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

UNITED SERVICES AUTOMOBILE ASSOCIATION — APPELLANT/CROSS-APPELLEE

VERSUS

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

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

BRIEF FOR APPELLANT
UNITED SERVICES AUTOMOBILE ASSOCIATION

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

Circuit Court Judge:

Honorable Billy G. Bridges, Special Circuit Court Judge

Parties:

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Gladys Kemp Lisanby
Plaintiffs/Appellees/Cross-Appellants

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This 14th day of October, 2009.

Respectfully submitted,

BY: _____

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Counsel of record for United Services Automobile Association ("USAA")

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INTRODUCTION

The verdict for the Plaintiffs in this case is based on physical impossibility – a hurricane wind that blew harder downstairs than upstairs, destroying the ground floor of a house but leaving the upper floor virtually unscathed. The verdict flatly contradicts the photographs and physical evidence. As a consequence, it cannot stand. Jury verdicts are not given deference when they attempt to

acknowledge the impossible as real. The verdict strongly indicates the jury was influenced by bias, passion, prejudice.

It is undisputed that wind blows harder the higher it is from ground level. The Lisanby house, built in the 1800's, sat only 100 feet from the Gulf of Mexico. It had two stories of living space and a large attic. Exterior walls had 2 x 6 studs. On top of the studs was 1 x 6 diagonal sheathing. On top of the 1 x 6 diagonal sheathing was lathing. Attached to the lathing was 2 ½-inch-thick concrete stucco. A glassed-in front porch, second story glassed-in porch, and all east side windows had hurricane shutters. Many other windows on the house had hurricane shutters, as well. A separate garage and separate guest house were also on the property, to the north of the house. The photographs in evidence demonstrate clearly that, during Katrina, the Lisanby house sustained minimal roof damage. Not a single window on the attic level or second floor was broken. The stucco (2½ inch concrete) siding on the second floor was largely intact. The second floor bedrooms and bedroom furniture were undamaged by wind. The difference between damage to the first floor of the house (destroyed) and the second floor (intact) was exposure to storm surge. The first floor was exposed to storm surge. The second floor was not. Just as Admiral Lisanby, a naval engineer, admitted less than a month after Katrina – the house was destroyed by storm surge. USAA is entitled to a JNOV or, at the least, a new trial on the Lisanbys' claim for homeowners insurance contract damages.

The evidence was similarly insufficient to support an award of emotional distress damages. Damages for emotional distress can only be awarded if an insurance company lacks an arguable reason for its claims decision. USAA clearly had an arguable reason for its decision concerning the amount of wind damage to the Lisanby property. Additionally, attorneys fees and expenses can only

be awarded when punitive damages are proper. Because punitive damages were not proper, the Lisanbys were not entitled to attorneys' fees or expenses.

Events before, during, and immediately after trial of this case demonstrated that bias and prejudice unfairly exists against USAA in Jackson County, and USAA simply cannot obtain a fair trial there. This prejudice was particularly compounded by the prominence of the Lisanbys in the Jackson County community. Admiral Lisanby testified he had a significant role in establishing the Pascagoula shipyard (now Northrup Gruman) and bringing Navy contracts to it, thereby significantly increasing employment in Jackson County. Any new trial should be held in a different venue where the evidence can be viewed without the bias against homeowners insurers that exists on Mississippi's Gulf Coast and where bias in favor of prominent citizens will not affect the case.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

On November 2, 2005, the Lisanbys filed a complaint against United Services Automobile Association ("USAA") for damages relating to their Hurricane Katrina property loss. They later filed an amended complaint. Alleging their property damages were caused by wind, the Lisanbys sought homeowners insurance benefits beyond those already paid by USAA. (R. at 20-85, 285-310.) The Lisanbys also alleged USAA handled their claim in bad faith. They sought emotional distress damages, punitive damages, attorneys' fees, and expenses. (R. *Id.*)[1] USAA denied that it owed any further payments for damage attributable to wind and asserted it properly adjusted the Lisanbys' homeowners insurance claim. USAA paid for those damages covered under the homeowners policy – damages caused solely by wind. The remainder of the Lisanbys' damages were caused either

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1 The case was initially removed to federal court and was later remanded. *Admiral v. United Services Automobile Association*, 2006 WL 3247251 (S.D. Miss. Nov. 8, 2006).

exclusively by storm surge flooding or were concurrently contributed to by storm surge flooding, and were excluded from coverage under the homeowners policy. (R. at 319-42.) Instead, those damages were covered by flood insurance under which the Lisanbys sought and were paid their $350,000 policy limits. (R. *Id.*)

USAA sought and was denied a change of venue. (RE at Tab 5; R. at 1928-2054, 2475-2637, 4679; T. at 72-80.) USAA also requested that the court bifurcate trial of the Lisanbys' contract claims (i.e., wind versus water claims) from their claims for emotional distress damages and punitive damages. (R. at 1045-49; T. at 769-71.) The trial court granted bifurcation of the punitive damage claim but declined to bifurcate the emotional distress claims. (RE at Tab 6; R. at 4724A-30, 4137-39; T. at 769-71.) After a 10-day trial, the jury returned a verdict awarding the Lisanbys a total of $909,641 in damages, as follows: $478,000 for additional wind damage to the structure of the house; $50,500 for wind damage to the structure of the garage; $0 for wind damage to the structure of the cottage; $197,000 for wind damage to the contents of all three buildings; $0 lost rent for the cottage; $12,000 additional living expenses occasioned by wind damage; and $86,000 per Plaintiff for emotional distress. (RE at Tab 4; R. at 3826-28.) The trial judge declined to send the punitive damages claim to the jury. (R. at 3843-45.) After entry of an interim judgment (R. at 3846, 3851), Plaintiffs sought attorneys' fees and expenses, which USAA opposed. (R. at 3861-3911, 3970-4009, 4012-26, 4842-4905, 4923-87.) The trial court entered final judgment on January 8, 2009, awarding the Lisanbys an additional $302,920.44 in attorneys' fees and $211,069.47 in expenses, for a total judgment of $1,423,630.85. (RE at Tab 2; R. at 4920-22.)

USAA timely filed motions for judgment notwithstanding the verdict ("JNOV") or, alternatively, a new trial or remittitur on January 20, 2009. (R. at 4988-91, 4992-5074, 5075-5486.) The trial court entered orders denying those motions on March 13, 2009. (RE at Tab 3; R. at 5563,

5564, 5565.) USAA timely filed its notice of appeal March 27, 2009. (R. at 5568-70.)

II. Statement of Facts

A. The Lisanby Property Before Katrina

The Lisanby property at 1615 Beach Boulevard, Pascagoula, was bounded on the south by Beach Boulevard and on the north by Washington Avenue. (T. at 1080.) A low sea wall separated the Boulevard from the Gulf. The house, built in 1897, sat 100 feet from the Gulf, facing the water. (RE at Tab 13; T. at 695; Exh. D5-101.) Although Admiral Lisanby believed the first elevated floor was at 14.5 feet above sea level, the official engineer's elevation certificate for the property states the first elevated floor was 13 feet above sea level. (T. at 738-39, 894-95.)

The house had two stories of living space and a large attic. (T. at 732-33, 949, 1196.) Exterior walls had 2 x 6 studs. On top of the studs was 1 x 6 diagonal sheathing. (T. at 651.) On top of the 1 x 6 diagonal sheathing was lathing. Attached to the lathing was 2 ½-inch-thick concrete stucco. (T. at 837, 853.) The Lisanbys added on a glassed-in front porch. (T. at 723.) The original exterior wall still existed behind the porch, separating it from the interior of the house. (1427.) There was a small glassed-in second floor porch that sat on top of the first floor porch. (T. at 822; Exh. P-219.) Behind that porch was the exterior stucco wall and a double set of doors leading into the second floor central hall. (RE at Tab 14; Exh. D5-23, D6-82.) The porches, and first and second floor windows on the east side of the house had hurricane shutters. (T. at 703-04; 742-43, 681-82, 702-03.) Some other windows had them too. (T. at 742-43.) The Lisanbys rolled down the shutters before evacuating in advance of Katrina. (T. at 742.)

The separate wood frame shingle-roofed garage sat on a slab and stood north of the house near the back of the property. (T. at 487, 723-24.) The wood frame shingle-roofed guest cottage had a pier and beam foundation and was also at the back of the property. (Exh. D-22, P-80.)

B. Katrina's Impact on the Lisanby Property

After Katrina, numerous photos of the house were taken by Admiral Lisanby, by USAA's adjusters, and by engineers retained by USAA to examine the property. The 225 such photos introduced in evidence at trial clearly demonstrate the major damage to the Lisanby house was to the bottom floor.

At higher levels – the second floor, attic, and roof – damage was minimal. The first floor was gutted by storm surge. (T. at 1386.) The front porch was gone. (RE at Tab 13; Exh. D5-112, P-209, D5-95.) The south and east first floor walls were destroyed. (RE at Tab 13; T. at 1230; Exh. D5-111, D5-112, D5-141). Remaining walls were torqued by storm surge, causing the house to lean. (T. at 1449; Exh. D5-90.) Floor boards floated up on the first floor and formed a huge pile, mixed with furniture, at the back of the central first floor hall. (T. at 836, D5-159, D5-100, D5-103.) First floor brick fireplaces were destroyed. (T. 691-92, 835-36, 868-69; Exh. D5-181, D5-100.) None of the first floor furniture was salvageable. (T. at 888.) On the west and north sides of the first floor, exterior walls remained. (RE at Tab 13; Exh. D5-108, D5-128.) Leeward first floor windows were not broken. (RE at Tab 13; Exh. D5-128, D5-129, D5-149, D4-28.) In sum, the bottom floor was completely ruined.

The second floor stood in stark contrast to the first. Not a single window was broken. (T. at 1442.) The second floor walls remained. There were no flying debris impact marks on those walls. (RE at Tab 14; T. at 1426; Exh. D3-26, D3-28-50, D6-1 at photos 33 and 28.) Admiral Lisanby reported the second floor doors had blown open, letting wind and rain into the second floor central hall. (T. at 744, 825-26.) Wind and rain damage in that hall was minimal. (RE at Tab 14; Exh. D3-26, D3-37, D6-1 at photos 33 and 28, D6-82.) Glass in the french doors that blew open did not break. (RE at Tab 14; T. at 1203; Exh. D6-82.) Wallpaper was damaged and the hall interior

got wet. (T. at 745.) All second floor furniture was intact and salvageable. The Lisanbys moved it to Kentucky and made no claim for it. (T. at 886-87, 1014; Exh. D5-185-196, D5-200-205, D5-210-211.) Cracks in the walls on the second floor in some bedrooms and a bathroom were created when the first floor of the house was torqued by storm surge. (T. at 1448; Exh.P238, P239.)

Damage to roof shingles was minimal. (T. at 1244, D3-60-67.) One piece of ridge cap blew off. (T. at 1209.) None of the substantial attic bracing was displaced. (T. at 1206-08; Exh. D3-52, D3-53, P-208.) None of the blown-in attic insulation was disturbed or wet. (T. at 1209; Exh. D3-52-54, P-211.) None of the attic dormer windows were broken, even though they had no storm shutters and were on the highest part of the house. (T. at 1191; Exh. P-196, D8-4.) Some shingles on the carport blew off in a spot that had previously been patched. (T. at 1450-51; Exh. D3-58, D3-59.) The carport was pulled to the west when the house torqued. (T. at 1449-51; Exh. P-240.)

The cottage floated away in the storm surge. (T. at 539.) The garage was destroyed when storm surge undermined it at the foundation, and the roof floated away with the surge. (T. at 536-39.) Photos show the cottage floating and the garage roof floating in storm surge. (RE at Tab 15; Exh. D13-2, P-168.)

C. Trial Evidence Regarding Causes of Damage to the Lisanby Property

1. Admiral Lisanby's Testimony

Before Katrina, Admiral Lisanby and his wife evacuated to Maxwell Air Force base in Montgomery, Alabama. (T. at 742.) They returned to Pascagoula on August 30. (T. at 814-15, 893.)[2] Admiral Lisanby is a naval engineer with a degree from MIT. (T. at 716-717.) Within 3

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2 With one exception, the property appeared as depicted in the "D5" series of photos taken by Admiral Lisanby. In these photos, the outer wooden doors into the upper second floor hallway are closed. However, the Admiral testified that, when he arrived at the property, the outer wooden doors and inner french doors into the second floor hallway were open. (T. at 744-75, 825-26.)

weeks after Katrina, the Lisanbys gave an interview to the *Times Leader* newspaper in the Admiral's hometown of Princeton, Kentucky. (RE at Tab 18; T. 891-92; Exh. D-19.) In that interview, the Lisanbys admittedly stated:

- "The first floor of the home was gone, ravaged by the Gulf of Mexico's surge;"
- "The water and the Beach Boulevard homes had been separated by the street and a low seawall that offered little protection against the hurricane;"
- "[T]he Gulf surge pushed between 20 and 24 feet of water through the home's first floor;"
- "The water stripped light fixtures off of 12-foot ceilings and reduced half of its fireplaces to rubble."

(RE at Tab 18; Exh. D-19; T. at 893-95.) Apart from this article, the Admiral also independently acknowledged storm surge stripped light fixtures off the 12-foot first floor ceilings. (T. at 895.)[3]

Admiral Lisanby admitted he made a flood insurance claim, and he wanted it handled quickly. (T. at 919-20, 933-34.) He believed the remainder of the damage to the house (other than that already paid by flood insurance) was caused by a combination of wind and water. (T. at 950.) On numerous occasions, the Admiral represented he found a 5-foot still water line in the house. (T. at 683, 1034-35, 1230, 1292, 1333, 1354, 1360; Exh. D6-1.) He acknowledged that all furniture on the second floor was salvageable. (T. at 888.) The Lisanbys did not make an insurance claim for loss to that furniture. (T. at 949-50.)

2. Gladys Lisanby's Testimony

Mrs. Lisanby professed to have found dry linens, stamps, and cards in two places in the house located just over two feet from floor level. (T. at 960, 969-73.) She maintained this meant there was

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3 When cued to do so by his own counsel on redirect, Admiral Lisanby attempted to retract this testimony. (T. at 952.)

only two feet of water in the house. (T. at 959.) During the insurance claim and discovery in this case, Mrs. Lisanby heard her husband state he had found a 5- foot water line. She never corrected him or mentioned anything about only 2 feet of water. (T. at 1035.)

One of the places Mrs. Lisanby claimed to have found dry linens was a bachelor's cupboard that, before Katrina, sat near the back of the first floor central hall. (T. at 1040; Exh. P-46.) Mrs. Lisanby testified that, after Katrina, she found the cupboard sitting damaged on the south (beach) side of the pile of floorboards in the central hall. (T. at 1040.) The linens were in the top drawer, reportedly dry and ready for use. (T. at 961.) The Lisanbys' disposed of the cupboard, so it was not available for examination. (T. at 1042.) Despite all the photos they took, they did not photograph the cupboard. (T. at 1042.) A photo of the south side of the pile where Mrs. Lisanby claimed to have found the cupboard showed nothing there and nowhere for the cupboard to sit. (RE at Tab 13; T. at 1048-49; Exh. D5-158, D5-159.) She could only suggest there must have been another pile. (T. at 1048-49.) Mrs. Lisanby similarly claimed to have found dry cards and stamps in the top drawer in her desk contiguous with the kitchen counter. (T. at 968-72; Exh. P-106.) Photos showed the top of the counter and desk were missing. Debris had fallen into the drawer from above. (T. at 1037-38.) The debris appeared to have been water soaked, despite Mrs. Lisanby's insistence it was "bone dry." (T. at 1038-40; Exh. D4-26, D4-27.)

3. Meteorological Testimony

The Lisanbys called two meteorologists – Richard Henning and Dr. Keith Blackwell. (T. at 142, 218.) Neither gave any opinion regarding causes of damage to the house. (T. at 183, 218-305.) Both testified to weather conditions and wind speeds in the area of the Lisanby property. Henning testified wind speeds were maximum sustained 100 mph with 124-140 mph gusts. (T. at 155.) Blackwell testified wind speeds were 100-105 mph with 125+ mph gusts. (T. at 237.) Blackwell

testified Katrina had two eyewalls – an inner eyewall with Category 3 hurricane winds and an outer eyewall with Category 2 winds. (T. at 300-01.) Only the lesser Category 2 eyewall passed over Pascagoula. (T. at 301-02.)

4. Butch Loper and George Sholl

The Lisanbys called Butch Loper, Jackson County Director of Emergency Management, and George Sholl, Director of Emergency Communications. (T. at 198, 596.) Both rode out Katrina at the Emergency Operations Center ("EOC") in downtown Pascagoula. (T. at 199-200, 596.) They testified the EOC had two anemometers to measure wind speed. One was on a twenty-foot tower on the roof. The other was on a pole on the side of the building. (T. at 201, 597.) Loper and Sholl stated the anemometers registered gusts of 137 and 140 mph at the time the tower on the EOC roof came down. (T. at 202-03.) A partial layer of tar and gravel blew off the roof, but the building never leaked. (T. at 209-10.) Loper authenticated a video taken at the EOC during Katrina. It showed effects of the wind – pieces of shingle and gravel blowing off roofs but no wind damage to walls or structures of buildings. Storm surge submerged vehicles (RE at Tab 17, Exh. D14-1) and reached a depth of 16.14 feet at the EOC. (T. at 205-06.)[4]

5. Steve Loper

The Lisanbys called Steve Loper, who rode out the storm at home at 1611 Washington Avenue. (T. at 515.) Loper's house faces south and is almost directly behind the Lisanby property. (T. at 544; Exh. P-166, D15-1.) Loper could not see the Lisanbys' house during Katrina. (T. at 535-36.) He could see the Lisanbys' garage and guest cottage. (T. at 536.) Loper testified the wind was

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[4] The EOC at 600 Convent Avenue in downtown Pascagoula is nearly 2 miles inland from the location of the Lisanby house on Beach Boulevard.

strong enough to blow his pickup truck across his driveway and bury the front end in mud. (T. at 519.) He testified wind blew a large beam through the front window of his house. (T. at 524-25.)[5] After water began coming into his house, Loper went to the second floor den, where he had a view toward the Lisanby property from south-facing windows. (T. at 530.) When there was about 6 inches to 1 foot of surge at the Lisanby garage it imploded, and the roof fell to the ground. Loper believed wind did this. (T. at 536.) As the storm surge got deeper, the garage roof floated away and was sawed in half by a tree due to the strength of the surge. (RE at Tab 15; T. at 537-38; Exh. D13-2.) Loper watched the entire cottage literally float down the Lisanbys' driveway, turn left onto Washington Avenue, and come apart. (RE at Tab 15; T. at 539; Exh. P-168, D13-2.)

The ground elevation at Loper's property is 16 feet 3 inches. (T. at 556.) The first floor is 19 feet 9 inches above sea level. (T. at 556.) At one point, there was at least 4 feet of water in the first floor of Loper's house, as it reached his chest height. (T. at 528-29.) With the Lisanby first floor elevation at 13 feet above sea level per the official elevation certificate (T. at 738-39, 895), this eyewitness account means there was 11 feet or more of storm surge in the Lisanby house. (T. at 556-558.) Even assuming the Admiral's floor level figure of 14.5 feet (T. at 894-95), that places 9 feet of storm surge in the Lisanby house. Loper told an engineer retained by USAA to examine the Lisanby property that there were 8 to 10 foot waves. (T. at 534-35; Exh. D6-1.)

6. Jim and Rebecca Treadway

Jim and Rebecca Treadway live at 1609 Washington Avenue. The Lisanby property is south of theirs and down one lot. (T. at 1079.) The Treadways rode out Katrina – first at their own house,

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5 Two neighbors, Jim and Rebecca Treadway, took shelter with Loper in the second floor of his house during Katrina. They did not recall seeing any beam in the front part of Loper's house. (T. at 1095; Exh. D13-08A.)

and then on the second floor of Steve Loper's house. (T. at 1082, 1093.) The Treadways initially drank coffee and watched the storm from under their carport. (T. at 1083.) By 8:33 a.m., there was 6 to 8 inches of water in their house. (T. at 1087; Exh. D13-01.) Between 8:33 and 9:00 a.m., water rose to Mr. Treadway's waist. (T. at 1088.) Wind blew their front door open and blew a limb through their bay window. (T. at 1090.) The Treadways started to go to their attic to escape rising water but were afraid they would be trapped. (T. at 1088.) They broke a window to get out of their house and "bobbed" through the storm surge. (T. at 1088-89, 1093.) Mrs. Treadway had to keep her mouth closed to keep from swallowing water. (T. at 1148-49.) They ultimately made their way to Steve Loper's house and joined him on the second floor. (T. at 1093-94.)

Jim Treadway had his digital camera with him and took photos and video. He photographed the Lisanby garage roof floating and being sawed in half by a tree due to the strength of the storm surge. (RE at Tab 15; T. at 1098-99; Exh. D13-2.) He photographed the Lisanby cottage while it was floating. (RE at Tab 15; Exh. P-168, D13-2.)[6] The photos showed rolling waves (D13-3, D13-5, D13-7). The video showed rolling waves impacting houses. (RE at Tab 16; Exh. D13-20A.) It also showed the wind force. For the most part, leaves were not even being blown off the trees. (Exh. D13-20B.) By contrast, storm surge was deep enough that it submerged and floated a neighbor's Jeep. (T. at 1110; Exh. D-25.) There were 10 foot by 20 foot swells. (T. at 1107-08.)

7. John Lindgren

John Lindgren lived at 915 Farnsworth Avenue, behind the first row of houses on Beach Boulevard. (T. at 347, 356-57.) He rode out Katrina at his house, about 300 feet from the Gulf and

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6 The cottage eaves were normally oriented on the north and south. In Exh. D- 13-2 and P-168, the eaves are shown oriented east and west because the cottage has floated. (RE at Tab 15; T. at 1102-03.)

½ mile east of the Lisanby property. (T. at 348.) Lindgren testified wind broke tree limbs and blew pieces of shingle, roofing material, and siding into his house. (T. at 349-50.) Flying debris broke glass in his french doors. Wind stripped the lock mechanism and blew the french doors open. (T. at 350-51.) His tree house and part of his privacy fence blew down. (T. at 352.)

When the storm surge came up, it came in through doors. In contrast to the Treadway video of wave action at the Lisanby property (RE at Tab 16; Exh. D13-20A), Lindgren said that there was little wave action. (T. at 354-55.) Large timbers and debris in the surge impacted his house and caved in its south side. The walls shifted and were not vertical. (T. at 361-62.) Lindgren previously testified there was 7 feet of water in his house. (T. at 358-59, 362-63.) At trial, he changed his testimony to 5 or 6 feet. (T. at 363.) He swam out of the house with his dog and got in a boat. (T. at 355, 365.) Lindgren claimed his full flood insurance benefits. (T. at 363.)

8. <u>Ralph Sinno</u>

Ralph Sinno, a Mississippi State University engineering professor, was the only witness to testify that 100% of the damage to the Lisanby house occurred because of wind, i.e., the house was a total loss before storm surge arrived. (T. at 669-70.) In so testifying, Dr. Sinno:

- contradicted Admiral Lisanby;
- ignored that the Lisanbys had acknowledged flood damage and received $350,000 in flood insurance benefits;
- contradicted his own testimony that water "most definitely broke down some partitions on a lower level" (T. at 642);
- contradicted the testimony of the fact witnesses; and, most significantly,
- testified in a fashion completely contrary to the condition of the house as depicted in the photographs introduced into evidence.

Dr. Sinno did not examine the house before it was torn down but did look at photos. (T. at 642, 669-70.) Sinno admitted wind speeds increase the higher one gets from ground level. (T. at 678.) He also admitted there were no debris impact marks shown in any photographs of the remaining walls. (T. at 677-78.) He opined that wind breached the glassed-in front porch, tore it off, and then tunneled through the house. (T. at 647-48.) He was unaware when he formed this opinion that there were storm shutters rolled down on the first floor glassed-in porch. (T. at 702-03.) He was also unaware the original exterior wall of the house still existed at the back of the glassed-in porch, separating the interior of the house from the porch and the outdoors. (T. at 684-85.) Dr. Sinno admitted in his deposition that, if the first floor outer cladding was the same as the second floor cladding, then wind would not have caused failure of the first floor walls. (T. at 687-88.) Upon realizing his opinion conflicted (a) with the fact that the first and second floors were constructed identically, (b) with the fact that there were storm shutters on the porch, and (c) with the principle that wind blows faster the higher it gets from ground level, he tried to find a new ground for his opinion. He took the position, for the first time at trial, that the first floor windows on the wall inside the glassed-in porch were taller than windows on the second floor. He testified this is why the first floor walls failed, while the second floor walls did not. (T. at 678-700.) This theory, too, was conclusively contradicted by photos of the house. The first floor east wall failed during Katrina. The second floor east wall did not. Before Katrina, the first and second floor windows on the east wall were absolutely identical. (RE at Tab 12; Exh. D-21.)

Sinno also testified the roof failed and uplifted, based on a missing piece of ridge cap (Exh. P-208) and indentations around the chimney on the roof's east side. (T. at 654-55.) However, photos of the attic bracing conclusively showed it had not been displaced or loosened. (T. at 652-53.) Based on photos of undisturbed blown-in attic insulation, Sinno had to admit there was no wind in

the attic. (T. at 691.) Photos showed indentations around the chimney occurred when its first floor base was destroyed, and it sank. (RE at Tab 13; T. at 692-93; Exh. D5-141, D5-100.)

There was little or no testimony concerning damage to first floor contents. At one point, Sinno stated surge floated the furniture. (T. at 642.) At another point, he said wind may have blown some furniture into the brick fireplace shown in Exh. D5-100. (T. at 693.)

9. Doug Smith

USAA called Doug Smith, an associate professor at Texas Tech and a Ph.D. in civil engineering with a specialty in structures and wind science engineering. He studies how wind flows over buildings, the pressures it produces, and the structural response of buildings.[7] It is Dr. Smith's opinion that wind forces damaged roof coverings, shingles, soffit and fascia on the Lisanby house. The damage to the first floor was caused by storm surge. The garage and cottage were destroyed by surge. (T. at 1385-86, 1387, 1424-25.)

In reaching his opinion, Dr. Smith visited the house and examined it. (T. at 1385.) He found no impact marks from wind-borne debris on the remaining walls. (T. at 1426, 1427-28.) He went inside the attic, photographed it, and searched for uplift. There was none. All attic bracing remained intact and in place. One piece of ridge cap blew off. (T. at 1444-46.) Indentations in roofing around the east side chimney occurred when the first floor fireplace was destroyed. The roof and second floor picked up the load, and the chimney pulled downward. (T. at 1442-43.)

As depicted in the photos of the Lisanby house, damage from the bottom up is the typical pattern seen with storm surge. (T. at 1390.) Dr. Smith performed calculations regarding wind

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7 Dr. Smith is on the committee of the American Society of Civil Engineers that establishes the standard on wind loading for building construction, i.e., ASCE-7. (T. at 1369-71, 1373). He and his graduate students have studied wind forces on buildings after every major hurricane since 1990. (T. at 1377-78.)

loading and surge loading on the house. He compared them in time to determine if wind speeds were ever high enough to exceed the ultimate load the walls of the house could withstand. (T. at 1392, 1413-24, 1429, 1437-40, 1449-60; Exh. D8-157.) They were not. (T. at 1413-24.) Dr. Smith ran his calculations using the same 99 mph peak wind speed that Dr. Sinno used. (T. at 1398-90.) He also performed wind load calculations at speeds of 110, 120, and 130 mph. (T. at 1459-60.) He used a 15-foot-above-sea-level still water height based on IPET data[8] and then applied waves to it. This yielded a water level above ground of 8 to 10 feet, consistent with the eyewitness testimony of Jim Treadway and Steve Loper. (T. at 1398-90, 1403.) Dr. Smith used IPET water levels rather than FEMA data to give the Lisanbys the benefit of the doubt, as the FEMA levels were higher. The lowest FEMA still water mark found near the Lisanby property was 16.8 feet above sea level. The highest was 18 feet. With waves, calculations based on these actual water marks show 10.5 feet of surge inside the Lisanby house. (T. 1389, 1400, 1403-04, 1524-25.)

Again giving the Lisanbys the benefit of the doubt in his calculations, Dr. Smith used a standard wall stud, rather than the stronger 2 x 6 stud that actually existed in the Lisanby house. All his calculations assumed a house built to current code, although the Lisanby house was actually stronger.[9] (T. at 1520-21, 1564). Based on calculations regularly used in the engineering field to determine loads on structures, Dr. Smith found the force of the wind, alone, never reached or exceeded the design load of the first floor walls (i.e., the amount of force the walls could handle

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IPET (Interagency Performance Evaluation Task Force) data was prepared by the Corps of Engineers and government agencies that did Katrina surge modeling to establish a surge time history to go with the wind time history. IPET data is peer reviewed. It provides still-water surge heights above sea level. (T. at 1400, 1401-02.)

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With its 2 x 6 wall studs, 1 x 6 diagonal sheathing, lathing, and 2 ½ inches of concrete stucco, the walls of the Lisanby house were far sturdier than anything required by modern building codes.

without failing). Rather, pressure of water and waves caused the first floor walls to fail when the ultimate load they could withstand was exceeded. (T. at 1413-24.)[10] Contrary to Sinno, higher window heights on the original exterior wall behind the glassed-in porch did not matter. Additional wall studs strengthened the areas where there were windows in the first floor walls. Furthermore, windows do not generally break due to wind pressure, as opposed to flying debris. As even Dr. Sinno admitted, there was no evidence whatsoever of wind borne debris impact marks on the house. (T. at 1453-54.) Moreover, on the east side of the house, where the first floor wall is also missing, the windows upstairs and downstairs were identical. (T. at 1454.)

Wall panel detachments and cracks upstairs were from torque caused by storm surge pressure, which de-stabilized the walls and caused the building to lean. (T. at 1448-49, 1461-62.) The same was true of the few portions of stucco that fell off exterior second floor walls. (T. at 1446-47, 1448). Torque caused the carport to lean when the house leaned. (T. at 1451.)

As to the garage, the photo of the roof floating upright demonstrated it was not blown off by wind. Typically, if wind blows the roof off a structure, it is found upside down because the highest pressures act on the leading edge and flip it. The garage roof in the photo shows no indication of ballooning or pressurization. (RE at Tab 15, T. at 1455; Exh. D13-2.)

D. USAA's Handling of the Lisanby Homeowners Insurance Claim

1. Pertinent Policy Provisions

The Lisanby homeowners policy contained dwelling coverage limits of $505,000; appurtenant structure limits of $50,500; additional coverage for the cottage of $22,000; personal property (UPP) limits of $378,750; and additional living expense limits of $101,000. (Exh. D1-1.)

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[10] The density of water is 800 times that of wind. (T. at 1416.)

The Lisanbys had flood insurance coverage of $250,000 for the structure of the house and $100,000 for its contents. (T. at 741.)[11]

The homeowners policy covered damage caused solely by wind. It excluded coverage of damage caused or contributed to by storm surge. (Exh. D1-1 at pp. 14-15).[12] Additional living expense coverage was provided only if a covered peril (in this case, wind) rendered the house uninhabitable. (Exh. D1-1 at p. 9.) The policy provided for payment of replacement cost benefits only if replacement of the damaged property actually occurred. In other words, to recover replacement cost, the property had to actually be repaired or rebuilt. Absent repair or rebuilding, losses are paid at actual cash value.[13]

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11 The Lisanbys did not purchase any excess flood insurance coverage.

12 The policy excluded coverage of damage caused or contributed to by storm surge flooding, as follows:

SECTION I – EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

   c. **Water Damage,** meaning:

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

Exh. D1-1 at p. 14.

13 The pertinent loss settlement provisions were as follows:

b. All items under Coverage A - Dwelling and buildings under Coverage B at replacement cost without deduction for depreciation *subject to the following:*

. . . .

(4) We will pay no more than the actual cash

(continued...)

2. The Lisanbys Make a Flood Claim and a Homeowners Insurance Claim

On August 29, 2005, while Katrina was in progress, USAA received a phone call from Admiral Lisanby to report a Katrina damage claim. The Admiral confirmed his identity by providing his USAA member number and the last four digits of his social security number. (T. at 816-17, 1575-76, 1587-88.) He told USAA's phone representative, Karen Bell, 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. The Admiral stated the cottage and garage were unevaluated. (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.)

Admiral Lisanby denied making this call. (T. at 753). His counsel implied USAA fabricated the call and predetermined the damage was from flood. (T. at 1588.) However, AT&T's computer system records the times of all calls made to USAA and the phone numbers from which they are made. (T. at 1592.) The Admiral testified his cell phone number was 228-324-1952. (T. at 818.) The AT&T electronic records of calls to USAA on August 29, 2005, demonstrated conclusively that this call was made from the Admiral's cell phone. (T. at 1597; Exh. D3-99, D3-100.)

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[13](...continued)

value of the damage unless:

> *(a) the actual repair or replacement is complete;. . . .*

Exh. D1-1 at pp. 9-10 (emphasis added).

3. Adjuster Visits to the Property

The property was inspected on 3 occasions by USAA's experienced dwelling adjuster, Gary Taylor, and by a contents adjuster, Laura Music. (T. at 1187, 1299; Exh. D3-15, P-179.) Mr. Taylor extensively examined and photographed the property.[14] He prepared diagrams of the structures and verified his measurements. (T. at 1183, 1186.) USAA also retained EFI Global to perform an engineering inspection. (T. at 1219.) EFI's engineer, Mark Voll, personally inspected the property and photographed it. (T. at 834.) Mr. Voll talked with the neighbor eyewitness, Steve Loper, who said there were 8 to 10 foot waves on the Lisanby property. (T. at 585-86.) Although Mr. Voll made an error reading a wind speed report from Trent Lott airport in Pascagoula, his quoted wind speeds for Category 2 and 3 level hurricanes, relied on by USAA's dwelling adjuster, were correct. Admiral Lisanby told Voll there was 5 feet of water in the house. (T. at 1230.) Based on his experience, USAA's dwelling adjuster, Gary Taylor, believed the water was even higher. (T. at 503-04; Exh.P-183.)

Voll reported that wind damaged the shingles and soffit trim. He assessed the remaining damage as being from storm surge. (T. at 1226; Exh. D6-1.) USAA's adjuster, Gary Taylor, additionally assessed damage to the second floor hallway as being from wind and wind-driven rain, as the Admiral told him the second floor doors blew open. (RE at Tab 14; T. at 1194-95; Exh. D3-26.)

The Lisanbys told USAA's contents adjuster, Laura Music, that the Admiral found a 5-foot water mark in the house. (T. at 1304, 1306-07.) She tried to be helpful to the Lisanbys and assisted

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14 *See* Photographs in evidence having a D3 prefix.

them in filling out their contents claim based on their statement to her that there was only 5 feet of water in the house. (T. at 1313.)

4. Claim Payments to the Lisanbys Under Their Various Coverages

Based on his own experience and on FEMA fast track payment guidelines, Taylor did not need to await the engineering report from EFI to evaluate and know that the Lisanbys had at least $250,000 structure damage from storm surge and $100,000 contents damage from storm surge. (T. at 1217-19.) As Admiral Lisanby testified, there was at least that much flood damage, and he was entitled to his flood insurance money. (T. at 920-21.) Gary Taylor processed the flood insurance claim, and the Lisanbys were paid their full flood insurance limits. (T. at 1214-15.)

On October 18, 2005, Voll, the engineer emailed Gary Taylor the text of his report, without attachments. Taylor saw it on October 20, 2005. (T. at 1220.) Taylor then prepared his wind damage estimate of $26,858 and discussed it with the Admiral. (T. at 1224.) The Admiral disagreed and asked Taylor to contact the engineer to see if the engineering opinion could be reconsidered. (T. at 1224.) At trial, Taylor did not remember his conversation with the engineer, but he had documented in a letter to the Admiral that he spoke with Mr. Voll and that Mr. Voll was sure of his engineering opinion. (T. at 1224; Exh. D-39.)

The Lisanbys were paid $21,808.88 for wind damage to the house.[15] They received $19,745.33 for contents damage on the second floor (computer equipment, etc.) and for moving second floor furntiure to Kentucky. They were paid $4,800 additional living expenses, pending the engineering assessment of the causes of damage. (T. at 471, 496, 768.) By January 31, 2006, the Lisanbys had received a total of $46,354.21 for the Hurricane Katrina damage.

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[15] $26,858.88 wind damage less the $5,050 deductible.

E. Facts Regarding Venue for This Trial in Jackson County, Mississippi

Katrina adversely affected every single resident of Jackson County. According to FEMA, approximately 30,514 homes in Jackson County were damaged (about 64%). (R. at 2535.)

1. Extensive Negative Media Coverage

A media blitz of negative coverage against insurers ensued following Katrina. Public figures engaged in incendiary commentary against insurers. The case record contains a significant sample of this inflammatory rhetoric. (R. at 2537-2601.) It includes Attorney General Hood characterizing insurance companies as Nazis and cowards. (R. at 1953-54, 2548-49.) Gulf Coast U.S. Representative Gene Taylor likened insurance companies to child molesters. (R. at 2594.)

2. The Jackson County Venue Survey Performed By Dr. Craig New

Dr. Craig New, a venue expert, performed a study on pretrial publicity and juror bias related to Katrina insurance disputes in order to determine whether USAA could obtain a fair jury trial in Jackson County. Dr. New concluded that the data obtained strongly supported a change of venue based on substantial bias and prejudice toward insurance company defendants in Jackson County and elsewhere on the Coast. (R. at 2503-34.) He provided the following summary of the indicators of bias in Jackson County:

> 70% of potential jurors in Jackson County believe the insurance companies have been unfair in dealing with policyholders, and nearly 60% believe insurers should pay for flood water damage *even if it was specifically excluded from the policy.* In addition, just over 60% also believe that insurance companies did not pay what they owed to homeowners on Katrina-related claims. To make matters worse, over half of Jackson County residents consider insurance executives and child molesters to be in a similar category. (R. at 2511.)

In Dr. New's opinion, "[t]his climate of bias and prejudice strongly indicates the defendant cannot obtain a fair and impartial trial in Jackson County or its neighboring counties." *Id.* Set forth below are other specific indicators of bias found by Dr. New:

- Almost Fifty-four percent of Jackson County residents reported that they agree with Congressman Gene Taylor's comparison of insurance company executives to child molesters. Exhibit 1, page 7-8 (Table 9)).

- Close to 50% of Jackson County residents believe Attorney General Hood was correct when he stated that jurors will have no mercy on insurance companies and that insurers will lose every single case. (Exhibit 1, page 7 (Table 8)).

In pretrial hearing testimony, Dr. New explained why, in a case such as this, the voir dire process will not serve to root out these pervasive biases, as follows:

> You also have in these cases the issue of what you might call conformity prejudice. I mean, the jurors that come into court in Jackson County are going to have to go back to their friends and family and tell them what they have done. And I would think that the pressure is going to be really high on those people to return a verdict that favors the plaintiff and not the insurance company.

(R. at 4295-96.)

3. Evidence of Venue Bias Before, During, and Immediately After Trial

The weekend before trial, the *SunHerald* and *Clarion Ledger* published an article about this case. (Exh. D-A, D-B) It contained an interview with the Lisanbys about the case, was extremely favorable to the Lisanbys, and highlighted their contributions to Jackson County. *Id.* Consistent with the article, Admiral Lisanby testified he was one of the Navy personnel responsible for selecting Pascagoula for a Navy shipyard, thereby bringing thousands of new jobs and well-being to Jackson County. (T. at 718-19.) The Admiral testified that, in his subsequent duties, he "wrote the check"

for the Navy contracts at the shipyard. (R. at 719-20.)[16] Plaintiffs' counsel emphasized in argument that the Admiral was responsible for building the shipyard into "the world class shipyard that it is today." (T. at 107.) This no doubt compounded the bias USAA faced.

Trial events concretely exposed the bias level in Jackson County against insurers, generally, and USAA in particular. Not a single person in the venire disagreed there is a public sentiment that, in wind versus water cases, the insured should recover. (T. at 61-62.) Of the 80-person venire, one person directly admitted he could not be fair because of the experience of a close friend. (T. at 10-11.) Some 13 venire members admitted they would have a problem applying the policy exclusion for storm surge damage. (T. at 50-52.) Eighteen persons stated Katrina issues were too emotional for them to decide fairly, or that their own emotions from their insurance claim would make them feel insurers were not fair. (T. at 59-60.) In sum, 23 of the 80-person venire (about 1/4) admitted they had problems with applying the law, being fair, or dealing with emotions about Katrina claims. Per Dr. New's survey and expert opinion, there were likely far more who did not speak up, either because of conformity prejudice or human failure to realize the extent of their own bias. (R. at 4295-96.) The entire venire indicated public sentiment favored finding against insurers. (T. at 62.)

During USAA counsel's closing argument, an audience member yelled "bull***t" and later yelled out that USAA counsel should not try to tell jurors what to decide. (R. at 5395-96.) The same audience member was quiet during arguments by Plaintiffs' counsel. (R. at 5395-96.) When the verdict was returned, there was laughter by the audience, or "tittering" as reported by the SunHerald. One woman threw up her hands in joy. One media outlet reported an audience member stated, "They just nailed the insurance company." (R. at 5260-62, 5127.) Admiral Lisanby was quoted in the

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16 Numerous members of the venire or their spouses were employed at the shipyard, now Northrup Gruman. (Exh. D-58.) It would be impossible to avoid this in Jackson County.

Mississippi Press: "Lisanby said he considers the jury award a warning to insurance companies from homeowners along the Gulf Coast. 'This will put them all on notice we've had all we can take,' he said." (R. at 5317-18.) The trial court's ruling that the case did not warrant punitive damages was followed with criticism and innuendo from the Lisanbys and community members of improper behavior by the judge and/or counsel for USAA. (R. at 5319-23.) Admiral Lisanby suggested in an interview on WLOX TV, a local station, that the judge was "influenced" in "some way or other." (R. at 5319.) Baseless Internet commentary then suggested impropriety in the ruling or improper influence by USAA counsel. (R. at 5321-23.) The media and Internet commentary demonstrates, without doubt, the unpopularity of any ruling in favor of an insurance company in a Katrina case in Jackson County. The Lisanbys' prominence in the community only served to compound that unpopularity in this case, regardless of the evidence.

4. The Post-Trial Venue Assessment By Dr. Allen McConnell

Dr. Allen McConnell, a Doctor of Psychology specializing in social psychology, judgment, and decision-making research, analyzed the voir dire and Dr. New's venue study and testimony. Dr. McConnell's analysis demonstrates further why a change of venue was (and is) necessary. (R. at 5397-5410.) Prospective jurors are not humanly able to recognize their inability to set ingrained biases aside. Venire persons want to believe they can be fair but, because of human inability to gauge the depth of one's own prejudices, they cannot realistically do so. Katrina's widespread catastrophic effect resulted in daily community reinforcement of these prejudices, and there is widespread pressure to conform to community opinion and norms. (R. at 5406-08.) Deep-seated bias against insurers cannot be overcome by actual facts and physical evidence. The biases themselves strongly affect jurors' information processing. Facts are unconsciously processed to

favorably fit the jurors' internal, unrecognized preconceptions, regardless of whether those preconceptions are in line with truth. (R. at 5406-08, 5399.) According to Dr. McConnell:

> The conformity pressures experienced by residents of Jackson County will encourage them to render conclusions in line with the prevailing attitudes of the community . . . . – (R. at 5399.)
>
> These biases are not correctable because they are not the result of juror choice, and jurors do not possess the means to report on the implications of such biases either prior to the trial (e.g., during voir dire) or take them into account during deliberations (thus, no cautionary instructions will be effective in eliminating these biases). – (R. at 5399.)
>
> Because Jackson County residents have gone through a very significant, emotional event "together" and share many relatively unique experiences (e.g., property loss, outrage toward the insurance companies), they will experience an especially strong sense of common purpose and shared identity (what social psychologists term strong *entitativity* . . . amplifying the likelihood that their decisions will "support the community" (i.e., find in favor of the homeowners who are "just like them"). . . . – (R. at 5404.)

From the very beginning of Katrina litigation, all of the regular Circuit Court judges in Jackson County recused themselves from hearing Katrina damage cases. (R. at 280.) USAA should not have been put to trial in a county where the judges recognize they cannot even fairly take the bench.

SUMMARY OF THE ARGUMENT

The photographs and the physical evidence in this case demonstrate without question that the first floor of the Lisanby house was destroyed by storm surge. The difference between the first floor of the house (exposed to storm surge) and the second floor of the house (not exposed to storm surge) compels that conclusion. The photographs and the physical evidence of the second floor hallway where wind **did** tunnel through the house compel that conclusion. Wind damage to that hallway (for which USAA paid) was limited to damage to wallpaper, wetting of the interior, and disarrangement

the Gulf Coast, where a jury can dispassionately review the evidence and render a verdict that does not ignore the physical evidence.

ARGUMENT

I. Applicable Standards of Review

A. Motions for JNOV: A motion for judgment notwithstanding the verdict ("JNOV") "'tests the legal sufficiency of the evidence supporting the verdict.'" *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, ¶21(Miss. 2008) (quoting *Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 713 (Miss. 1984)). In evaluating a motion for JNOV, the evidence is viewed "in the light most favorable to the non-moving party." *Prudential Ins. Co. of America v. Stewart*, 969 So. 2d 17, ¶10 (Miss. 2007). "Substantial evidence" is required to support a verdict. *Adcock v. Miss. Transp. Comm'n*, 981 So. 2d 942, ¶25 (Miss. 2008). The non-moving party is entitled only to those favorable inferences that can be **reasonably** adduced from the evidence as a whole. *Spotlite Skating Rink, Inc. v. Barnes*, 988 So. 2d 364, ¶10 (Miss. 2008). A JNOV should be granted if "the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *White v. Stewman*, 932 So.2d 27, ¶11 (Miss. 2006).

B. Motions for New Trial: Though jury verdicts generally receive deference, a verdict will be set aside when it contradicts the substantial or overwhelming weight of the evidence. *Blossman Gas, Inc. v. Shelter Mut. Gen. Ins. Co.*, 920 So. 2d 422, ¶¶10, 16 (Miss. 2006). Conflicts in evidence and reasonable inferences – but **only reasonable inferences** – are to be drawn in the verdict's favor. *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n*, 560 So. 2d 129, 131 (Miss. 1989). Nevertheless, a new trial should be ordered "when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice . . . ." *Herrington v. Spell*, 692 So. 2d 93, 103-04 (Miss. 1997). "[A] verdict is deemed

against the overwhelming weight of the evidence when no reasonable hypothetical juror could have reached the conclusion of the jury." *Blossman Gas*, 920 So. 2d at ¶16. A new trial should be granted when "'the jury has departed from its oath and its verdict is a result [of] bias, passion, and prejudice.'" *Hamilton v. Hammons*, 792 so. 2d 956, 965 (Miss. 2001) (quoting *Bobby Kitchens, Inc.*, 560 So. 2d at 132)).

C. **Questions of Law:** Questions of interpretation and application of law are reviewed *de novo*. *Keener Properties, L.L.C. v. Wilson*, 912 So. 2d 954, ¶3 (Miss. 2005).

D. **Change of Venue:** Rulings on motions for change of venue are reviewed for abuse of discretion. *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446, 448 (Miss. 1997).

E. **Evidentiary Decisions:** Evidentiary rulings are reviewed for abuse of discretion. *Delashmit v. State*, 991 So. 2d 1215, ¶9 (Miss. 2008). However, if a question of law is involved in the decision to admit or exclude evidence, the issue of law is reviewed *de novo*. *Id.* Similarly, a decision whether to bifurcate trial on particular issues is reviewed for abuse of discretion. *Terrain Enterprises v. Mockbee*, 654 So. 2d 1122, 1132 (Miss. 1995).

F. **Jury Instructions:** Reversible error will be found in jury instructions if, read as a whole, they either do not fairly state the applicable law or are without foundation in the evidence and create an injustice. *Entergy Mississippi, Inc. v. Bolden*, 854 So. 2d 1051, ¶6 (Miss. 2003).

G. **Motions for Mistrial:** A trial court's decision on whether to grant a motion for mistrial is reviewed for abuse of discretion. *Caston v. State*, 823 so. 2d 473, ¶54 (Miss. 2002).

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

A verdict contrary to physical and photographic evidence cannot stand. *Johnson v. City of Pass Christian*, 475 So. 2d 428, 431 (Miss. 1985). It is not given deference, because it tries to

elevate the impossible to reality. *Id.* Such a verdict indicates the jury ignored its oath and operated based on bias, passion and prejudice. *Blossman*, 920 So. 2d at ¶¶14-15. That is exactly the kind of verdict rendered against USAA, and either a JNOV or new trial is warranted. *Johnson*, 475 So. 2d at 431 (JNOV); *Blossman*, 920 So. 2d at ¶¶14-20 (new trial or JNOV). The totality of the evidence regarding the Lisanby house, garage, and contents of all three buildings on the property points uncontrovertably in favor of USAA's decision about the damage caused solely by wind versus the damage caused by storm surge.[17] That Plaintiffs called an engineer to testify contrary to the physical facts does not create a basis on which a reasonable jury could find for the Lisanbys. *Blossman*, 920 So. 2d at ¶¶13-20.

Although Dr. Sinno testified 100% of the damage to the Lisanby house resulted from wind, he did nothing more than point at photographs and declare that damage was wind damage. There was no scientific basis provided. There was no physical evidence to support his opinion and, at times, he even contradicted himself. Mere repetition of his opinion from the witness stand cannot elevate it to a valid basis for the jury's verdict. Dr. Sinno's opinion made no sense in light of the physical facts. The second floor central hall is the undisputed example of the most the wind could have done in tunneling through the house. USAA paid for it. Photos demonstrate conclusively that this wind damage is nothing like the type of damage seen downstairs.

Dr. Sinno did not present any substantial evidence or testimony to indicate that contents of any of the buildings were destroyed by wind. His only definite testimony concerning furnishings on the first floor of the house was that they would have floated in storm surge. (T. at 642) No other

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The jury correctly found the cottage was destroyed by surge, but then awarded monies for wind damage to the contents of the cottage, which were included in the Lisanbys' claim for contents above 5 feet. This is not logical.

witness presented evidence that contents of the house, garage, or cottage were destroyed by wind. The Lisanbys bore – and utterly failed in – the burden of proof that their contents were destroyed by wind, since the policy's contents coverage was named peril coverage. *Corban v. United Services Auto. Ass'n*, 2009 WL 3208704, ¶ 53 (Miss. October 8, 2009); *Broussard v. State Farm Fire and Cas. Co.*, 523 F.3d 618, 625-26 (5th Cir. 2008). Yet, the jury gave the Lisanbys an award for all contents of the house, garage, and cottage above 5 feet.

The facts and physical evidence were indisputable that the Lisanby house, other buildings, and their contents were destroyed by storm surge. The house was only 100 feet from the Gulf. It was over 100 years old and weathered many hurricanes in which it was exposed to wind but not inundated by surge. The Admiral admitted in a newspaper interview that the first floor was destroyed by 24 feet of storm surge. He accepted $350,000 for flood damages. The testimony, photos, and video from eyewitnesses conclusively point to destruction of the Lisanby property by storm surge. Steve Loper admitted stating he saw 8 to 10 foot waves. Water reached at least chest height in the first floor of his house. Given the height of Loper's lot and first floor level of his house, this put the surge at 23 to 25 feet above sea level. Jim and Rebecca Treadway testified to the high storm surge – high enough to submerge and float their neighbors' Jeep. There were 10 by 20 foot rolling waves. Significantly, Jim Treadway's photos showed the roof of the Lisanbys' garage floating away on the storm surge and showed the Lisanbys' cottage floating. The force of the wind, by contrast, left the leaves on the trees. Video from the EOC in downtown Pascagoula similarly showed the effects of the wind – some pieces of shingle and gravel blowing off roofs, but no wind damage to walls or structures of buildings.

USAA's engineering expert, Doug Smith, found, consistent with the physical facts and USAA's inspection, that storm surge caused the damage to the first floor of the house, as well as the

structural damage from twisting (torque). FEMA recorded high still-water marks of 16.8 feet to 18 feet above sea level near the Lisanby property. Waves of 40% of the still water height added at least another 6 to 7 feet to the surge depth. These waves and water (with a force much greater than wind) pounded the house, knocked out the south and east exterior walls of the first floor, and then ravaged the interior of the first floor. Both the garage and cottage were also destroyed by storm surge.

Photographs of the house, alone, clearly demonstrate destruction of the first floor (the damage for which USAA did not pay under the homeowners policy) resulted from storm surge. These photos showed, incontrovertably, that:

- the first floor of the house was destroyed, and the flooring was washed into a pile against the rear wall of the house;
- the second floor of the house remained intact;
- the second floor windows and attic windows were intact, with the glass undisturbed even in those windows not covered with storm shutters;
- the exterior siding of the house (made of 2 ½ inch concrete over lathing and diagonal bracing boards) was still largely intact on the second floor and showed no evidence of debris strikes;
- there was only minor damage to shingles on the roof and one section of ridge cap that blew off;
- the interior bracing for the roof inside the attic above the second floor was intact, with no damaged or loosened boards or nails and no wet insulation.
- no attic insulation was displaced, and even Dr. Sinno had to admit there was no air moving in the attic, the highest interior part of the house.
- the chimneys remained intact on top of the roof and on the second floor, and were destroyed only at the bottom on the first floor.

In short, both floors of the Lisanby house were exposed to Katrina's winds. Only the first floor was exposed to Katrina's storm surge. The second floor remained. The first floor was gone.

This Court has addressed similar situations in which photographic evidence conclusively contradicts a plaintiff's theory of the case. The Court has held, in such instances, that verdicts for the plaintiff will not stand, stating:

> In similar cases, this Court has ruled that, where the photographs contradict the plaintiff's tenuous theory of an accident, the plaintiff's theory will not support a jury verdict.

Johnson, 475 So. 2d at 431 (plaintiff alleged her car hit a hole, causing her to run off the road, and a witness testified he saw the hole; JNOV for defendant city affirmed because photographs demonstrated conclusively there was no hole). *See also Gunn v. Grice*, 204 So. 2d 177, 185 (Miss. 1967) (photographs demonstrated plaintiffs' theory of accident was completely at odds with what occurred; verdict for plaintiff reversed); *City of Biloxi v. Schambach*, 247 Miss. 644, 157 So. 2d 386 (1963) (photographs of sidewalk completely contradicted plaintiff's theory of negligence).

Similarly, this Court has held that expert testimony which makes no sense in light of physical facts is not sufficient to uphold a verdict. *Blossman*, 920 So. 2d at ¶¶ 13-20. In *Blossman*, Shelter paid for its insured's fire loss and brought a subrogation action against Blossman Gas, alleging gas fireplaces in its insured's home were improperly installed, causing an explosion and fire. *Id.* at ¶¶4-9. The overwhelming physical evidence showed that Blossman's employees improperly installed the fireplaces. *Id.* at ¶¶12-13. Nevertheless, Blossman was able to retain experts to testify to the contrary. *Id.* at ¶¶13. After a jury verdict for Blossman, the trial judge ordered a new trial, finding the verdict shocked the court's conscience and was against the overwhelming weight of the factual and physical evidence. The verdict necessarily evidenced bias, passion and prejudice, because no reasonable jury could have ignored the facts and physical evidence to reach it. This was true, despite that Blossman called experts to offer testimony contrary to the physical facts. *Id.* at ¶¶14-15. This

Court affirmed a new trial was in order. *Id.* at ¶¶17-20. Had a judgment notwithstanding the verdict been requested, it would have been granted. *Id.* at ¶20.

The jury's verdict in this case awarding $478,141 in homeowners insurance benefits for wind damage to the first floor of the Lisanby house; $50,500 for the garage structure; $197,000 for contents of the house, garage and cottage; and $12,000 in additional living expenses cannot stand in the face of the clear evidence of destruction by storm surge. Likewise, the remainder of the judgment cannot stand, as further contract benefits simply were not owed. USAA was entitled to a JNOV, and the judgment in favor of the Lisanbys should be reversed and rendered. Alternatively, a new trial should be granted. The evidence was not such that any reasonable, fairminded jurors could have reached the verdict that occurred in this case. In the words of this Court:

> A 'verdict' does not by its utterance create that which cannot be determined rationally to have existed. A verdict cannot metamorphose an incredible assumption into a plausible fact worthy of being accepted as a reality.

Elsworth v. Glindmeyer, 234 So. 2d 312, 321 (Miss. 1970).

III. The Lisanbys' Claims For Emotional Distress

A. The Trial Court Erred in Allowing the Jury to Consider the Claims for Emotional Distress and in Denying USAA's Motion for JNOV or New Trial Concerning Those Claims.

In cases based on alleged breach of an insurance contract, Mississippi only allows the imposition of extra-contractual damages to go to the jury where the insurer lacked an arguable basis for its claim decisions. *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 295 (Miss. 1992); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1186 n. 13 (Miss. 1990). In *Veasley*, the first Mississippi case to allow extra-contractual and emotional distress damages in a breach of contract case in the absence of a separate independent tort, the Court clearly equated "negligence" not with

simple breach of contract, but with breach of contract "without an arguable reason." *Veasley* at 295. Since *Veasley*, Mississippi courts have universally followed the rule that extra-contractual and emotional distress damages cannot be recovered without the plaintiff showing the insurer lacked an arguable reason for its breach of contract. *See, e.g., United American Ins. Co. v. Merrill*, 978 So.2d 613, 630 (Miss. 2007) (quoting *Veasley*); *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 628 (5th Cir 2008)(insurers may be liable for extra-contractual damages where decision to deny claim is without a "reasonably arguable basis" but does not otherwise rise to level of independent intentional tort); *Guideone Mut. Ins. Co. v. Rock*, 2009 WL 2252204 (N.D. Miss. July 28, 2009) ("[E]ven this intermediate level of extra-contractual damages is unavailable if the decision to deny the claim has "a reasonably arguable basis.")

The existence of an "arguable basis" is a question of law that should ordinarily be decided by the court and not the jury. *See Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1185 (Miss. 1990); *Reserve Life Ins. Co. v. McGee*, 444 So.2d 803, 809 (Miss. 1983); *Broussard* at 628; *Hebert v. Mid-South Ins. Co.*, 48 F.3d 532 (5th Cir. 1995). Only if there was a relevant disputed fact that would be determinative of the "arguable basis" issue would the jury be required to make a specific fact determination.

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); *Richards v. Amerishure Ins. Co.*, 935 F.Supp. 863, 867 (S.D. Miss. 1996).

In this case there was ample undisputed evidence to establish as a matter of law that USAA had, at a minimum, "some credible evidence" for determining that it paid the full extent of potential

wind damage to the plaintiffs' property. This is not a case where there was any lack of investigation on the part of USAA or any evidence of egregious claims handling practices. For example, the evidence at trial clearly established that USAA based its claim decisions, in part, on the following:

- the unambiguous water damage exclusion and other provisions in the policy;
- the undisputed fact that substantial storm surge inundated every beachfront property along the Mississippi Gulf Coast;
- the conclusions of an experienced dwelling adjustor, Gary Taylor, who met with Admiral Lisanby, inspected the property on 3 different occasions, extensively examined and photographed the property and prepared diagrams of the structures and verified his measurements;
- the conclusions of an experienced contents adjustor who visited the property and met with the Lisanbys face-to-face;
- the written report of a reputable, independent engineering firm, EFI Global, that had an engineer personally inspect and photograph the property and provided meteorological data and opinions as to what parts of the Lisanby property were potentially damaged by wind and which included a report of 8 to 10 foot waves by Steve Loper, the Lisanbys' neighbor who rode the storm out immediately north of the Lisanbys' property;
- The physical condition of the Lisanby's house and surrounding property observed by the adjustors and engineer, including the trees with minimal loss of foliage, debris fields and obvious bottom-floor-only wash out of other houses, all of which are borne out in the extensive photos in the record;
- Admiral Lisanby's own report to the engineer and adjustors that there was 5 feet of water in the house;
- the extensive photographic evidence showing substantial surge damage to the first floor of the house and minimal wind damage to the second floor, windows and roof of the house, including no upper level window breakage or attic disturbance and minimal shingle loss.

In *Broussard*, the Fifth Circuit Court of Appeals addressed what qualifies as an "arguable basis" for denial of a claim specifically in a Hurricane Katrina case. In that case, State Farm denied the homeowners claim in its entirety based only on its adjustor's conclusion that the "[e]vidence

suggests [the] home was more damaged by flood than wind." *Id.* at 622, 23. The court held that the following facts were sufficient to qualify as an "arguable basis" for denying the claim:

- the claims adjustor examined the position of the home seaward of the debris line;
- the adjustor examined the conditions of the trees in and around the property which he considered more consistent with flooding than with tornadic winds;
- the adjustor concluded that the insured location and surrounding neighborhood was damaged by tidal surge and flood.

Id. at 628.[18]

Clearly, if State Farm's bases for completely denying a claim (paying $0) in *Broussard* was sufficient for an "arguable basis", then USAA's grounds for paying all of the potential wind damage identified by the engineer plus the damage to the upstairs hallway based on the Admiral's representation of finding the second floor french doors open constitute an "arguable basis." Further, the testimony of fact witnesses and experts and the documentary and photographic evidence was sufficient for the trial court to make this determination as a matter of law.

In this case, the trial court never made any specific finding as to whether USAA's reasons for its wind-water determination was "arguable." It simply gave the issue of liability for emotional distress damages to the jury. The issue of emotional distress damages should never have been presented to the jury and certainly should never have been allowed in the first phase of the trial where an already biased jury was presented with testimony and improper argument by counsel of emotional injury to the Lisanbys. The entire purpose of Mississippi's safeguards separating

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The court did, however, conclude that State Farm lacked an "arguable basis" for its continued refusal to pay for partial wind damage after its trial expert (an engineer) concluded that some minimal wind damage could have occurred prior to the storm. In contrast, USAA retained an engineer before making its claim decision and paid the Lisanbys wind damage consistent with that opinion.

contractual damages from extra-contractual damages is to protect from just such prejudice. Allowing the jury to hear such evidence was like throwing a match on a pile of dry brush in drought conditions.

B. The Trial Court Erred in Failing to Bifurcate Trial of the Emotional Distress Claims and Thereby Allowing Claims-Handling Evidence in the First Phase of Trial.

In this case, the trial court bifurcated the issue of punitive damages and attorneys fees from the wind-water trial, but failed to separate the claims for emotional distress and negligent claims adjusting. The emotional distress testimony and argument should never have been presented to the jury. Even if submission to the jury was proper, the first phase trial should have been limited to the sole issue of whether USAA paid the proper amount of benefits for the plaintiffs wind-related damages. This would have allowed the jury to first consider only evidence of whether USAA in fact complied with its contractual duty to pay for the plaintiffs' covered wind damages without the improper influence of contrived issues of misconduct and of physical and emotional injury that played on the already heightened emotional state of jurors, all of whom had, either directly or indirectly, personally been affected by the devastation of Katrina.

Instead, under the guise of claims for negligent adjusting and emotional distress, the plaintiffs were allowed to testify and make emotional arguments about alleged improper adjusting practices and their alleged physical pain and suffering and emotional distress. As a result, the jury rendered an emotional distress award, the amount of which ($172,000) had no basis in any evidence introduced at trial. By allowing the issue of emotional distress to go before the jury and, especially, in what should have been a contract-only phase, the trial court failed to function as a gatekeeper. The court failed to make an initial determination, as a matter of law, as to whether USAA had an arguable basis for the manner in which it handled the Lisanbys' claim. It further failed to insure that

the jury's deliberations on the contract claim would not be biased by improper emotional and inflammatory testimony and argument by the Lisanbys and their attorneys.

Mississippi's punitive damages statute, Miss. Code Ann. § 11-1-65, and the scheme of separate trial phases that it implemented was designed to prevent just such prejudice and confusion. In *Hartford Underwriters Ins. Co. v. Williams*, 936 So.2d 888, 897 (Miss. 2006), this Court held:

> the clear intent of the legislature was to prevent issue confusion and to create a barrier between testimony regarding the fundamental issue of liability and the inflammatory issue of egregious conduct.

Id. at 897. In insurance bad faith cases, where an intermediate tier of damages has been created, the barrier between testimony of punitive damages is logically extended to testimony of emotional distress and/or negligent claims practices to serve the "clear intent" of the statute to prevent issue confusion and avoid bias with regard to the fundamental issue of liability. Mississippi Rule of Civil Procedure 42(b) authorizes the trial court to bifurcate such emotional distress and claim practices evidence.

In insurance cases, the fundamental issue of liability is whether the insurance contract has been breached. Only then is the issue of extra-contractual damages (including emotional distress) relevant.[19] If testimony of claims practices and emotional distress are interjected into the trial of the breach of contract issue, then the jury can be emotionally charged on an issue that is not even ripe for their consideration. Sympathy for the plaintiffs' alleged emotional condition or anger against the defendant over alleged bad conduct will surely affect the jurors' ability to fairly decide the fundamental issue. That is clearly what occurred in this case. The vast amount of physical evidence

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19 For example, in this case, assuming there was some negligence by USAA in the manner that it handled the Lisanby's claim, if that negligence did not result in a breach of contract, then it is irrelevant. This is especially the case where the only emotional distress the Lisanbys claim was allegedly caused by not getting paid their full policy limits, not by any egregious conduct by USAA.

available to the jury was overwhelming in its depiction of the washed-out bottom floor of the house and the near perfect condition of the upper floors. The added prejudice of erroneously allowing improper emotional distress and claims handling evidence before an already biased jury resulted in a verdict that was against the overwhelming weight of evidence.

C. The Trial Court Erred in Granting Jury Instruction P-16 Regarding Emotional Distress Damages.

The trial court's only instruction to the jury regarding emotional distress damages and improper claims handling was P-16.[20] The instruction prematurely passed the issue of negligent investigation and emotional distress damages to the jury without any mention of the necessity of a threshold finding of a lack of an arguable basis or any instruction at all on the standard for determining whether USAA had an arguable basis. Based on USAA's clearly arguable reasons for its claims decisions, the trial court should have refused as a matter of law to allow the jury to be instructed on any potential for emotional distress damages. Even if the trial court believed that the "arguable basis" question involved an unresolved fact issue, P-16 certainly did not properly instruct the jury in that regard. P-16 left the impression on the jury that, if USAA failed to pay some additional wind damages, then it could be liable for pain and suffering and emotional injuries, even if USAA based its decisions on reasonable grounds. The instruction was improper, should have been refused and resulted in USAA being assessed substantial emotional distress damages.

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20 The emotional distress jury instruction that was given appears in the record as "P-__." (R. at 3819.) The parties referred to it as "P-16," which was the number originally assigned to it in proposed instructions filed by Plaintiffs' counsel.

IV. The Trial Court Erred in Granting the Lisanbys' Motion for Attorneys' Fees And Expenses.

A. Mississippi Follows the American Rule That Attorneys Fees and Expenses Are Not Recoverable Absent Punitive Damages.

The trial court erred in awarding attorneys' fees and expenses to the Lisanbys. For decades, this Court has followed the American Rule regarding when an award of attorneys fees and expenses is proper. As recently as, June 12, 2008, in *In re Guardianship of Duckett*, this Court held:

> The law in Mississippi with respect to awarding of attorney's fees is well settled: '[I]f attorney's fees are not authorized by the contract or by statute, they are not to be awarded when an award of punitive damages is not proper.' *Hamilton v. Hopkins*, 834 So. 2d 695, 700 [¶16] (Miss. 2003) (collecting authorities).

Duckett, 2008 WL 2372830, ¶30 (Miss. 2008). In *Duckett*, an award of attorneys' fees was reversed because the award of punitive damages was erroneous. *Id.* In this case, just as in *Duckett*, there is no contract or statute authorizing an award of attorneys' fees. Punitive damages were held inapplicable as a matter of law. Therefore, there can be no award of attorneys' fees and expenses. *See also Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So. 2d 495 (Miss. 2007)(attorneys' fees cannot be recovered unless authorized by a contract or statute, or unless punitive damages are proper).

In *United American Ins. Co. v. Merrill*, 978 So. 2d 613 (Miss. 2007), this Court affirmed an award of attorneys' fees and expenses. However, the Court did so only because punitive damages were also awarded. *Merrill*, 978 So. 2d at ¶117. The *Merrill* Court expressly stated:

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

Id. at ¶117. In the section of its opinion concerning attorneys' fees and expenses, the *Merrill* Court relied on *Mississippi Power & Light v. Cook*, which holds as follows:

> Absent some statutory authority or contractual provision, attorneys' fees cannot be awarded unless punitive damages are also proper."

Mississippi Power & Light Co. v. Cook, 832 So. 2d 474, ¶ 40 (Miss. 2002) (citing *Aetna Cas. & Surety Co. v. Steele*, 373 So. 2d 797, 801 (Miss. 1979)).

Plaintiffs have wrongly relied on *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290 (Miss. 1992), to argue that attorneys fees and expenses are proper even absent conduct warranting punitive damages, and the trial court wrongly followed that argument. In *Veasley*, this Court considered a suit for breach of a life insurance contract, in which the insurer admittedly made a mistake in initially denying benefits to the insured. This Court recognized that Universal Life had *no arguable reason* for having initially denied Veasley's claim and had no explanation for the denial other than a *mistake* resulting from a failure of competence. *Id.* at 294. There was no basis for an award of punitive damages, because Universal Life did not act maliciously. *Id.* In regard to extracontractual damages, this Court affirmed an award of emotional distress damages because the initial claim denial was *a mistake made without any arguable reason* and was therefore negligent. *Id.* at 295-96. **However, there was no award whatsoever of attorneys' fees and expenses.** *Id.* Consequently, language in *Veasley* suggesting that attorneys' fees and expenses might be recoverable when punitive damages were not appropriate was mere *dicta*. That *dicta* contradicted long-established Mississippi law, i.e., the American Rule now recently affirmed in *Duckett*, 2008 WL 2372830 at ¶30.

In fact, in *Miller v. Allstate Ins. Co.*, 631 So. 2d 789, 792 (Miss. 1994), two years after *Veasley*, this Court confirmed that *Veasley's* language regarding attorneys' fee and expense awards was no more than *dicta* by following established precedent – the American Rule. The *Miller* court held that, as the case was not one for punitive damages, there was no entitlement to attorneys' fees

and costs. *Miller*, 631 So. 2d at 792. The *Miller* Court appended and quoted with approval the trial court's opinion, which stated:

> Plaintiff's prayer for attorneys fees is denied. In the absence of a showing of gross or willful wrong entitling the Movant to an award of punitive damages, the Mississippi Supreme Court has never approved of awarding attorneys fees to the successful litigant. *See e.g., Central Bank of Mississippi v. Butler*, 517 So. 2d 507, 512 (Miss. 1988); *Aetna Casualty & Surety Company v. Steele*, 373 So. 2d 797, 801 (Miss. 1979).

Miller, 631 So. 2d at 795.

This quote from *Miller* in 1994 has remained true to this day. No decision of this Court has approved an award of attorneys fees and expenses absent conduct warranting punitive damages. Mississippi still follows the American Rule as to recovery of attorneys' fees and expenses. *Duckett*, 2008 WL 2372830 at ¶30; *Tupelo Redevelopment Agency*, 972 So. 2d at ¶68. [21] Consequently, the Lisanbys are not entitled to recover attorneys' fees and expenses in this case.

B. Even if This Court Were To Deviate From the American Rule And Award Allow Attorneys' Fees And Expenses Based on Negligence Under *Veasley*, They Are Not Awardable Where the Insurer Has An Arguable Basis for Its Actions.

1. Even *Veasley*'s Dicta Still Requires Lack of Arguable Reason

Veasley's dicta suggesting that attorneys' fees and expenses might be awardable in certain insurance contract cases where punitive damages were not appropriate was limited to cases in which the insurer is found to have acted without an arguable reason. Specifically, the *Veasley* opinion stated:

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When federal courts have cited *Veasley*'s language regarding recovery of attorneys' fees as if it were more than *dicta*, they have simply made an incorrect *Erie*-guess. *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 451-52 (5th Cir. 2008); *Simpson v. Economy Premier Assur. Co.*, 2006 WL 2590620 (N.D. Miss. 2006).

> Some justices on this court have suggested that extra-contractual damages ought be awarded in cases involving a failure to pay on an insurance contract **without an arguable reason** even where the circumstances are not such that punitive damages are proper . . . . Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment.

Veasley, 610 So. 2d at 295 (emphasis added). Clearly, *Veasley* equated negligence with lack of an arguable reason. In declining to award extracontractual damages such as attorneys' fees and expenses when punitive damages were not appropriate, the Court has noted that such damages are not recoverable if an insurer had an arguable reason for denying a claim. *Windmon v. Marshall*, 926 So. 2d 867, ¶ 32-37 (Miss. 2006).

The Mississippi Court of Appeals has held that *Veasley* did not establish any "new, pure foreseeability standard for awarding attorneys' fees in a breach of contract case." *Sports Page, Inc. v. Punzo*, 900 So. 2d 1193, ¶¶ 43-47 (Miss. Ct. App. 2005). The *Punzo* court went on to note that, "[w]hile there may be some uncertainty about what conduct exactly gives rise to an award of '*Veasley* damages,' we can safely say that the general rule on attorney's fees remains intact." *Punzo*, 900 So. 2d at ¶ 46.

2. As a Matter of Law, USAA Possessed an Arguable Reason for Its Decisions Regarding the Lisanbys' Claim

For the same reasons discussed previously in regard to the Lisanbys' award of emotional distress damages, the evidence was not sufficient to show that USAA lacked any arguable reason for its actions or even was negligent in its investigation of the Lisanbys' claim. Plaintiffs bore the burden of proof to show that USAA lacked an arguable reason for its actions or was negligent in some way. That burden of proof is totally unsustainable in this case, in light of the avalanche of

evidence from the Admiral's own statements, photos, video, and eyewitnesses that the house and other buildings on the Lisanby property were destroyed by storm surge. As such, *Veasley* does not support an award of attorneys' fees and expenses in this case. Such an award, in a case in which punitive damages were held improper as matter of law, would be a novelty and an aberrant departure from the American Rule. The award of attorneys fees and expenses should be reversed and rendered.

V. The Trial Court Erred in Denying a Change of Venue.

Both before trial and after voir dire, USAA sought a change of venue pursuant to Miss. Code Ann. §11-11-51, which applies when a fair trial cannot be had in a particular venue because of "prejudice existing in the public mind." Miss. Code Ann. §11-11-51. Various circumstances can warrant a change of venue under §11-11-51. They include substantial media attention, including reports on evidence deemed inadmissible,[22] and "a concern of community bias or intimidation of the jurors, in the event the verdict was in favor of [the defendant]." *Hayes v. Entergy Miss., Inc.*, 871 So. 2d 743, 746 (Miss. 2004). They also include (a) that prominent figures in the county are plaintiffs; (b) a high volume of similar litigation in the county in recent years; and (c) negative publicity, including advertising by attorneys, creating a negative pre-existing opinion about the subject of the case. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 51 (Miss. 2004). All of these circumstances, and more, are present here. In particular, the factor of prominent citizenship is a factor. The Admiral testified that he was responsible for bringing the Navy shipyard to Pascagoula and for making it the world-class shipyard it is today. He told the jury that he was

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22 The chaos surrounding the trial was far-reaching. The trial court ruled inadmissible the testimony of Mike Church, who rode out Katrina. Mr. Church was over 30 miles from the Lisanby property, and a proffer showed there was little similarity between conditions at Church's property and the Lisanby property. (T. at 195-96, 346.) The *SunHerald* published an extensive article on what his testimony would have been. (R. at 5192.)

responsible for "writing the check" for the government contracts handled by the shipyard, and reminded the jury that thousands of new jobs were created for Jackson County citizens. In short, the Admiral directly reminded the jurors, as citizens of Jackson County, how much the community owed him.

Phenomena similar to those observed by Dr. Craig New and Dr. Allen McConnell have been observed by this Court and were held to warrant venue change. *Fisher v. State*, 481 So. 2d 203, 220-21, 223 (Miss. 1985). The *Fisher* opinion is highly relevant to this case, as follows:

> The jury selection system we employ is without the capacity to determine whether the influences of substantial pretrial publicity may be extinguished from a given juror's mind. Elementary principles of group psychology, as well as empirical findings, make clear that, where questions are put to the panel as a whole, the average potential juror will be extremely reluctant to disclose his biases. he knows that he is supposed to be fair and impartial. Knowing that, and being subject to the peer pressure of the courtroom setting (not to mention the intimidating nature of the whole experience to the first-time juror), he will be unlikely to admit that he cannot give the accused a fair hearing, even though he suspects that to be the fact. For these and other reasons, voir dire, even when most skillfully performed, is often ineffective to discover the extent to which a juror's vote may be affected by what he has heard about a case.
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> Many whose views may be substantially affected by pre-trial publicity may not know that they are incapable of sitting as fair and impartial jurors. [citations omitted] Many who allow bias and prejudice to affect their relationships with and attitudes toward their fellow man may believe quite sincerely that they are impartial and fair-minded persons. Most of us do not include among those to whom justice is due every individual within the constitution.
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> . . . .
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> As stated by this Court in *Seals v. State*:
>
> A fair trial . . . means, in addition to the right to be tried by such individual jurors, the right to be tried in an atmosphere in which public opinion is not saturated with bias and hatred and prejudice against the defendant; where jurors do not have to overcome that

> atmosphere, nor the later silent condemnation of their fellow citizens if they acquit the accused. 208 Miss. at 249, 44 So.2d at 67.

Fisher, 481 So. 2d at 220-21, 222.[23]

USAA has a right to a fair trial in an impartial venue. It has a right to trial in a venue "in which public opinion is not saturated with bias and hatred and prejudice against the defendant . . ." *Fisher*, 481 So. 2d at 222. It has a right to trial in a venue "where jurors do not have to overcome that atmosphere . . . ." or overcome "the later silent condemnation of their fellow citizens if they acquit the accused." *Id.* It has a right to trial in a venue where jurors do not have to overcome feelings of indebtedness to a prominent citizen in order to render a decision based on actual, physical evidence that negates that citizen's claims. All of these circumstances infect Jackson County – there is bias, hatred, and prejudice against insurance companies, including USAA; there is an atmosphere in which jurors would have to overcome that bias; there is an atmosphere in which jurors would have to be willing to overcome condemnation by community members if they find for USAA; there is an atmosphere where jurors would have to find against a prominent citizen in order to reach a decision based on the actual physical evidence. It is unrealistic to think that jurors in a community in which all members suffered from Katrina (including the circuit judges, who recused themselves) can provide USAA with a fair trial. The venue error, alone, requires a new trial. Coupled with other errors and the overwhelming evidence of destruction of Plaintiffs' property by storm surge, a new trial is clearly warranted.

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That *Fisher* was a criminal case does not dilute its applicability here. A civil defendant is equally entitled to a fair and impartial trial as is a criminal defendant. *King v. Kelly*, 243 Miss. 160, 173, 137 So. 2d 808, 813 (1962).

VI. The Trial Court Abused Its Discretion in Admitting Evidence of Replacement Cost of the Lisanby Property.

The Lisanbys did not rebuild their house, garage, or cottage. Admiral Lisanby publicly stated to the Princeton *Times Leader* in 2005 that they did not intend to rebuild. (RE at Tab 18; Exh. D-19.) The USAA homeowners policy provides that replacement cost up to, but not exceeding, policy limits for the dwelling and other structures can only be recovered after actual repair or replacement is complete. Before replacement, the insured is only entitled to recover the actual cash value of the loss. (Exh. D1-1 at p. 9-10.) Under the policy provisions, Plaintiffs were not entitled to recovery of replacement cost. They were only entitled to consideration of actual cash value. *Aiken v. Rimkus Consulting Group, Inc.*, 2007 WL 4245906, *2 (S.D. Miss. Nov. 29, 2007). At most, discussion of replacement cost was admissible for the limited purpose of presenting how actual cash value of the loss was calculated. *Penthouse Owners Assoc., Inc. v. Certain Underwriters at Lloyd's*, 2009 WL 94835, * 1 (S.D. Miss. Jan. 13, 2009).[24]

Instead, the Lisanbys were allowed to present replacement cost value as if they were entitled to replacement cost coverage. (RE at Tab 7; R. at 4741; T. at 774-93, 1073-74.) Such admission of speculative replacement cost evidence not actually incurred was error. It was irrelevant and overly prejudicial under Miss. R. Evid. 401 and 403. Since they did not repair or replace the property, Plaintiffs should have been limited to evidence of the actual cash value of the loss. *Aiken*, 2007 WL 4245906 at *2. Admission of replacement cost evidence as if Plaintiffs were entitled to replacement cost coverage adversely affected USAA's substantial rights and prejudiced USAA. Miss. R. Evid.

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24 USAA moved in limine to exclude replacement cost evidence. (R. at 2880-2922.) While USAA stipulated to the replacement cost dollar figure, USAA objected at trial to its admission. (T. at 774-93, 1073-74.) The motion and objections were overruled. (RE at Tab 7; R. at 4741; T. at 792.)

103. It led the jury to believe the Lisanbys were entitled to coverage for which they had not met the required conditions. They were not entitled to it according to the terms of the contract. This evidence presented the jury with a higher figure in Plaintiffs' damage calculations than they were entitled to consider. The error undergirded one of the arguments made by Plaintiffs' counsel, who sought to have the jury render a verdict based on factors other than the actual, physical evidence – i.e., that simply because replacement cost of the house was so high, the jury should award the Lisanbys' their policy limits as a percentage of damage to the first floor even if wind damage was minimal.

The higher figure played into the bias, passion and prejudice already at work. For example, in order to support their verdict of $478,000 for additional wind damage to the house, the jury would have had to be able to find that there was evidence of components of the house, actually damaged by wind, that equaled that dollar amount. Such evidence simply does not exist in this case. The error in admission of replacement cost mislead and confused the jury into accepting an argument that they should render a verdict based on a percentage theory that contradicted the actual physical evidence introduced at trial. As previously discussed, such verdicts cannot stand. The trial court abused its discretion in admitting replacement cost evidence without limitation, and this error warrants a new trial.

VII. The Trial Court Abused Its Discretion in Denying USAA's Motions for Mistrial.

A. Improper Arguments By Plaintiffs' Counsel

During closing argument, Plaintiffs' counsel improperly told the jury to decide this case based on bias and prejudice. He also made a "send a message" argument, asking the jury to speak for the people of Jackson County, rather than decide the case on the evidence. Specifically, the arguments were as follows:

> You know, sometimes we feel so powerless. There's such an unequal situation between the little policyholder and the big insurance company. The insurance company –
> MR. COPELAND: Improper argument, Your Honor.
> THE COURT: I think so.
> MR. COPELAND: No doubt about it.
> MR. DON BARRETT: The insurance company –
> MR. COPELAND: Your Honor, if he's –
> MR. DON BARRETT: I beg your pardon.
> MR. COPELAND: Did you just sustain the objection?
> THE COURT: Yes.
> MR. COPELAND: That's what I thought.
> MR. DON BARETT: You don't know what I'm going to say.
> The insurance company has the exclusive control, dominion and power over the evaluation, processing and denying of a claim, and the people have no voice. But not today. In this one shining moment in our American system, the people can speak and respond in justice. Today, you are the voice of the people.
> MR. COPELAND: Your Honor, that's totally improper argument.
> MR. DON BARRETT: It is not improper.
> THE COURT: I'm going to overrule your objection. Let him get through.
> MR. DON BARRETT: Today, you are the voice of the people. Speak. Speak quickly and speak clearly. If you do today, the people of Jackson County will be heard.
> MR. COPELAND: May we approach, Your Honor.
> MR. DON BARRETT: Thank you.
> (Off-the-record sidebar conference.)
> THE COURT: The jury will disregard the last statement made by Mr. Barrett. Do not consider that in your deliberations.

(T. at 1804 – 1806.) These comments were entirely inappropriate and purposefully designed to play on bias and prejudices of the jurors. Merely sustaining USAA's objections and instructing the jury to disregard the comments was insufficient to deal with the damage done. USAA moved for and was denied a mistrial. (RE at Tab 10; T. at 1807-08.)

Such "send a message" arguments and appeals to passion and prejudice stand condemned by this Court. By themselves, they are reversible error. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, ¶¶143-144 (Miss. 2004) ("send a message" argument by plaintiffs' counsel to make defendant understand that "even in Claiborne County...you have to pay" was reversible error); *Brown v. State*,

986 So. 2d 270, ¶¶11-21 (Miss. 2008) ("send a message" argument by prosecutor was reversible error requiring new trial). As the Mississippi Supreme Court stated clearly in *Janssen*:

> The only legitimate purpose of the argument of counsel in a jury case is to assist the jurors in evaluating the evidence and in understanding the law and applying it to the facts. Appeals to passion and prejudice are always improper and should never be allowed. *Shell Oil Co. v. Pou*, 204 So. 2d 155, 157 (Miss. 1967).

Janssen, 878 So. 2d at 31. The relevant test is "'whether the natural and probable effect of the improper argument . . . create[s] an unjust prejudice against the [opposing party] result[ing] in a decision influenced by the prejudice so created." *Tentoni v. Slayden*, 968 So. 2d 431, ¶29 (Miss. 2007) (quoting *Eckman v. Moore*, 876 So. 2d 975, 986 (Miss. 2004)).

Bias and prejudice against USAA already existed in Jackson County. The comments of Plaintiffs' counsel improperly played upon it, magnifying it, and telling the jury to act – not based on the evidence – but based on group psychology of bias and peer pressure to find against insurance companies. In the face of the avalanche of evidence that the Lisanby property was destroyed by storm surge, these improper arguments had their desired effect. Refusal to grant USAA's motion for a mistrial was error, and USAA is entitled to a new trial.

B. <u>The Inappropriate Media Interview Given By Plaintiffs' Counsel</u>

Plaintiffs' counsel conducted an interview with local TV station WLOX–TV during the recess between jury deliberations of June 26 and 27, stating the Lisanbys "should win" the case. (Exh. D-22, video.) Plaintiffs' counsel conducted his TV interview in front of the courthouse, in plain view of jurors as they were leaving for the night. Every juror but one admitted having seen Mr.

Barrett giving the interview. (T. 1817–1820.) Counsel's purpose was to further inflame the community and increase peer pressure on the jurors to "be the voice of the people."[25]

USAA sought a mistrial, which was denied. (RE at Tab 11; T. at 1810-16.) Under the circumstances of this case, where USAA was already facing a monumental amount of bias, the mistrial should have been granted. Uniform Circuit and County Court Rule 3.12 provides that the court can declare a mistrial on motion of any party "if there occurs during the trial, either inside or outside the courtroom, misconduct by . . .the party's attorneys . . . resulting in substantial and irreparable prejudice to the movant's case." There is no question that the conduct of Plaintiffs' counsel was wrongful. It violated Rule of Professional Conduct 3.6(a), which provides:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Rule Prof. Cond. 3.6(a). The atmosphere surrounding the trial was highly charged. Plaintiffs' counsel played on this and on conformity pressure, giving the interview such that the jurors would see it occurring and be reminded the community was watching. While jurors did not openly admit any impact from the event, such peer pressure undoubtedly influenced their ability to render a fair and impartial verdict. On the evening of June 26, before recessing, the trial court inquired whether the jury was close to a verdict. The jurors represented they had several more hours work to do. (T. at 1808-09.) They were then released for the night, walked out, and saw the interview being given.

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25 USAA counsel understood before trial that the court had instructed the parties and counsel not to speak with the media. (R. at 5605.) Plaintiffs' counsel represent they understood they were simply to tell the Lisanbys not to speak to the press. (R. at 5605-06.) The trial judge does not recall imposing a gag order, but stated attorneys should have known better than to give a media interview during trial. (R. at 5655.)

The next morning, they returned a verdict in about an hour. (T. at 1820.) The actions of Plaintiffs' counsel had the desired effect on the jurors. A new trial is warranted.

VIII. Cumulative Errors Warrant a New Trial.

Even if any one of the above errors was not sufficient by itself to require reversal and remand for a new trial, the cumulative effect of all the errors warrants reversal. *See Illinois Central Railroad Co. v. Clinton*, 727 So. 2d 731, 736 (Miss. Ct. App. 1998)(individual errors, not reversible in isolation, can combine to create cumulative error requiring new trial).

CONCLUSION

Based on the foregoing, 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.

Respectfully submitted this 14th day of October, 2009.

/s/ C. G. Copeland

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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 Appellant United Services Automobile Association to:

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
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This 14th day of October, 2009.

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 Appellant United Services Automobile Association to the following:

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