Merrill* decision declined to find reversible error in a trial court's failure to bifurcate an insured's contract claim from her emotional distress claim, *Merrill* is distinguishable and does not excuse the failure to bifurcate in this case.[18]

Merrill was a post-claims underwriting case in the life insurance context, in which it can be difficult to separate the insured's claim for benefits from the manner in which it was handled by the insurance company. *Merrill*, 978 So. 2d at ¶¶64-76. Moreover, simply because the Court declined to find reversible error under the circumstances presented to it in *Merrill* does not mean that there is no reversible error in the circumstances of this case.

This suit is more akin to that presented to the Court in *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888 (Miss. 2006), an insurance bad faith claim based on an auto accident. In

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Plaintiffs misquote *Merrill,* stating that this Court noted it has moved away from the requirement of proof of a "separate independent tort" to establish emotional distress damages. *See* Plaintiffs' brief at p. 29. Actually, the *Merrill* court noted a move away from a requirement of proof of a "'separate independent **intentional** tort.'" *Merrill*, 978 So.2d at ¶ 84 (emphasis added). The distinction is not one without a difference. Proof of an independent tort is still required for an award of emotional distress damages under *Veasley*. However, negligence (lack of arguable reason) is sufficient, and malice need not be shown. *Merrill*, 978 So. 2d at ¶ 84 (quoting *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992)).

Hartford, the Court noted that claims handling evidence should not be presented in the first phase of trial, because it would distract and confuse the jury and deter the jury's ability to rightly determine the fault issues regarding the car wreck. *Hartford*, 936 So. 2d at ¶¶26-29. The findings on those fault issues would then govern the course of other claims sought to be presented. *Id.* Granted, the Court's statements in *Hartford* were made in the context of requiring bifurcation of a punitive damages claim, but the reasoning in the *Hartford* case applies equally here, as demonstrated by Plaintiffs' own brief to this Court.

The evidence cited by Plaintiffs at pp. 15-21 of their brief to support their emotional distress claim, and the evidence cited by Plaintiffs at pages 41-44 of their brief to support their alleged entitlement to pursue a punitive damages claim is **identical**. This makes it clear that the failure to bifurcate in this case allowed the jury to consider claims handling evidence during the wind versus water phase of the case that related to a purported punitive damages claim. The failure to bifurcate also led the trial court to submit the issue of negligent investigation to the jury, without first making a determination as a matter of law whether USAA had an arguable reason for its actions.[19] This was particularly egregious in this case, in which community bias already so strongly disfavored USAA. It resulted in exactly the problem describe by the *Hartford* Court:

> At trial, testimony regarding the close issue of fault most likely was confused with testimony concerning the issue of how Hartford investigated fault. Instead of strictly focusing on the accident and the applicability of UM coverage, the jury was allowed to consider evidence as to the way Hartford conducted its investigation of the accident and ultimately ignored the needs of its

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19 The question of whether an insurance company possesses an arguable reason is, in the first instance, one of law for the court. *Jenkins v. Ohio Cas. Ins. Co.*, 794 So.2d 228, ¶18 (Miss. 2001); *Murphree v. Federal Ins. Co.*, 707 So.2d 523, 529 (Miss. 1997). A claim for negligent investigation simply asserts that further investigation would have shown the insurance company that its arguable reason was not legitimate. *Liberty Mut. Ins. Co. v. Neely*, 862 So. 2d 530, ¶12 (Miss. 2003).

> insured. While the jury did render a large compensatory damage award in this case, there is no way to know how much effect inflammatory punitive damages evidence had on this preliminary determination. Moreover, there is no way to know if the evenly contested issue of fault, if properly tried, would have exonerated Hartford from the liability associated with its decision to deny Williams's UM claim.
>
> . . . .
>
> We must remand this case for a new trial inasmuch as we can never know the full effect the premature hearing of the punitive damages evidence had on the jury's verdict for compensatory damages.

Hartford, 936 So. 2d at ¶¶ 27-29. The same considerations applied to claims-handling evidence offered on the claim for emotional distress damages here. It was erroneously admitted in the trial's first phase. Such evidence confused the jurors. It improperly removed their focus from the basic contractual issues of wind damage versus water damage. Trying the emotional distress claim in the first phase of trial additionally left the Court in abandonment of its gatekeeping function on the arguable reason element. A new and bifurcated trial is warranted, in which emotional distress and claims-handling evidence is deferred until a second phase of the trial. The jury should not be instructed on or allowed to consider emotional distress until after the trial court has made a determination of whether USAA possessed an arguable reason for its actions.

IV. The Issue of Attorneys' Fees Should Not Have Been Considered As an Element of *Veasley* Damages.

In arguing that the trial court properly allowed consideration of attorneys' fees and expenses as an element of *Veasley* damages, the Lisanbys primarily rely on two federal court decisions – *Essinger v Liberty Mut. Fire Ins. Co.*, 534 F.3d 450 (5th Cir. July 7, 2008) and *Simpson v. Economy Premier Assur. Co.*, 2006 WL 2590620 (N.D. Miss. Sept. 8, 2006). Both of these decisions relied on the dicta in *Universal Life Ins. Co. v. Veasley* stating that attorneys' fees might be part of the compensatory damages awardable in a case of negligent breach of contract (i.e., breach without

arguable reason). Neither decision, however, notes that *Veasley*'s dicta concerning attorneys' fees and expenses has never been followed by this Court, which has firmly and rightly adhered to the American Rule regarding recovery of attorneys' fees in all cases.

More recently than the federal court's decisions in *Essinger* and *Simpson*, this Court has reiterated that Mississippi follows the American Rule regarding when attorneys' fees and expenses are recoverable.

> [A]bsent statutory authority or contractual provisions, attorneys' fees cannot be awarded unless punitive damages are also proper. *Smith v. Dorsey*, 599 So. 2d 529, 500 (Miss. 1992).

Warren v. Derivaux, 996 So. 2d 729, ¶ 32 (Miss. 2008) (decision issued in December 2008). In *Barnes, Broom, Dallas and McLeod, PLLC v. Estate of Marilyn Cappaert*, 991 So. 2d 1209 (Miss. 2008), decided in October 2008, this Court also expressly affirmed the American Rule still applies in Mississippi in breach of contract cases. *Barnes*, 991 so. 2d at ¶ 22.

The *Merrill* case, cited by Plaintiffs, said nothing different. It, too, based its award of attorneys' fees solely on the fact that punitive damages were awarded and were proper, stating:

> Additionally, '[w]here punitive damages are awarded by the jury, attorney's fees are justified.

Merrill, 978 So. 2d at ¶117. The portion of *Merrill* quoted by Plaintiffs in their brief at pp. 31-32 is from the part of the opinion concerning jury instructions that allowed emotional distress damages under *Veasley*. It has nothing to do with the separate section of the opinion following the American Rule regarding attorneys' fees. *Compare Merrill*, 978 So. 2d at ¶ 86 (section of the Court's opinion concerning jury instructions on emotional distress issues) *with Merrill*, 978 So. 2d at ¶ 117 (regarding the American Rule and attorneys' fees).

The federal court's Erie guess in *Essinger* and *Simpson* was wrong. Before *Merrill*, during

Merrill, and after *Merrill*, this Court has continued to apply the American Rule to claims seeking recovery of attorneys' fees and expenses. Respectfully, the Court should not deviate from the American Rule now, overruling an untold number of contract decisions in which it has been properly followed. The award of attorneys' fees and expenses should be reversed and rendered.

V. Even Under *Veasley* Standards, USAA Clearly Had An Arguable Reason For Its Actions, Precluding Consideration of Emotional Distress Damages and Attorneys' Fees.

An arguable reason is simply one in which there is some credible evidence supporting the given reason, even if there is also evidence to the contrary. *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 851 (Miss. 1984); *see also Prudential Prop. & Cas. Ins. Co. v. Mohrman,* 828 F. Supp. 432, 441 (S.D. Miss. 1993) (stating arguable reason exists if the denial is supported by at least some credible evidence, even though there may be evidence to the contrary); *Richards v. Amerisure Ins. Co.,* 935 F. Supp. 863, 867 (S.D. Miss. 1996) (citing *Campbell*, 466 So.2d at 851). There is no question that credible evidence supports USAA's decision regarding the Lisanbys' claim. The evidence that storm surge washed out the first floor of the house is no less than overwhelming. Photos of the house, alone, demonstrate this. The second floor of the house demonstrates it, showing the limited effect of wind tunneling through the house, in stark contrast to the condition of the first floor. The FEMA high still-water mark near the house demonstrates it, placing over 10 feet of ocean water (including waves) surging through the first floor. Admiral Lisanbys' admission to the Princeton, Kentucky *Times Leader* demonstrates it. Eyewitness testimony and photos and video on the property demonstrate it.

Similarly, a claim for negligent investigation simply asserts that further investigation would have shown the insurance company that its arguable reason was not legitimate. *Liberty Mut. Ins. Co. v. Neely*, 862 So. 2d 530, ¶12 (Miss. 2003). In the face of all of this evidence, gleaned by USAA

1749.)

> USAA seized on what Admiral Lisanby said about water in the plate and a four-and-a-half foot cabinet and said, ha, that's it, we got him, we'll call it five feet. He's stuck with it. (T. at 1789.)
>
> USAA's investigation of the water was no investigation at all. It was more than just sloppy work. It was a sham. And USAA is accountable for that in this courtroom. (T. at 1792.)
>
> This damage was caused by wind. USAA knows it, and USAA is accountable to the Lisanbys for their callous disregard of the Lisanbys' rights. (T. 1793.)
>
> The question arises, was this a badly bumbled claim, which is bad enough or is something else going on here? A fair reading of the evidence is there was something else going on here. (T. at 1802.)
>
> It was all a sham. (T. at 1804.)

Thus, the arguments of Plaintiffs' counsel in this case, just like those in *Janssen*, accused USAA of lying (performing a sham investigation), trying to take advantage of the Admiral (seizing on his statement about a 5-foot waterline), trying to cheat the Lisanbys ("something else going on here"), and having callous disregard for the Lisanbys' rights. These are all punitive arguments. Coupled with counsel's send-a-message argument, a new trial is required. Counsel's media interview, in violation of this State's ethics rules, added further to the problem. The change in the jurors' conduct and statements before and after the interview indicates the interview had its effect, despite that no juror acknowledged personally seeing it. *See* USAA's Brief for Appellant at pp. 53-54. USAA is entitled to a new trial.

RESPONSE ARGUMENT ON CROSS-APPEAL

VIII. The Trial Court Properly Granted USAA's Motion for Directed Verdict and Declined to Send the Issue of Punitive Damages to the Jury.

At p. 39 of their brief, the Lisanbys maintain that the trial court acted *sua sponte* when it

dismissed their claim for punitive damages. As detailed in the Course of Proceedings section of this brief, and as quoted from the trial court's opinion on the issue of punitive damages, the punitive claim was dismissed upon USAA's validly stated motion for directed verdict – not on the Court's own motion. (R. at 3848.) The dismissal occurred only after briefing of the issue by the parties. (R. at 3848; T. at 1836-37, 1839.)

In reliance on an extensive discussion of *Bradfield v. Schwartz*, 936 So. 2d 931 (Miss. 2006), the Lisanbys argue the trial court was required to hold an evidentiary hearing regarding the issue of punitive damages prior to dismissing that claim. The *Bradfield* procedure was superceded by an amendment to Miss. Code Ann. §11-1-65. The statute does not require an evidentiary hearing in front of the trier of fact. The statute, as applicable to this trial, simply required the trial judge to hold an evidentiary hearing to determine if punitive damages could be submitted to the jury. Miss. Code Ann. §11-1-65(c). Plaintiffs at least acknowledge this much in their brief at p. 40.

However, Plaintiffs' claim that there was no evidentiary hearing regarding their punitive damage evidence involves yet another misrepresentation of what occurred at trial. **As a matter of fact, the entire trial was an evidentiary hearing on Plaintiffs' claim for punitive damages.** The record demonstrates, and Plaintiffs' brief to this Court demonstrates, that Plaintiffs rely on exactly the same accusations and alleged evidence for both their emotional distress claim and their punitive claim. *See* Plaintiffs' brief at pp. 15-21 and 41-44. The alleged evidence and accusations had already been put completely before the trial judge (and, unfortunately, the trier of fact) before USAA's motions for directed verdict were made. The Lisanbys point to no other claims handling evidence they were not allowed to offer. They proferred no such evidence to the trial judge. They argue no such evidence. There was none. Plaintiffs' counsel represented to the trial court that their punitive damages presentation would take less than 30 minutes. (T. at 1835.)

Having presented their claims-handling accusations in the contract phase of the trial, and having made their arguments to the jury that USAA should be held accountable for callous disregard during the first phase of the trial, Plaintiffs should not be heard to complain that they did not get an evidentiary hearing. They did get one, albeit in a way that violated USAA's rights to a fair trial. They were not entitled to present a punitive damage claim.

Punitive damages are disfavored in the law. *Life & Cas. Inc. Co. of Tennessee v. Bristow*, 529 So. 2d 620, 622 (Miss. 1988). They are an extraordinary remedy intended only for extreme cases and are to be allowed only with caution and within narrow limits. *Id.* "[A]ny plaintiff asking for punitive damages . . . based on bad faith of an insurance company has a heavy burden." *Id.* In cases involving breach of insurance contract, an insured cannot recover punitive damages without presenting sufficient evidence in the record to create a jury question whether: (a) the insurer lacked a legitimate or arguable reason for its claims decision; **AND** (b) clear and convincing evidence that the insurer acted with malice, gross negligence, or actual fraud in handling the claim. Miss. Code Ann. §11-1-65 (1)(a); *Windmon v. Marshall,* 926 So. 2d 867, 874 (Miss. 2006).

The trial court is the gatekeeper of whether the issue of punitive damages should be submitted to the jury. Miss. Code Ann. §11-1-65 (1)(d); *Cossitt v. Federated Guar. Mut. Ins. Co.*, 541 So. 2d 436, 443 (Miss. 1989). Before submitting the issue of punitive damages to a jury, the court must first determine that there is sufficient evidence in the record that would support a jury verdict for punitive damages. *Id.* [23]

An arguable reason is simply one in which there is some credible evidence supporting

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Although the jury finding in this case on emotional distress damages indicates a finding of inadequate investigation, the trial court could not abandon its gatekeeping function on sufficiency of the evidence of arguable reason and malice.

the given reason, even if there is also evidence to the contrary. *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 851 (Miss. 1984); *see also Prudential Prop. & Cas. Ins. Co. v. Mohrman,* 828 F. Supp. 432, 441 (S.D. Miss. 1993) (stating arguable reason exists if the denial is supported by at least some credible evidence, even though there may be evidence to the contrary); *Richards v. Amerisure Ins. Co.,* 935 F. Supp. 863, 867 (S.D. Miss. 1996) (citing *Campbell*, 466 So.2d at 851). However, absence of an arguable reason will not, by itself, support submission of the issue of punitive damages to a jury. *Pioneer Life Ins. Co. of Illinois v. Moss*, 513 So. 2d 927, 930 (Miss. 1987). A jury cannot be allowed to consider punitive damages unless the trial court can first find that there is record evidence that the insurer's conduct was so malicious or reckless as to rise to the level of an independent tort. *Windmon v. Marshall,* 926 So. 2d 867, 874 (Miss. 2006).

> "Bad faith requires a showing of more than bad judgment or negligence; rather, 'bad faith' implies some conscious wrongdoing 'because of dishonest purpose or moral obliquity.'"

Tarver v. Colonial Life & Acc. Ins. Co., 2007 WL 551766 at *8 (S.D. Miss. Feb. 21, 2007) (citing *Bailey v. Bailey*, 724 So. 2d 335, 338 (Miss. 1998)).

The Plaintiffs did not put forward sufficient record evidence to make these required showings. Although Plaintiffs' counsel made numerous accusations, those accusations by counsel are not evidence. The trial court properly, as a matter of law, dismissed the punitive damage claim from this case. There is ample evidence in the record that USAA had an arguable and legitimate reason for its claim decisions. No amount of investigation could have erased that arguable and legitimate reason, which was based on external and verifiable evidence regarding storm surge damage to the Lisanby property. There is ample evidence that USAA acted in good faith, and not with malice, fraud or gross negligence. The trial court properly found there was no malice or gross

negligence in USAA's conduct. (R. at 3848-50.) Plaintiffs' arguments misrepresent the evidence concerning USAA's actions – twisting snippets of testimony and proffering the accusations by Plaintiffs' counsel as if they were evidence. These points have already been detailed extensively in the previous sections of this brief. In the face of the overwhelming evidence that storm surge destroyed the Lisanby house, the trial court properly dismissed the claim for punitive damages. There was no basis for such a claim in this case.

IX. If Attorneys' Fees Can Be Awarded Under *Veasley*, the Trial Court Properly Limited Them to Compensatory Damages and Acted Properly in Its Consideration of the *McKee* Factors.

A. Damages for Breach of Contract Are Limited to Those Necessary to Make Plaintiffs Whole

The Lisanbys and their counsel had a 1/3 contingent fee contract. (Exh. 1 to 10-28-08 hearing, under seal). Nevertheless, the Lisanbys' counsel submitted a request that sought $845,317.50 attorneys' fees, plus $211,069.47 in expenses – all together, a total of more than the jury awarded their client. (R. at 3861.)

If this Court were to abandon the American Rule based on *Veasley*'s dicta and allow awards of attorneys' fees and expenses, then *Veasley* limits the Lisanbys to recovery of an amount equal to a 1/3 contingent fee – the amount they actually owed to their attorneys. The *Veasley* opinion discussed awarding attorneys' fees and expenses solely in terms of potential compensatory damages to make a Plaintiff whole in the face of an insurance claim denied without arguable reason. *Veasley*, 610 So. 2d at 295. Specifically, the Court stated:

> Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss. Additional 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.

Id. (emphasis added.) Therefore, just as emotional distress damages under *Veasley* have been treated as a form of compensatory damages, attorneys' fees and expenses would have to be treated the same way. *Merrill*, 978 So. 2d at ¶83-85 (characterizing award of emotional distress damages under *Veasley* as a category of compensatory damages). Plaintiffs acknowledge that *Merrill* treats *Veasley* damages as nothing more than compensatory damages, stating:

> In *Merrill* this Court stated that negligence in claims handling which causes foreseeable damages gives rise to compensatory damages . . .

Plaintiffs' brief at p. 32.

Damages for breach of contract are simply to "make whole," i.e., to "put the injured party in as good a position as he would have been in but for the breach." *J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., Inc.*, 683 So. 2d 396, 405 (Miss. 1996) (citing *Veasley*); *Wilson v. General Motors Acceptance Corp.*, 883 So.2d 56, ¶39 (Miss. 2004).

> '[W]hen a person has been injured by a breach of contract, he or she is entitled to be justly compensated and is to be made whole by the trial court; however, it is never contemplated that the injured party be placed in a better position than he or she otherwise would have been in if the contract had been performed.'

Wilson, 883 So.2d 56 at ¶41 (quoting *Polk v. Sexton*, 613 So. 2d 841, 844 (Miss. 1993)); *see also Aetna Cas. & Surety Co. v. Doleac Elec. Co., Inc.* 471 So. 2d 325, 330 (Miss. 1985) (in breach of contract case, award of damages attributable to breach is to make plaintiff whole).

If attorneys' fees and expenses were allowable in this case, despite the American Rule, the amount of fees and expenses would be limited strictly to the amount the Plaintiffs actually owed. This is the only amount for which they had any liability to their attorneys, and the only amount that could possibly be necessary to put them in the same position as if USAA had originally paid them

the amount of contract damages the jury awarded. Any greater amount of fees than that which the Plaintiffs actually owed their lawyers would constitute a windfall and would improperly place Plaintiffs in a better position than they would have been in – something not remotely envisioned by Mississippi law when a breach of contract is not attended by bad faith. *Wilson*, 883 So. 2d at ¶¶39-41 ("[T]his Court has never contemplated that an injured party be placed in a better position than she would have been had the contract been performed.").

Although the trial court erred in allowing recovery of attorneys' fees under *Veasley* in the absence of punitive damages, he did correctly limit *Veasley* damages to compensatory damages. Consequently, the trial judge was correct in holding that attorneys' fees, if awardable under *Veasley*, would be limited to the contingent fee contract amount representing what was owed by the Lisanbys to their attorneys. All that remained, then, was for the trial court to consider the *McKee* factors and determine if the contingent fee was a reasonable fee. The trial court did so.

B. The Trial Court Properly Considered the *McKee* Factors and Was Not Required to Issue Findings on Each Factor.

Contrary to any suggestion otherwise in the Lisanbys' brief, the trial judge did consider the *McKee* factors with regard to the attorney fee award, expressly stating:

> The Court has also, alternatively, considered the factors in *McKee v. McKee*, 418 So. 2d 764 (Miss. 1982) based on the facts and the Court's own observations. The Court finds that the contingent fee amount is the reasonable and fair fee.

(RE at Tab 2; R. at 4921.)

In reliance on *Bellsouth v. Board of Supervisors*, 912 So. 2d 436, 447 (Miss. 2005), the Lisanbys urge this Court to reverse the trial court's award of attorneys' fees because the judge did not make individual findings regarding each *McKee* factor. The Lisanbys' reliance on *Bellsouth* ignores this Court's more recent jurisprudence, which has declined to require trial courts to issue

specific findings and conclusions on each of the *McKee* factors, as long as it is evident from the trial court decision that those factors were considered. *Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n*, 964 So. 2d 1100, ¶36, 39 (Miss. 2007) (declining to reverse award of attorneys' fees where it was obvious the trial court considered *McKee* factors but did not make individual findings on each factor). In *Upchurch*, the trial judge's order stated:

> THIS CAUSE came before the Court on the issue of attorney fees. The Court has reviewed the attorney fees sought and finds that they meet the reasonableness requirement of the rules. The Court further finds that due to the complexity of the subject matter and the lengthy duration of the litigation that the employment of two (2) attorneys was justified. Accordingly the Court finds that the amount of attorney fees to be awarded in this cause shall be $240,980.40.

Id. at ¶36. One of the parties specifically contended the fee award should be reversed because the trial judge did not make individual *McKee* factor findings. *Id.* This Court declined to reverse the fee award, holding:

> This Court stated in *Mabus v. Mabus,* 910 So.2d 486, 489 (Miss. 2005) that, where a trial judge relies "on substantial credible evidence in the record regarding attorney's fees," the trial judge has not abused his discretion. It is 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. Thus, we find that Judge Hines did not abuse his discretion . . . .

Upchurch, 964 So. 2d at ¶39. Similarly, in *Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So.2d 495 (Miss. 2007), this Court affirmed an award of attorneys' fees without burdening the trial judge to make individual *McKee* factor findings, where his order on fees made it evident he had considered the factors. *Tupelo Redevelopment Agency*, 972 So. 2d at ¶¶83-86.

It is expressly evident from Judge Bridges' ruling, contained in the final judgment, that he did consider the *McKee* factors. He found that the contingent fee was the reasonable and fair fee. (RE at Tab 2.) Thus, Plaintiffs are not entitled to remand and reconsideration of the fee amount

awarded, if a fee is to be allowed at all.

CONCLUSION

Based on the foregoing and on its prior submissions to this Court, USAA respectfully requests that the judgment against it be reversed and rendered in whole, or alternatively, in part. Alternatively, USAA respectfully requests that it be granted a new trial. Plaintiffs' cross-appeal should be denied. The trial court's dismissal of the claim for punitive damages should be affirmed. USAA submits that no award of emotional distress damages or attorneys' fees and expenses was proper. However, if fees were to be allowed under *Veasley*, then the trial court properly limited them to compensatory damages and properly considered the *McKee* factors in so doing.

Respectfully submitted this 18th day of February, 2010.

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CERTIFICATE OF FILING

I, Janet G. Arnold, 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 Cross-Appellee/Reply Brief for Appellant, United Services Automobile Association to:

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Gartin Justice Building
450 High Street
Jackson, Mississippi 39201

This 18th day of February, 2010.

Janet G. Arnold (MBN [redacted])

CERTIFICATE OF SERVICE

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

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