IN THE SUPREME COURT OF MISSISSIPPI

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W.R. BERKLEY CORPORATIONN
UNION STANDARD INSURANCE COMPANY,
UNION STANDARD INSURANCE GROUP, AND
GREAT RIVER INSURANCE COMPANY APPELLANT / CROSS APPELLEES

VS. NO.: 2009-CA-01223

REA'S COUNTRY LANE CONSTRUCTION, INC. APPELLEE / CROSS APPELLANT

BRIEF OF THE APPELLEE / CROSS APPELLANT, REA'S COUNTRY LANE CONSTRUCTION, INC.

(ORAL ARGUMENT REQUESTED)

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

W.R. BERKLEY CORPORATION, et al. **APPELLANT / CROSS APPELLEES**

VS. **NO.: 2009-CA-01223**

REA'S COUNTRY LANE CONSTRUCTION, INC. **APPELLEE / CROSS APPELLANT**

CERTIFICATE OF INTERESTED PERSONS

Undersigned Counsel of Record certifies the following listed persons have an interest in the outcome of this case. These representations are made to enable the Justices of the Supreme Court and/or Judges of the Court of Appeals to evaluate possible disqualification or recusal.

Chancery Ct. Trial Judge:	The Honorable J. Larry Buffington
Special / Successor Judge:	The Honorable Edward C. Prisock (appointed January 7, 2011)
Appellants / Cross Appellees:	Great River Insurance Company, W. R. Berkley Corporation; Union Standard Insurance Group; and Union Standard Insurance Company Michelle Van Hook Esquire (Claims Counsel Who Denied Claims) Jerry Crites (Appellants' Vice President in Charge of Claims)
Counsel for Appellants / Cross Appellees:	Robert P. Thompson, Esquire Caryn Anlage, Esquire Copeland, Cook, Taylor & Bush, P.A. Thomas T. Buchanan, Esquire Tucker Buchanan, P.A.,
Claims Counsel for Appellants/Cross Appellees:	Steven C. Cookston, Esquire Upshaw, Williams, Biggers & Beckham, LLP
Appellee / Cross Appellant:	Rea's County Lane Construction, Inc. Wayne Rea (Owner)
Counsel for Rea's:	Clyde H. Gunn, III., Esquire Christopher C. Van Cleave, Esquire W. Corban Gunn, Esquire David N. Harris, Jr., Esquire Corban, Gunn & Van Cleave, PLLC

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ORAL ARGUMENT REQUESTED

Appellee / Cross Appellant ("Rea's") requests Oral Argument in this matter because, while the underlying issues are not particularly complex, there are multiple issues at hand and the Record in this case (which was tried in May, 2005) is voluminous. The Appellant/Appelle ("Great River, et al.") erroneously states the dispute between the parties concerns the "law" and not the "facts". Oral argument in this case is expected to help this Court appreciate the true facts, and Great River's continuing efforts to push aside the application of those facts to applicable law.

STATEMENT OF THE CASE

1. Foreword

Rea's Country Lane, Construction, Inc. (Rea's) is a Mississippi corporation formed in 1982 by Wayne Rea, his wife Joyce, his Mother Mildred Erlene, and his Father Murry Oneal. The family business was started by buying one bulldozer; at the time of trial Rea's owned approximately 50 pieces of equipment. Rea's does "dirt work" – they build levies and roads, lay riff raff, pipe and dirt, and put in dirt for guardrails all around the State. Rea's is now owned by Wayne and Joyce, and their son has worked with them since high school. The Rea's daughter was a Barksdale Honor College Scholar at Ole Miss where she was also honored as "Ms. University", and has since completed medical school at UM. **RE 35-39, T 139-143**

This case involves Great River Insurance Company's ("Great River") breach of its absolute duty to defend Rea's, its insured, against litigation pursued against Rea's and multiple other defendants by Margaret Broom ('Broom") – alleging damage to Broom's property in Wayne County, Mississippi ("Underlying Litigation"). Rea's paid and incurred in excess of $130,000 expenses defending itself, and was then forced to retain counsel to enforce its contractual rights. Great River's conduct was directed, controlled and/or directly participated in by its co-principals and/or "alter egos", W. R. Berkley Corporation ("Berkley"), Union Standard Insurance Group, and Union Standard Insurance Company (jointly "Union Standard").

Great River fails to fully and accurately apprise this Court of the facts in the Record. Contrary to Great River's repeated assertions the only issues before the Trial Court (even in the underlying Motion for Summary Judgment ("MSJ")) were issues of "law", Rea's demonstrated that disputed issues of fact prohibited summary judgment in favor of Great River. Ultimately, the Trial Court (Chancellor) correctly resolved those issues of fact, and applied those facts to applicable law, to find Great River breached its duty to defend. If anything, the Record, which

includes admissions by Great River and its Senior Vice President that coverage counsel advised arguments existed both ways about whether or not the allegations against Rea's constituted an "occurrence" of "property damage", and that it was "possible" a Mississippi Court would resolve same in favor of coverage for Rea's, would have supported summary judgment in favor of *Rea's*. infra

2. Initiation Of Underlying Litigation And Rea's Claim For A Defense

On January 26, 2001, Broom filed suit against Kent Excavating, Inc. ("Kent"), National Union Fire Insurance Company of Pittsburg, PA. ("National Union"), J.B. Talley and Company, Inc. ("Talley"), Rea's, L&J Construction, Inc. ("LJC"), and L&J Trucking, Inc. ("LJT"). Broom alleged damage to her property, and her claims included counts for negligence, gross negligence, conversion, equitable relief, and unjust enrichment – in addition to contract claims. **RE13-24, R 35-46** Broom attached a December 30, 1997 contract with Kent titled "Option to Purchase Roadway Material" ("Kent/Broom Contract"), and a contract between Kent and MDOT to perform a project on Highway 45 ("Kent/MDOT Contract"). **RE 21-22; R 43-44** With her Complaint Broom served separate Requests for Admissions, Interrogatories and Request for Production on each Defendant. **R 47-122** Broom's Request for Admissions to National Union included a request (#13) that National Union admit "Broom has suffered property damage to the subject property as a result of the work done by you, your agents or assigns." **RE 48, R 61**

Rea's procured Commercial General Liability Insurance from Great River for 10 to 15 years, and during the late 1990's to 2000 Rea's annual premiums were in excess of $50,000. **RE 339-40, T 143-44; TE1 116, 262, 401**[1] When Broom sued Rea's, Wayne Rea called Great River's Agent, Jim Armstrong / Bottrell Agency ("Armstrong", "Bottrell"), and told Armstrong Rea's

[1] Citations to Transcript are to "T", followed by page number. Citations to Trial Exhibits, which are numbered in the Record "Trial Exhibit 1.0000001", "Trial Exhibit 1.000002", etc., will be to the Trial Exhibit Number – "TE1", followed by the Trial Exhibit page number, i.e. "TE1, 1" and TE1, 2".

did not have any contract with Broom and had never been on her property. Armstrong told Rea he would turn the claim over to Great River, and that Rea's would be covered under its general liability clause. **RE 343, T 148** On March 7, 2001 Bottrell sent Great River Broom's Complaint and requested it contact Rea's "as soon as possible". **TE5, 3** On March 8, Great River's and Union Standard's "Claims Counsel", Michelle Van Hook ("Van Hook"), wrote a letter to Upshaw Williams lawyer Steve Cookston ("Cookston"), attached a copy of the Complaint and the allegedly "applicable" policy, and asked Cookston to "provide an opinion on our respective duties to defend and indemnify [Rea's]." Van Hook instructed "it may be necessary that you take a sworn statement from our insured". **TE5, 17** It is undisputed that no representative of Great River interviewed Wayne Rea prior to twice denying Rea's claim.

Rea's policy was an "occurrence policy". It is not clear from Broom's complaint when the loss was alleged to have occurred as it pertains to Rea's. Great River made no effort to determine the specific date(s) involved. Jerry Crites ("Crites"), the Senior Vice President in charge of claims for most of Berkley's subsidiaries (including Great River and Union Standard) **(RE 183-84; TE11, 2, 4)**, admits that given the allegations in Broom's Complaint, Great River required policies for each of the years encompassed therein (1997-2001) to be looked at and placed in the claim file. **RE 196; TE11, 27** Great River only sent one policy year to Cookston, yet no effort was made to determine whether the insuring agreements and exclusions for the annual policies covering the time periods 1997-2001 were the same. Great River could not testify under oath that they are the same. **RE 129-31; TE10, 32-34** The "certified" policy Great River provided to Rea's is different from the policy actually delivered to Rea's. **RE 132-35; TE10, 35-38**

Although Great River determined Rea's claim presented both a "claim" and a "coverage" issue, and has a procedure for setting up a Chinese wall in such circumstances, that was not done

in this case. **RE 125; TE10, 20** Van Hook oversaw both the coverage file and claims file. **Id., 22** Great River retained Copeland Cook lawyer Sam Morris to obtain an extension of time on behalf of Rea's. **RE 128; TE10, 28** Cookston's bill references a conversation with Van Hook "regarding extension of time to answer complaint and need to obtain conflict waiver" **(RE 137; TE 10, 29)**, however no conflict waiver was ever obtained. Morris wrote counsel for Broom to confirm a March 8 conversation he initiated on behalf of Rea's and Great River, that "Great River is evaluating whether coverage exists for Rea's," and that Broom's Counsel granted an additional 20 days to answer the Complaint – but no additional time to answer the Requests for Admissions served therewith. Morris notified Van Hook responses to Requests for Admissions were due March 24. **RE 68-69; TE5, 18-19** It is undisputed that Great River made no effort to ensure a timely response to Broom's Requests for Admissions.

While awaiting Great River's claims decision, Rea's filed a timely Answer to Broom's Complaint. **R 142-60** Rea's asserted Rea's is not a party to, and has no obligations under, the Kent/Broom Contract. Rea's also attached a separate contract Broom entered into with LJC ("Broom/LJC Contract"), and demonstrated Rea's was not a party to, and had no obligations under, that contract. **RE 26-27; R 143-44, 155**

Kent, National Union, and Talley filed an Answer to Broom's Complaint, which included a Cross-Claim against Rea's by National Union and Talley, on March 9. **R 161-224** They asserted Kent defaulted on the MDOT Contract, but never exercised the "Option" in the Kent/Broom Contract. While admitting National Union procured completion of the MDOT highway project, and entered into a Construction Management Agreement with Talley for that purpose, National Union and Talley denied they assumed any obligations under the Kent/Broom contract. National Union admitted it entered into a "Completion and Indemnification Agreement" ("National Union/Rea's Contract") with Rea's to complete certain obligations in connection with the Hwy

45 project, but expressly denied it contracted with Rea's to assume any obligations under and/or exercise the option under the Kent/Broom contract. **RE 28-30; R 163-64**

The National Union/Rea's Contract expressly states Rea's agreed to complete certain defined "Bonded Contracts" and "Borrow Pit Work". The Broom/Kent Contract is not a "Bonded Contract" or "Borrow Pit Work" as defined in the National Union/Rea's Contract. **RE 31-33, 35; R 176-78, 180** Rea's subcontracted with LJC to assist it with carrying out obligations assumed under the National Union/Rea's Contract ("Rea's/LJC Contract"). The Rea's/LJC Contract identified some specific borrow pits – but not Broom's property. **RE 60-64; R 393-397** National Union and Talley filed separate responses to Broom's Request for Admissions on March 23 **(R 296-301, 302-307)**, and each denied it and/or its agents or assigns caused Rea's to be hired to perform pit and dirt work on Broom's property. **Re 51, 53; R 298, 303**

Wayne Rea called Armstrong to report National Union's / Talley's Cross Claim, and Armstrong told Rea he would get in touch with Great River and that the Cross-Claim would be defended under the same defense [as Broom's claim]. **RE 344-45; T 149-50** The facts are undisputed Great River never accepted or denied coverage for the Cross Claim.

2. First Denial of Rea's Claim

Rea's served its responses to Broom's Request for Admissions, without assistance from Great River, on March 20, 2001. Rea's denied that: it performed any work, dug any pits, hauled any dirt on, or was responsible for any work on Broom's property, and asserts it was not involved in any work on Broom's property. **RE 54-59; TE6** On April 4 Cookston advised Van Hook that Rea's personal attorney, Andy Kilpatrick, appeared and filed a timely Answer and Responses to Broom's Requests for Admissions. **RE 70; TE5, 22** Rea's served its responses to Broom's Interrogatories on March 27, 2001. **R 384** Rea's swore it did not have a contractual or any other relationship with Broom, never did any work on, gave or received any instructions

regarding work on, and never received any compensation for work done on Broom's property. **RE 221-235; TE20** It is undisputed Great River made no effort to gather or review Rea's answers to Requests for Admission or Interrogatories prior to denying Rea's claim on 4/21/01.

On April 12, 2001 Cookston wrote Van Hook a coverage "analysis". **RE 71-82; TE5, 23-34** Cookston advised that Bottrell's Loss Notice, Broom's Complaint and attached exhibits, and the 2/1/98 -2/1/99 insurance policy were the "only materials reviewed". Notably, Cookston confirmed "[w]e have not seen any contract that may have been entered into between [Rea's] and [Talley] and/or [Broom]. (emphasis added) Cookston opined that after Kent defaulted on its contracts with Broom and MDOT, "[National Union] assumed Kent's obligations under [those] contracts . . . [and] [National Union and Talley] hired [Rea's] and other Defendants to work on [those contracts]." **RE 71; TE5, 23** The true facts – clearly communicated to Great River – were that Cookston had not seen any contract identifying which of Kent's contracts were "bonded", or any contract with Rea's name on it.

Cookston advised that Broom alleged the Defendants "dug three large pits" on her property, and "the roads and slopes were not graded and grassed, the main road was not graded and graveled. . . . [and] top soil was allegedly wrongfully taken from the property [without compensation]." Cookston acknowledged Broom sought, in addition to damages "on the contract", "the value of the top soil wrongfully taken, . . . and any cost associated with reclaiming and restoring the property." **RE 72-73; TE5, 24-25**

Cookston correctly advised Van Hook that "an insurer must defend when a claim includes any basis for potential liability under the policy"; and opined that "arguments exist that the damages claimed by [Broom] do not come within the risk assumed by Great River . . . ." **RE 73-74; TE5, 25-26** Great River (30(b)(6) Designee) admits Cookston's assertion "arguments exist damages claimed by Broom do not come within the risk . . ." suggests it could be true that

arguments likewise exist to the contrary. **RE 142; TE10, 45**

Cookston noted that even if the pits constituted "property damage", they must be caused by an "occurrence", and advised "we have not found a case from any Mississippi Court specifically addressing the issue, [however] courts from other jurisdictions have held that damages flowing from breach of contract are not the result of an 'occurrence' as defined in the policy at issue." **RE 75; TE5, 27** Cookston advised the claim should be examined "to determine if it is more appropriately designated as a contractual claim," notwithstanding the existence of claims sounding in tort. **Id.** Having acknowledged "we" have seen no contract involving Rea's, Cookston never the less opined "even though [Broom] employed negligence concepts in drafting the Complaint, it seems clear that her claims arise out of and are based upon duties imposed as a result of the underlying contracts;" and advised that Broom's allegations of "negligence" "arguably" do not give rise to a covered claim. **Id.**

Great River understood that Cookston was advising no Mississippi case holds breach of contract does not meet the definition of "occurrence" in a CGL policy. Great River admits it was "possible that a Mississippi judge would side with a [jurisdiction] which found such facts do create an occurrence," and expressly stated "it is **equally** possible that a Mississippi Court, or even more possible that it would take persuasive authority and follow that authority [to deny coverage]". **RE 149; TE10, 56** Cookston admitted it was possible a Mississippi Court would find Broom's Complaint alleged an "occurrence" of "property damage" under the facts as he understood them (**RE 119; TE9, 26**); and Great River admitted it knew it was possible a Court would conclude such claims constitute an "occurrence". **RE 153; TE10, 66**

Cookston also stated "arguments exist" any property damage shown by Broom would be excluded by Exclusion j(5). As to Exclusion J(6), Cookston opined "arguments exist [one of the exceptions to the exclusion] precludes application of this exclusion as a basis to deny coverage

[to Rea's]." **RE 78-79; TE5, 30-31** Although Cookston first stated that Exclusion (m) "would" operate to exclude coverage for Broom's claims, he later concluded "arguments exist" it may operate to preclude coverage. **RE 81; TE5, 33** Of course, Cookston's opinions were premised on the false and unreasonable conclusion that Rea's had performed some work on Broom's land for which it had a duty to conform to the terms of some (admittedly unknown) contract. Notably, Cookston explained that the purpose of CGL policies is that "the risk insured is the possibility that the product or the work of the insured, once relinquished or completed, will cause . . . damage to property other than the work itself, and for which the insured may be found liable." **Id.** As will be shown, supra, such was the clear nature of some of Broom's claims.

Cookston offered "three options for proceeding at this juncture include (1) denying coverage and declining to defend, (2) tendering a defense under a reservation of rights, or (3) denying coverage or defending under a reservation of rights and either intervening in the present action to seek a declaration of rights under the [policy] ... or filing an independent [dec action]." **RE 81** Cookston concluded "one risk involved in declining coverage would be that a Mississippi Court would broadly construe the underlying complaint and/or policy at issue and determine that coverage exists, potentially resulting in a claim for attorney fees and other damages, including possibly punitive damages." (emphasis added) **RE 82; TE5, 34** Great River did eventually file a Dec Action, but only in response to Rea's Third Party Claim for bad faith. **R 1458** Cookston admits he did not tell Great River to deny Rea's claim. **RE 109; TE9, 5**

Although Cookston stated no contract between Rea's and Talley and/or Rea's and Broom had been seen, Great River never contacted Rea's to find out whether it ever had such a contract – Great River concluded it was not necessary to make that determination. **RE 139; TE10, 40** Great River admits Rea's did everything it was required to do under the policy of insurance. **RE 147; TE10, 54** Even so, on April 20, 2001, Cookston sent a letter to Rea's, on Van Hook's

instruction (**RE 159; TE9, 18**), denying Rea's claim. **RE 83-90; TE5, 35-42** Great River unreasonably (and falsely) asserted National Union assumed Kent's obligations under the Kent/Broom contract, and that National Union and Talley hired Rea's (and other co-defendants) to work on the "contracts at issue [including the Kent/Broom Contract]." **RE 84; TE5, 36** A simple reading of the National Union/Rea's contract would have confirmed Rea's was not contracted to work on, and assumed no obligations under, the Broom/Kent Contract. **R 176-78, 180** Great River could just as easily have determined the Kent/Broom contract was not a "bonded" contract under Rea's contract with National Union, and that Rea's never contracted with Broom, and never did, directed or supervised any work on Broom's property – by interviewing Wayne Rea (its insured). **RE 341-342, 358-360; T 146-147, 183-85**

Great River advised Rea's to retain counsel at its own expense. **RE 89; TE5, 41** Although it took 45 days to respond to Rea's claim (while making no effort to ensure Requests for Admissions were answered on time, or interview Wayne Rea), Great River sought to saddle Rea's with an extra-contractual requirement that "if we do not hear from you or your attorneys within thirty days of the date of this letter, we will presume that you agree with our factual assessment based on the Complaint and our conclusions based on the policy and the law." **Id.**

Crites testified, as "the senior most claims person at Union Standard and Great River", that his only knowledge about why Great River failed to defend Rea's was what he had been told by Van Hook – that "it was denied based on advice of counsel that there was no coverage". Crites acknowledged, however, that Cookston's opinion letter did not advise Great River to deny the claim; but that arguments existed about whether or not there was an "occurrence" of "property damage" and advised Great River to make the call. Crites first testified it was "not necessarily" wrong to deny Rea's claims under those circumstances, then picked up the party line and maintained it "should have been denied." **RE 188-89; TE11, 16-17**

3. Great River's Non Existent Claims Procedures and Grossly Inadequate Investigation

Van Hook did not personally perform any investigation of Rea's claim, but made the decision to deny it. **RE 124; TE10, 14** Admitted to the Mississippi Bar in 1994, Van Hook was hired as "Claims Counsel" for Great River in July, 1998 – at which time she had no experience in issues regarding an insurance company's duty to defend. **RE 122-23; TE10, 7-8** No lawyer had ever supervised her work, although Great River knew she was a young lawyer who had never worked for another insurance company. **RE 138; TE10, 39**

Berkley, Great River's parent, has "Claim Department Best Practices" (**RE 160-80; TE10, 507-27**) each of its subsidiaries (including Great River) is supposed to follow. **RE 144; TE10, 47** They set forth the Code of Conduct for the "Claim Departments of each regional company with the W.R. Berkley Corporation". **RE 161; TE10, 508** The Best Practices require each claims department to "develop operating plans and objectives ... it is essential the objectives and action plans be communicated to all staff and rolls clearly defined." The Practices mandate "some type of appropriate documentation is necessary not only to establish responsibilities and authority but also provide an adequate tracking and feedback mechanism to measure performance." "Each company should develop and maintain a structured litigation management program which encompasses the key elements of claim investigation and handling." (emphasis added) **RE 164-65; TE10, 511-12** Great River admits there are no written policies and procedures, or "established steps", for handling claims such as Rea's. **RE 143, 155; TE10, 46, 68** Great River has no claim manual. **RE 186; TE11, 10**

Berkley recommends "each company provide, at a minimum, annual training to its staff", and notes "whether an individual is new to the business or [has] previous experience, each company should develop ... a training and education plan ...." Berkley emphasizes "proper training is NOT an option, it is a necessity and forms the basis for staff development and effective claim

handling." (emphasis in original) **RE 167-68; TE10, 514-15** Crites is Van Hook's Supervisor. **RE 121; TE10, 3** Crites has not systematically trained Van Hook about established policies and procedures for handling claims, and there are "no written standards, recommendations or guidelines for Van Hook to follow other than [the Berkley Best Practices]." **RE 190; TE11, 18** Crites could not provide step by step claims procedures required upon receiving a lawsuit against Great River's insured, but leaves that to Van Hook's discretion. There is no written guide about what type of investigation should be conducted. **RE 191-92; TE11, 20-21**

For claim investigation, the Best Practices recommend initial contact of the parties within 24 hours, and emphasize "it is important that the impressions of the involved **parties** be captured as soon as possible after a loss. Statements are necessary when issues of coverage, liability and/or damages exist." (emphasis added) **RE 167; TE 10, 514** Crites left it to Van Hook to "proceed with the investigation as she saw fit" **(RE 191; TE11, 20)**; and Van Hook in turn hired Cookston to "do any investigation he thought necessary." **TE10, 25** Although there are no written claims procedures, on "every" claim Van Hook contacts the insured and the agent. There is no record she did so in this case, however. **RE 125A-26; TE 10, 22-23** Even though Cookston was instructed "it may be necessary that you take a sworn statement from our insured", no statement was taken. **RE 127-28; TE10, 27-28** When Wayne Rea received Great River's first claim denial, he had never received any call Cookston, Van Hook, Crites, or any other representative of Great River. **RE 346; T 151** The facts are undisputed Great River never interviewed Broom, or any of the other "parties" (or their attorneys) to the litigation. Cookston did not take any statements, or attend any depositions. **RE 146; TE10, 53**

The Best Practices state "visual evidence will be included within a file to clearly depict and preserve evidence. If the issues involved are of such minor significance that visual evidence is deemed unnecessary, the decision must be clearly justified within the file." (emphasis added) **RE**

171; TE10, 518 Great River made no effort to obtain pictures of Broom's property. **RE 146** The Practices define "Documentation" as "the evidence supporting the investigation and analysis completed relative to coverage, liability, damages and reserves", and express examples include such things as summaries of the statements of parties involved in the underlying coverage issues, underwriting file contents, agency file contents, etc. **RE 172; TE10, 519** Great River's investigation of Rea's claim did not include obtaining or reviewing the agency file or the underwriting files. **RE 146-47; TE10, 53-54** Van Hook testified that in not documenting activities undertaken on the file, she was following what she understood to be the policies and procedures of Great River. **RE 138; TE10, 39** Great River *has* a computer type diary system – it simply doesn't use it. **RE 187; TE11, 14**

The Best Practices state "while the front end processing of claims is certainly critical, an essential component of the overall process is the backend audit and review process ... [t]o ensure that performance expectations are being met and to provide valuable input to the training process, these quality review programs should be completed on a regular and consistent basis on both open and closed files ... each company should set the standards against which staff shall be measured ...." "At a minimum, this [quality control review] should address contacts and service, coverage, liability, damage assessment, documentation, adequacy of investigation, [etc.]". (emphasis added) **RE 177-78; TE10, 524-25** Although all lawsuits filed against any of the multiple Berkley companies filed in Mississippi go to Michelle Van Hook for handling **(RE 185; TE11, 7)**, no one at Great River is charged with auditing Van Hook's claims work. **RE 156; TE10, 69** Even her superior, Crites, does not physically review her files. **RE 184; TE11, 4** As Senior Vice President, Crites admits it would be a "prudent practice" to have some type of audit of Van Hook's files. **RE 196a, TE 11, 30**

Crites admits that when three or four contractors are being sued and all are insured by

different CGL carriers who have ISO form policies, it "could be" a good idea to touch base with the other defendants and other insurance companies in the course of the investigation. **RE 195; TE11, 26** Although Rea's was the only Defendant not defended by its insurance company (**RE 348; T 153**), the facts are undisputed Great River did not do that in this case.

Crites, the Senior Vice President in charge of claims, doesn't know what Mississippi law requires before denying coverage, or whether Mississippi requires an insurer to continue its investigation throughout the course of litigation. Great River and Union Standard have no established procedures to instruct their claims handlers and adjusters on those issues. Typically Union Standard and Great River would want some investigation beyond looking only at the complaint and applicable policy before denying coverage to its insured, in order to assist the company to develop the facts. **RE 194a-96; TE 11, 25-27** Crites would expect an investigation to be conducted to determine what the facts are before conclusions such as those set forth in Cookston's first opinion letter were made. **RE 186-86a; TE 11, 10-11** To determine whether there is coverage, you have to look at the facts that are there. **RE 184a-85; TE11, 6-7** Crites admits that based on his [40 years] of claims handling experience, in order to determine what the facts are you typically contact your insured to find out "exactly what happened, why was he being sued, and what's the situation". If an attorney were asked to conduct an investigation, under the same scenario as the Rea's case, Crites would "assume" that individual would "take the same approach as what I would, and that would be to contact all the people that would talk to you about it to find out what's going on". That is what he expects the practice of Great River to be. As Senior Vice President of Union Standard and Great River, Crites agreed that a thorough investigation of facts *should* be conducted before coverage is denied. **RE 193-94; TE11, 22-23**

Crites has ultimate responsibility for "all the claims for Great River and Union Standard"; but even after receiving notice of Rea's Third Party Complaint, Crites did not review Rea's claim

file or even a memo of what occurred – and feels he doesn't need to. **(RE 185-85b; TE11, 7-9)** Crites confirmed he was not aware prior to his deposition that the only materials Cookston looked at as the basis for his 04/11/01 opinion were the Loss Notice, the policy for a one year period, and the Complaint, and that the company would "probably not" know all of the facts of the case or reasonably all of the facts by looking only at those documents. **Re 196; TE11, 27**

When Wayne Rea received Cookston's 4/20/01 denial letter, he spoke with agent Armstrong. Armstrong told Rea that Great River *should* defend, and that he would check to find out why it did not. **RE 346-47; T 151-52** Rea told Armstrong each of Rea's co-defendants was being defended by its insurance carrier, and asked why Great River would not defend Rea's. Armstrong told Rea he could not understand why. **RE 348; T 153** Rea discussed the issue with Armstrong, and asked Armstrong to have Great River get back in touch with him, numerous times. However, Great River never contacted Wayne Rea. **RE 347; T 152**

4. Great River's Continued Failure To Investigate and Second Denial of Rea's Claim

On August 3, 2001, Great River received a fax from Bottrell asking "could you please give us a status on this claim, insured has requested." **Re 67; TE5, 1** Though Van Hook testifies she "would" have called the agent, there is no documentation in Great River's claim file that Great River responded to this request. **RE 152; TE10, 65** Great River admits it did not perform any additional investigation on Rea's claim between April 20, 2001 and July, 2002. **TE10, 64**

On June 27, 2002 Kilpatrick wrote a letter to Armstrong confirming Rea had discussed the matter with Armstrong, renewing Rea's request for a defense, and confirming substantial defense costs. **RE 92-93; TE5, 46-47** On July 2, Van Hook sent a letter to Cookston attaching "a letter from the agent on this claim" (not attached in claim file), and advised Kilpatrick is requesting a defense. **RE 94; TE5, 48** On July 8, Cookston sent Kilpatrick a letter saying he looked forward to receiving additional information, including copies of the National Union/Rea's Contract, the

LJC Subcontract, and Broom's deposition – which Cookston confirmed was noticed for July 15. **TE5, 51** On August 10, Cookston received "various contracts relating to the underlying lawsuit." **RE 158; TE10, 383** On August 26, Cookston wrote Kilpatrick and requested cost or repair estimates prepared by Broom's expert, briefs for and against Rea's Motion for Summary Judgment, and all cross-claims filed against Rea's. **TE5, 60** On August 22, Cookston was advised that Rea's co-defendant, LJC, was being defended by its insurance company. **TE13 898**

On September 11, 2002, Cookston sent Van Hook a second analysis of Rea's claim. **RE 95-104; TE 5, 62-71** Referencing Broom's deposition, Cookston acknowledged Broom was contending that 7 to 12 foot pits were dug on her property, that ruts were left in her fields, that 77 loads of soil and waste was "dumped" on her property and still piled up there, and that "her land is devastated". **RE 96; TE5, 63** A thorough review of Broom's 425 page deposition demonstrates far more pertinent testimony regarding her allegations of "property damage" caused by an "occurrence". When Broom acquired the land it was being leased for pasture, cattle, and hay. She did not renew the existing lease when she entered the Kent contract. **RE 198; TE13, 23** Broom did not know how many pits would be dug on her property under the Kent Contract. **Re 199; TE13, 36** In late 1998 Kent's agent told Broom Kent was going bankrupt. **TE13, 42**

Broom's brother talked with W.C. Pitts ("Pitts") about Broom accepting some topsoil to fill in some gullies on the subject property in May, 1999, and he in fact delivered 7 loads of "prairie dirt" in May. This was unrelated to any contract, and Broom was not aware Pitts was working for anybody else. Broom asked Pitts not to deliver any more dirt to her property, but later saw additional trucks going in and out of her field, and a total of 77 loads of dirt were dumped on Broom's property (outside of any contract) **RE 200-03; TE13, 45-48** Broom confirmed she did not have any type of written agreement with Pitts regarding the 77 loads of dirt, did not pay

anything for it, and she does not believe those loads had anything to do with any agreement she signed related to excavations on her property. **RE 215C; TE13, 146** Prior to May 18, 1999, and prior to the time Pitts made those deliveries; another contractor (not a Defendant in the Underlying Litigation) was given free rein to dump materials on Broom's land. Willard Bishop ("Bishop"), Tanner Construction's superintendent, asked Broom if he could deliver loads of dirt from his work site to erosion gullies on her property, she accepted, and he made various deliveries of dirt and other "materials" to her land. **RE 204-05; TE13, 49-50**

Broom received a call from Pitts who said he wanted to move his equipment in to begin "excavation". Broom was leaving town and told Pitts to get with her brother the next morning to get a key for access to her gated and locked property – but Broom did not know why Pitts was there because no one told her Pitts was going to do any excavation. No one ever told her where in her fields pits would be dug, other than Kent's representative when she signed the Kent contract. **RE 207; TE13, 100** The next morning, Broom's brother found that the gate to Broom's property had been removed from the hinges, with the lock and chain still on it. **RE 207A, TE13, 104** The gate post had also been pulled up. **RE 209; TE13, 117**

Broom returned days later and observed "devastation", there were two pits dug with no slopes, trucks going every which way in every direction, and ruts everywhere. **RE 208; TE13, 106** The adjoining land owner, Hoffman, told Broom he went onto her land and told "the operators" not to drive all over Broom's field; however Broom does not know who was driving all over her fields. **RE 208A, TE13, 110** In July or August, 1999, Broom measured three pits that had been dug on her land. It looked like a bomb had dropped. Trucks had driven all over Broom's field, ruts were waist deep, and the topsoil was gone. **RE 205A-205B; TE13, 57-58** The ruts in the field prevented the field from growing hay. Hoffman repaired the ruts, without charge, in exchange for being able to get the hay he would then grow there for no charge. **RE**

209, 215A; TE13, 117, 142 Broom also had to repair the road going in to the property from the highway. Previously, she could drive her car in, afterwards it was difficult to even drive a pickup truck because of the ruts. **Id.** Broom would have been receiving payment for hay or cattle if she had not had to have the ruts and pits repaired, and could not lease the property it to anyone with the holes and pits in it. **RE 214B-215; TE13, 139-140**

Bishop advised Broom that Tanner had a "slide" on its project, and asked if she could use the soil in the pits. Broom accepted, and one of the pits was almost completely filled. Later, in 1999 or early 2000, Broom returned from out of town to discover a second pit had been filled with materials and the first pit had been filled to the top. She did not see who filled the pits. At the time of her deposition, Broom testified her property was "still a wreck", that she still had a huge hole there, and that she still had a field full of ruts that holds water (even after some ruts had been repaired, supra). Broom testified that the field is still not suitable for growing hay, and there are lots of ruts there and the soil has no topsoil because that was removed. **RE 209-14; TE13, 117-22** Broom testified her property is dangerous because you can't walk around the edges of the pits without falling in. **Re 214A; TE13, 126**

Broom admitted she doesn't have a single contract that connects National Union or Talley with her property. **RE 215; TE 13, 140** Broom testified "the property speaks for itself", and admitted she sued multiple defendants because somebody must be responsible for the damage to her property. **RE 215B; TE13, 143**

Cookston also reviewed the deposition of Broom's husband, Knox ("Knox"), and reported Knox' primary concern was that a pit remained open leaving the property in an unsafe condition. **RE 96; TE5, 63** A thorough review Knox's deposition demonstrates additional pertinent testimony. Knox admitted he does not know how the bonding contracts worked, or who bonded whom. **RE 218; TE13, 241** He confirmed the entire tract of land at issue is 40 to 50 acres.

TE13, 256 He admitted Kent was not required to execute a separate performance bond on the Kent/Broom contract; and agreed that reading the language of the Broom/LJC Contract there would be no way one could refer back to the Kent/Broom contract. **TE13, 274-75**

Cookston also reviewed Bishop's deposition. While omitting Broom's testimony that Hoffman fixed ruts in barter for hay, Cookston noted that, according to Bishop, Broom asked him to repair the ruts so she could use her hay field and he dumped dirt into the ruts to repair them for free. **RE96-97; TE5, 63-64** Cookston advised Great River in his first coverage opinion "arguments exist that coverage may exist for consequential damages to other property ... resulting from the insured's negligence." **RE74; TE5, 26** Being unable to grow hay is such "consequential damage". Additional pertinent facts are in Bishop's deposition. "Exhibit 1" to Bishop's deposition is a June 5, 1999 contract titled "Disposal Agreement" between Tanner Construction and Broom, which allows Tanner to dispose of excavation and debris removed from Tanner's job site on Broom's property, and by which Broom granted Tanner and MDOT an easement over and across any portion of Broom's property for the purpose of enabling the contractor to dispose material. **RE 216; TE13, 220** Bishop testified there were two or three truckers (from different companies) hauling materials out of Broom's pits. **RE220; TE13, 301**

Great River admits it knew many depositions were taken in the Broom case, but that it only gathered and reviewed 3 of the 16 depositions. **RE 140-141; TE10, 43-44; 506**

Cookston also reviewed additional contracts. He advised the scope of the National Union/Rea's Contract was to complete Kent's contract with MDOT, and that Rea's agreed to effect the completion of the borrow pit work and bonded contracts in accordance with the terms of the bonded contracts. Cookston acknowledged that Kent's contract with Broom is <u>not</u> a bonded contract. **RE 97; TE5, 64** This was the first time Great River ever saw a contract with Rea's name on it. **RE 154; TE10, 67** Reviewing the LJC/Rea's Contract, Cookston explained

that L&J agreed to perform certain dirt work "specified in the contract". **RE 98; TE5, 65** Review of this Contract reveals that while it does identify some specific borrow pits –Broom's property is not identified. **RE 60-64; R 393-97** Cookston also reviewed the Broom/LJC Contract, and advised it does not reference the Broom/Kent Contract. **RE 98; TE5, 65**

Cookston acknowledged National Union's cross-claim against Rea's, although Rea's was never advised whether there was or was not coverage for that claim. Cookston acknowledged that, "among other things", Broom was contending "Rea's knowingly accepted and reaped the benefits of the dirt procured from her property," and that

> ... with respect to [negligence claims against Rea's], Broom contends the pits were dug straight down and too close together to make proper ponds. The top soil was not left in order to grass slopes. The field has ruts in it and the road was left with ruts in it. Broom's fence was removed from its posts. Defendants exhibited no respect for Broom's property.

Finally, Cookston advised "Broom contended she had valid claims for the dirt removed from her property as well as the task needed to completely reclaim her property." **RE98; TE5, 65** Summarizing the cost estimate from Broom's expert, Cookston noted he offered different scenarios depending on the extent to which Broom's property was restored, ranging between just over $4,000 to in excess of 1.3 Million Dollars. **RE99; TE5, 66**

Although Cookston acknowledged he reviewed the "parties summary judgment materials" **(RE 98, 159; TE5, 65 N5; TE10, 384)**, his "opinion" omits critical information therein. Rea's Memorandum in Support of MSJ **(TE13, 461-78)** demonstrates the Broom pit was not among the pits for which Rea's was responsible in the Rea's/National Union Contract, and that although the Rea's/LJC Contract reflected reclaiming specified borrow pits covered under the National Union Contract (such as the "Bishop/Pitt" and "McCardy/Pitt"), the Broom pit was not among the pits for which Rea's was responsible. **RE 236-37** Similarly, in Rea's itemization of undisputed facts **(TE 13, 481-546)**, Rea's demonstrates that it has no contractual relationship whatsoever with

Broom. **RE 238-41** Rea's MSJ includes excerpts from Pitts' deposition where he testified he had no contract with Rea's and did not work on Broom's property on behalf of Rea's, and that Rea's never had any thing to do with Broom's property. **RE 242-245; TE13, 578-80**

In Response to Rea's MSJ, Broom argued that the Broom/LJC Contract is not an enforceable contract. Broom argues it was "impossible to perform" because it only permits LJC to obtain dirt from "existing pits", and it is undisputed there were no existing pits on Broom's property. Broom asserts "there is no way that any dirt was removed under the authority of this document," and also argues the Broom/LJC contract is "illegal", and "void". **TE13, 614-16** Broom argues that "in the alternative to the plaintiff's breach of contract claim, Broom claims that defendants were negligent in performing the work on her property. . . . The field had ruts in it and the road was left with ruts in it. Ms. Broom's fence was removed from its post." Broom also confirmed she was asserting claims against Rea's for conversion and unjust enrichment, alleging "there is no agreement in existence anywhere in which Broom agreed to any removal of her topsoil ... Broom has plead in her sworn complaint and stated in her deposition that the topsoil was removed". **TE13, 619-20** Broom concluded "if the Kent/Broom Agreement is not the basis for the removal of dirt ... then, clearly, the so-called [Broom/LJC Contract] afforded no authority for Pitts, L&J, Rea's or anyone else to remove material from the Broom property ... When Rea's received the material from Broom's property, conversion of Broom's property by Rea's took place". Broom also argues she has valid claims for equitable relief in the form of an accounting for the dirt removed from, and the tasks needed to reclaim, her property. **TE13, 622-23**

Cookston observed that economic losses, stemming from an insured's alleged breach of contract, give rise to intangible property losses that do not constitute "property damage" as defined in the policy. **RE 99; TE5, 66** Cookston opined that since Broom's claims appeared to be based on the contention that Rea's, through subcontractor LJC, failed to fulfill obligations set

forth in *the Kent Contract,* such damages "arguably do not constitute property damage". Cookston advised "even if the ruts on plaintiff's property ... could somehow be construed to constitute 'property damage', this condition was fixed by Bishop at no cost to Broom and it is difficult to see how this could be included as an element of damages sought." **Id, N6** Cookston reiterated that "damages flowing from breach of contract do not result in an occurrence". **RE 100; TE5, 67** He noted that "although Broom's complaint included two claims couched in terms of negligence", "it seems clear ... she seeks to recover based on an alleged failure to fulfill a contractual obligation, not actionable negligence." **Id.**

Cookston said Exclusion j(5) may "arguably" preclude coverage because it appeared that all of the damages sought by Broom, including the alleged ruts in the field, resulted from or arose out of Rea's operations. **RE100-01; TE5, 67-68** Addressing Exclusion j(6), Cookston opined it appeared Broom was seeking the cost to repair Rea's work and/or fulfilling terms of the Kent contract; and that the exception for work under the Products Completed Operations Hazard may not apply because "it does not appear that all of the work called for in the contract at issue was ever completed or that the site was put to its intended use. (i.e., as a pond)." **RE 101; TE5, 68** Turning to Exclusion m, Cookston stated since it appears Broom seeks to recover solely for economic loss because Rea's work (or that of Rea's subcontractors) was not that which she bargained for in the **Kent/Broom** and/or **Broom/LJC** contracts, those damages would be precluded from coverage. **RE 102; TE5, 69** Cookston admits that at the time he wrote his September, 2002 opinion letter he had not seen a Mississippi Supreme Court case apply to CGL exclusions like Exclusions "j(5)", "j(6)" or "m" in the policy, and that the Court may rule opposite to the way he would. **RE 117-18; TE9, 24-25**

On September 13, 2002, Great River reconfirmed denial of Rea's claim. **RE 105-07; TE5, 72-74** Cookston admits, with regard to Rea's claim, he never: called Wayne Rea or Broom's

attorney, looked at our sought to obtain photographs of Broom's property, talked to a representative of Kent, National Union, Talley, LJC or LJT, saw a contract prior to the first claim denial with Rea's name on it, or asked Broom's lawyer or those for other Defendants for any information; and doesn't believe any representative of Rea's ever put a foot on Broom's property. **RE 110-11; TE9, 7-8** Great River never requested him to conduct any further investigation. **RE 116; TE9, 23** Cookston acknowledged an insurance company's continuing duty to investigate under Mississippi law, but confirmed Great River did not request any further services from him after he wrote the 4/20/01 denial until July, 2002. **RE 112; TE9, 10** Cookston admitted his file for the Rea's claim was labeled "Great River Adverse to Rea's Country Lane". **RE 113-15; TE9, 16-18**

Rea's felt compelled to contribute to settlement of Broom's claims (she would not settle with unless all settled), and on March 6, 2003 Rea's paid $60,000 to settle Broom's claims. Rea's also paid $61,511.47 in attorneys' fees and expenses for the defense of Broom's claims. Rea's incurred additional expenses and loss of wages / productivity, totaling $13,333, due to Wayne Rea's participation as a result of Rea's having to defend itself in the Broom litigation. **RE 349-51, 265-66; T 154-56, TE16, TE15, TE18** Rea's would not have settled Broom's claims, or paid attorney's fees to defend those claims, if Great River had been defending Rea's. **T 159**

Great River admits that if it had the claim to handle over again today it would handle it the same exact way. **RE 148, 50; TE10, 55; 57**

5. The Current Litigation

Great River omitted pertinent facts regarding the current litigation from its "Statement of the Case". Rea's filed a Motion to Dismiss Great River's Counterclaim pursuant to Miss.R.Civ.P. 12(b)(6) and 57 on December 6. **R 1497-1507** In its January 2, 2003 Reply, Great River alleged its Dec Action should not be dismissed because, if Rea's voluntarily dismissed its Third Party

Complaint, it may find itself without a resolution from the Court to "clarify and settle the legal duties and issue ... ie, determine the issue of coverage under the policy." **RE 247; R 1521**

On April 29, 2003, Berkley filed a Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim Upon Which Relief May be Granted. **R 1576** Rea's filed a timely response, and provided evidence that Union Standard and Great River "consolidated back office operations in 1999"; that all the Third Party Defendants shared officers and/or directors, and that those for Great River and Union Standard are identical – half of which are on the Board or Senior Management of Berkley; and that Berkley files a Combined Annual Statement of all its insurance company subsidiaries. **R 1583-1608** Berkley never obtained a hearing on its Motion.

On March 3, Great River filed a Motion to Compel wherein it argued, notwithstanding its admission it conducted no additional investigation on Rea's claim between April 20, 2001 and July, 2002 (**RE 151; TE10, 64**), that following its initial denial of Rea's claim Great River's "coverage counsel continued thereafter to secure information and documents relevant to the lawsuit and on September 11, 2002, issued his supplemental opinion." **RE 249, R 1838, N1**

On May 28, 2004, Rea's filed a Rebuttal to Third Party Defendant's Responses to Rea's Motion to Compel (seeking responses to supplemental discovery requests on the relationship by and between the Third Party Defendants). **R 2198-2204** Rea's summarized additional evidence, in form of Defendant's 30(b)(6) testimony, justifying Rea's alter ego claims. **RE 251, R 2200**

Great River did not file an itemization of undisputed facts with its July 14, 2004 Motion for Summary Judgment. **R 2250-2491** Contrary to Great River's assertion Rea's Response to MSJ "was not based on the presence of any disputed facts", Rea's Response and Memorandum Brief in Opposition, which incorporated more than 1,000 pages of exhibits, addressed scores of facts that prevented summary judgment in favor of Great River. **R 2497-3704** Rea's Response set forth 141 paragraphs of facts (including most of those set forth above) that Rea's asserts "at a

minimum, create a question of fact to be determined by the court during [trial]" (**RE 253; R 2521**) Regarding Great River's MSJ on bad faith, Rea's demonstrated clear and convincing evidence supporting Rea's claims in light of the facts before the Court. **RE 255-56; R 2516-17** In its September 30 Rebuttal, Great River acknowledged Rea's argument that genuine issues of material fact precluded summary judgment. **RE 257-58; R 3709-10** Great River acknowledged *Marver Shrimp* is well recognized for the premise that an insurer aware of facts potentially giving rise to coverage that may be inconsistent with the complaint "cannot shield its eyes from those facts and instead adopt the allegations of the complaint". **RE 259; R 3719** Even so, Great River alleged Broom's claims for damages resulting from ruts that caused her to have a loss of use to the property because she was unable to drive down the roads or grow hay to sell did not give rise to coverage because they weren't alleged in Broom's Complaint. **RE 260; R 3722**

During the September 29 MSJ Hearing, the Trial Judge ordered the Third Party Defendants (not Rea's) to bring in the firm of Upshaw Williams (**T 28-29**), which was confirmed in an October 18 Order. **R 3956** On November 19, Great River filed a pleading "to allow intervention of third party [Upshaw Williams]". **R 3958-75** Upshaw Williams responded by asking to be dismissed for failure to state a claim (**R 3978**), and on February 4 the Trial Court entered an Order finding "based on the position taken by Great River that Third Party Defendants are abandoning and waiving any claim Third Party Defendants now have or may have in the future against Upshaw Williams ... for actions related to this cause of action ... Third Party Defendants are henceforth precluded from making any claim against Upshaw Williams ... arising out of the matters which are the subject of this case." **R 3993**

During the April 4, 2005 (second) Hearing on Great River's MSJ, Great River asserted "our position is that this is a contract action" (**T 36**), and that the "heart" of its argument was there was no "occurrence" **T 46** Great River confirmed "... our position in the case, for purpose of

summary judgment [is that there is] no occurrence, therefore there's no coverage in this case. There's no duty to defend." **T 51** Rea's argued Great River breached its duty to defend without conducting any reasonable investigation, and that it ultimately denied the claim in violation of Mississippi law even though its own claims counsel concluded there were two possible interpretations – one that would lead to coverage and one that would lead to no coverage when you analyzed the Complaint and the policy. **T 53-54** Rea's moved to have the Court disregard and/or strike Sam Thomas's "expert" report. **T 56** Rea's demonstrated that *had* Great River talked to Broom or her lawyer, it would have learned its basis for denial was without merit. **T 58-59** Rea's showed that under standing Mississippi law, given the wording of Great River's policy, you had to look at whether the property damage was "accidental" from the standpoint of Broom (who certainly did not expect or intend the damage); but that even accepting Great River's argument, Rea's never expected or intended to get sued under a contract between Kent and Broom to which Rea's was neither a signatory, beneficiary or obligor. **T 69-70**

Great River argued "what you have to find is . . . [Rea's] intended to perform work pursuant to a contract and the contract was breached. There was a contract out there. That's the whole issue." The Trial Court agreed, finding "that's a factual situation that's got to be played out. . . . I've got to, first of all, based on your arguments, got to find out that a contract existed between Broom and Rea's Country Lane. At this time I don't think I can take that step forward, therefore the Motion for Summary Judgment will be overruled." **RE 333-34; T 71-72**

Rea's filed its Response to Great River's Petition for Interlocutory Appeal on May 4, 2005.

During the Bench Trial, Exhibits 1-4, 7-16, and 21-23 (including testimony, by deposition, of Great River's corporate rep (**T10**), Union Standard's and Great River's Vice President in Charge of Claims (**T11**), and coverage counsel (**T9**)). **T 75** Great River's claim file (Exhibit 5) was admitted by agreement. **T 77** Great River's proffered expert, Sam Thomas, Esquire, was taken

out of turn by agreement. **T 78** Mr. Thomas admitted his report contained legal conclusions, and conceded that he "always wondered to what extent I would be allowed to testify". Rea's renewed its Motion to exclude Sam Thomas' opinions. **T 79-81** After argument, including Great River's assertion no harm could come from the Chancellor hearing Thomas' testimony in a bench trial and deciding what testimony is admissible, the Trial Court overruled Rea's Motion and stated he would give whatever weight he thought appropriate. **T 82-101**

Great River confirmed that "the issue in this case was, was there an occurrence" **T 96** The Trial Court admitted Exhibit 6 and 20 by stipulation. **T 51** Counsel for Great River stipulated that the amounts of Great River's defense costs, including attorney's fees, reflected in Exhibit 15 were necessary and reasonable (but simply maintained Great River did not owe them) **RE 350; T 155** Wayne Rea testified that Exhibit 18 sets forth an itemization of expenses incurred during the course of the litigation and the settlement of the litigation. Exhibit 18 was admitted into evidence pursuant to Great River's stipulation that it set forth a summary of damages claimed by Rea's, with the understanding that Great River did not concede it was responsible for those claimed amounts. **RE 351-52; T 156-57** On Cross, Rea explained that the additional expenses reflected on **TE18 (RE 264-65)** were for 4 round trips to Jackson for a total of 1,096 miles to meet Kilpatrick and to go to arbitration; that the 2 round trips to Laurel were for Broom's deposition, and that all of the trips were in conjunction with the lawsuit. **RE 356-57; T 176-77**

Wayne Rea testified LJC's trucks never went onto Broom's property; and that LJC was getting dirt from a different pre-paid pit (not Broom's). **RE 353-54; T 168-69** Rea's did not enter into any agreements with Pitts, did not consent to any agreements being entered on Rea's behalf by Pitts, and that Pitts did not conduct any activity with regard to Broom's property pursuant to a contract with Rea's. **RE 361; T 187** Rea testified he made sure it was communicated to Broom

with his settlement that he was not paying for "property damage", because Rea's had been sued for property damage and he was not going to admit any wrong doing. **RE 355; T 173**

Rea's reserved its right to proceed in a second phase of the bifurcated trial as previously ruled by the Court. **T 189** Rea's moved, pursuant to Miss.R.Civ.P. 15, to have the Court allow it to amend its Complaint to conform to the proof and the Court so ordered without objection. **T 191** The Chancellor noted that, prior to issuing judgment, he would "have to read four or five depositions, plus look back through these exhibits ...." **T 191**

The Trial Court's July 7, 2005 "Final Judgment" included findings (omitted by Great River) that "this Court further finds that there existed no contract between Rea and Broom and therefore, any alleged damages by Broom against Rea were not contractual in basis and could only lie through negligence"; and, recognizing Rea's duty to mitigate, "based on the fact that the settlement amount [paid by Rea's] was in line with the amount of attorney's fees [already] paid and the fact that once they settled it, attorney's fees would stop and would benefit both Great River and Rea's Country Lane ... the same would be recoverable from Great River." However, the amount of recoverable damages was not specified. **RE 268-69; R 4030-31**

Rea's filed a timely Motion to Amend on July 14. **RE 271-74; R 4033-36** On August 3, the Trial Court entered an *Agreed Order* finding that the 07/07/05 Final Judgment is not final and appealable pending the Court's ruling on Rea's Motion to Amend. **R 4049**

Rea's *Argument in Support of Punitive Damages* is at **RE 275-87; R 4051-4063.** Great River omits the fact that, in its Response, it essentially argued punitive damages are not appropriate because it relied on the advice of Counsel. Great River also omits the Trial Court's findings, in its August 18, 2006, second "Final Judgment" that:

> Great River sought the advice of counsel and that counsel, in fact, questioned whether they would, in fact, be responsible for any judgment that might be received against Rea's by virtue of [Broom's suit]. After obtaining that letter it was up to Great River to determine whether they wanted to do nothing, to defend the lawsuit, [or] defend . . .

under a reservation of rights.

. . .

This Court recognizes that it can make a finding of bad faith and award attorneys' fees, or as the Supreme Court has said in other cases, may make a finding that punitive damages might be allowable but not awarded, and that attorneys' fees and other damages could and should be assessed . . . .

RE 289-90; R 4069-70 On August 25, Rea's filed a timely Motion to Amend, seeking to have the Trial Court rule on the pending motion re: amount of actual damages, interest and attorneys' fees. **RE 292-96; R 4072-76** Great River's September 7 Response argued attorneys' fees should be limited to a 40% contingency. **R 4083-95** Rea's filed a Rebuttal on September 14. **Re 297-303; R 4096-4103**

On September 22, 2006, the Trial Court entered an Agreed Order finding its 08/16/06 Final Judgment is not "final and appealable" given the pending matters before the Court. **R 4104** With regard to Rea's filed Affidavit of Clyde H. Gunn, III, along with attachments, in support of Rea's claim for attorney's fees and costs **(RE 304-10; R 4111-17)**, Great River omits that in its Response it stipulated it

. . . does not dispute the terms of [Rea's] attorney fee contract ... granting counsel ... a 40% recovery. Further, Great River does not dispute the itemization of expenses submitted by [Rea's] ...

...

By hereby acknowledging the authenticity and reasonableness of the costs and expenses submitted by [Rea's], Great River does not waive any defenses and/or arguments it may have to [Rea's] alleged entitlement to the same ...

Re 312-13; R 4119-4120

On September 9, 2008 the Trial Court entered its *Judgment*, and found, in part,

. . . having looked at the time incurred in this matter together with the challenges involved in bringing this action [and in light of Rea's 40% contingency contract] that a judgment of 40% for the damages awarded shall be assessed against the defendant. This 40% shall be in addition to the amount recovered by Rea's in actual damages. This Court feels based on the time and effort put forth that, in fact, the defendant's probably benefit from the assessment of a contingency fee instead of this Court assessing a fee based on hours at an hourly rate. ... The Court further has been provided an expense ledger setting forth expenses and the Court has reviewed the same. This Court has never reimbursed for copies and postage, and, therefore having reviewed the expense

sheet finds the attorney's are also entitled to recover an additional judgment against the defendant the sum of $10,000.00 in expenses.

RE 314-15; R 4122-23 On September 18 Rea's filed a timely Motion to Amend, referencing its pending motions, and seeking pre and post judgment interest. **RE 316-21; R 4124-55** Rea's filed its Rebuttal to Great River's Response on October 9, arguing Great River was making arguments regarding Rea's entitlement to additional and extra expenses incurred by Rea's in the amount of $13,333.00 that were not made by Great River at trial, and thus waived. **Re 329-30; R 4164-87**

In its June 18, 2009 Final Judgment, the Trial Court "ORDERED, ADJUDGED AND DECREED that a Judgment in the amount of $193,684.95 is awarded to Rea's Country Lane Construction, together with pre-judgment interest and post-judgment interest in the amount of 6% per annum from and after March 6, 2003 [date Rea's settled Broom's claims]." **Re 331; R 4188-89** Rea's filed a timely Notice of Appeal/Cross Appeal on July 23, 2009. **RE 331; R 4197**

SUMMARY OF THE ARGUMENT

Broom's Complaint alleged "property damage" and/or "personal injury" as defined by the policy. The damages alleged by Broom constituted an "occurrence", defined by the policy as an "accident". "Accident" is not defined under the general liability portion of the policy (but is defined under the business auto section as "continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage'). **RE 12** Standing Mississippi Law at the time Rea's claim was made, and denied (twice), held that when "accident" is not defined you must look to see whether the damage was "expected or intended" from the standpoint of the injured party. None of the property damage alleged by Broom was "accidental" from her standpoint. Even applying Great River's argument (that you must look at the standpoint of the insured), Broom's alleged damages could not have been "expected or intended" by Rea's, as it never had any contract or contact with Broom or her property.

Great River conducted absolutely no independent investigation, but retained counsel and left

it entirely to that young lawyer's discretion what investigation would be done on Rea's claim. The facts are undisputed Great River knew, based on Cookston's opinion, there was a possibility a Mississippi Court may find Rea's claim was covered. Although Great River's limited (and insufficient) investigation revealed the possibility of coverage, and although it knew that possibility triggered an absolute duty to defend and that if it failed to defend it may be liable for punitive damages, Great River denied Rea's claim on two separate occasions.

At the Summary Judgment Hearing, Great River argued the Court must find that Rea's "intended to perform work [on Broom's property] pursuant to a contract and that the contract was breached" in order to rule in favor of Great River. The Court agreed, and found that was a disputed issue of fact preventing summary judgment. All exclusions urged by Great River are premised on factual issues resolved in Rea's favor by the Trial Court. Rea's also offered substantial, un-refuted evidence that Great River's conduct demonstrated a reckless disregard for Rea's rights. Great River had no written claims procedures. Great River failed to conduct a reasonable investigation that, if conducted, would have demonstrated its basis for denying Rea's claim was without merit. The Court properly denied Summary Judgment.

At trial, Rea's presented un-refuted evidence Broom's alleged damages could not have been expected or intended by Rea's. Since the National Union/Rea's Contract does not define Broom's property as a "bonded contract" or "borrow work", and Broom contends the Broom/LJC Contract is void and unenforceable, Great River's position – that the damages sought by Broom are purely economical contract damages – is *per se* unreasonable. Rea's also presented un-refuted evidence Rea's incurred $134,844.47 in costs and expenses for having to defend itself against Broom's Complaint; that Great River had no written claims procedures, no training or supervision or quality control requirements or procedures; and that Great River failed to conduct the minimum investigation Great River's Vice President in Charge of Claims believed

must be conducted. Rea's presented un-refuted evidence that Great River failed to conduct a reasonable or adequate investigation, and that if it had it would have determined its basis for denying Rea's claim was without merit. Rea's presented un-refuted evidence Union Standard and Berkley directly participated in, controlled and/or directed the inadequate investigation and wrongful denial of Rea's claim. Rea's Motion to Conform the Pleadings to the Proof was granted without objection. At a minimum, the evidence supports a joint and several judgment against all Third Party Defendants because there were "co-principals" of Great River.

The Court correctly awarded actual damages, attorneys' fees and expenses, and pre- and post-judgment interest to Rea's. Great River continued to advance meritless bases for denying Rea's request for a defense, through trial. The Court erred in failing to award Rea's all of the undisputed actual damages it incurred as a result of Great River's failure to defend; and in reducing the amount of Attorney's expenses Great River stipulated were authentic and reasonable; and in failing to enter a judgment for punitive damages to punish Great River for its reckless disregard for Rea's rights and failure to conduct an adequate investigation that would have revealed its denial was without merit.

ARGUMENT

1. Standard on Appeal From Chancery Court

Since this litigation transpired in Chancery Court, a special standard applies:

> This Court employs a limited standard of review on appeals from chancery court. . . . As such, this Court "will not disturb the factual findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, [or his findings were] clearly erroneous [,] or [he] applied an erroneous legal standard." . . . Questions of law are reviewed de novo.

In re Estate of Baumgardner, 82 So.3d 592, ¶15 (Miss. 2012) (citations omitted).

2. The Trial Court Correctly Found Disputed Issues of Fact Precluded Summary Judgment

Contrary to Great River's argument to this Court, it conceded to the Chancellor its request for

summary judgment pivoted on a factual issue, and the Court found that issue disputed:

> **Great River:** [W]hat you have to find is . . . [Rea's] intended to perform work pursuant to a contract and the contract was breached. There was a contract out there. That's the whole issue.
> **The Court:** [T]hat's a factual situation that's got to be played out. . . . I've got to, first of all, based on your arguments, got to find out that a contract existed between Broom and Rea's Country Lane. At this time I don't think I can take that step forward, therefore the Motion for Summary Judgment will be overruled.

RE 333-34

Rea's' Third Party Complaint seeks damages from Great River for claims including, but not limited to, Great River's bad faith failure to defend Rea's against the claims brought by Margaret Broom and Great River's bad faith failure to defend Rea's against the Cross-Claims of National Union, et al.. **R 1432-45** Great River did not address Rea's claims pertaining to failure to defend the Cross-Claim in any of its pleadings or argument in support of summary judgment. Great River chose not to focus on Rea's' allegations of bad faith, but simply argued no duty to defend. Rea's presented the Court with plentiful evidence demonstrating, at a minimum, disputed issues of fact that prevented summary judgment on Rea's bad faith claims. **R 2516-17**

Great River did not file an itemization of undisputed facts with its Motion for Summary Judgment. **R 2250-2491** Rea's Response itemized undisputed facts that would prohibit entry of summary judgment – to which Great River did not respond. **R 2497-3704** Great River's failure to comply with the requirements of U.C.C.C.R. 4.03(2) also justified the Chancellor's denial of Great River's motion (the Chancellor could have deemed Rea's itemization of facts admitted). *Estate of Jackson v. Mississippi Life Ins. Co.*, 755 So.2d 15, ¶¶ 28-30 (Miss.App. 1999)

3. Great River Breached Its Duty to Defend Rea's In the Underlying Litigation

"An insurance company's duty to defend its insured is triggered when it becomes aware that a complaint has been filed which contains reasonable, plausible allegations of conduct covered by the policy." *Baker Donelson Bearman & Caldwell, P.C. v. Muirhead*, 920 So.2d 440, 450

(Miss. 2006) "We hasten to point out that where an insurer makes the decision not to provide a defense ... it runs a substantial risk of a later determination that a defense should have been provided. Such decisions, absent an arguable, reasonable basis, can result in a finding of bad faith." Id. at ¶47. "For those in-between situations where it is unclear whether the factual averments of a complaint ... fall within the coverage ambit of an insurance policy and thus [trigger the duty to defend], doubts are to be resolved in favor of the insured." *Burton v. Continental Casualty Co.*, 2007 WL 2669201 (N.D. Miss. 2007) (citing *Boutwall v. Employer's Liab. Assurance Corp.*, 175 F.2d 597,600 (5th Cir. 1949) (applying Mississippi law, insurer's "obligation was not merely to defend in cases having perfect declarations, but in cases where by any reasonable intendment of the pleading liability could be inferred")).

"The 'traditional test' for whether an insurer has a duty to defend under the policy language is that the obligation of a liability insurer is to be determined by the allegations of the complaint or declaration [in the underlying action.]" *Sennett v. United Stated Fid. & Guar. Co.*, 757 So.2d 206,212 (Miss. 2000) The insurer is justified in refusing to defend only if it is clear from the face of the state court complaints that the allegations therein are not covered. See *Moeller v. American Guar. & Liab. Ins. Co.*, 707 So.2d 1062, 1069 (Miss.1996); *Merchants Co. v. American Motorists Ins. Co.*, 794 F.Supp. 611, 617 (S.D.Miss.1992) ("[T]he duty to defend is broader than the insurer's duty to indemnify under its policy of insurance: the insurer has a duty to defend when there is any basis for potential liability under the policy"). If the Complaint alleges multiple grounds for recovery, the insurer must provide a defense if any ground falls within the terms of the policy. *American Guarantee and Liability Ins. Co. v. 1906 Co.*, 273 F.3d 605, 611(5th Cir. Miss. 2001).

In *Burton*, Judge Bramlette found (applying Mississippi law) that the question of whether allegations in a Complaint trigger a duty to defend must be answered by determining whether

any of the facts asserted in the complaint are sufficient to give rise to a duty to defend. *Burton* at *2. (emphasis added). Even though the majority of allegations in the plaintiff's complaint were clearly not covered by the terms of the insurer's E&O policy, the allegations in two paragraphs "are not clearly precluded from coverage [by the insurer's policy]". *Burton*, at ¶¶7-8 Judge Bramlette ruled that since the allegations in those two paragraphs alleged acts or omissions "*potentially* covered by the policy"; "a 'claim' ostensibly exists for which [the insurer] had a duty to defend." *Id.* Judge Bramlette concluded "all doubts are to be resolved in favor of the insured and finding that a duty to defend was owed." *Burton*, at ¶9 (citations omitted). Indeed, provisions that limit or exclude coverage must be construed liberally in favor of the insured and most strongly against the insurer. *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994). This Court must "interpret and construe [the Policy] liberally in favor of the insured [Rea's]." *Lewis vs. Progressive Gulf Ins. Co., Inc.*, 7 So.3d 955, ¶14 (Miss.App. 2009).

The Record reveals Great River had an absolute duty to defend Rea's against Broom's claims. The subject policy of insurance[2] provides, in pertinent part:

SECTION I – COVERAGES
Coverage A. Bodily Injury Or Property Damage Liability
1. Insuring Agreement
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. We will have the right and **duty to defend** the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking ... "property damage" to which this insurance does not apply. ...
b. This insurance applies to . . . "property damage" only if: **(1)** The ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and **(2)** The ... "property damage" occurs during the policy period.[3] ...
Coverage B. Personal ... Injury Liability
1. Insuring Agreement
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" ... to which this insurance applies. We will have the right and duty to

[2] Although Great River did not bother to determine what policy year to review, Rea's cites the 2/1/99-2/1/00 policy, as Broom's deposition suggests that is when most of the alleged property damage occurred.
[3] It is undisputed two "suits" were brought against Rea's (Broom's Complaint and National Union's Cross Claim), and alleged damages were in the "coverage territory" during the policy period.

defend the insured against any "suit" seeking those damages. ...
b. This insurance applies to: **(1)** "Personal injury" caused by offenses arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by you or for you;
SECTION V – DEFINITIONS ...
12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general and harmful conditions.
13. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses: . . . **c.** The wrongful eviction from, wrongful entry into, or invasion of a right to private occupancy of a . . . premises that person occupies by or on behalf of it owner, landlord or lessor; ...
15. "Property damage" means: **a.** Physical injury to tangible property, including all resulting loss of use of that property ...; or **b.** Loss of use of tangible property that is not physically injured
19. "Your work" means; **a.** Work or operations performed by you or on your behalf; and **b.** Materials, parts or equipment furnished in connection with such work or operations.
"Your work" includes: **a.** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and **b.** The providing of or failure to provide warnings and instructions.
2. Exclusions This insurance does not apply to:
a. Expected or Intended Injury. .... "Property damage" expected or intended from the standpoint of the insured. . . .

RE 4, 6-7, 10-11; TE1, 302, 305-06; 314-15

Great River contends it had only to compare Broom's Complaint to Rea's policy to support its first claim denial. Rea's contends Crites' testimony regarding minimum required investigation, and Cookston's admission "we" have not seen any contract with Rea's name on it, supra, required additional investigation, including at least interviewing Wayne Rea and looking for contracts that obligated Rea's to do anything with regard to Broom's property. Even considering just the policy and Complaint, however, Great River breached its duty to defend.

Broom's Complaint clearly alleges "physical injury to tangible property" as "property damage" is defined in the policy. Broom's Complaint alleges Defendants caused "three (3) large pits to be dug on [her] property"; that "roads and slopes were not graded and grassed nor was the main road graded and graveled", that "topsoil was wrongfully taken from the property"; and that "[77] truckloads of red clay waste material had been dumped on her property". **R 35-42, ¶¶ 16, 18** COUNT IX, "DAMAGES" seeks, in addition to "payment under the subject contract" and "cost of fulfilling [contract obligations]"; "and any costs associated with reclaiming and restoring

the property." **Id. ¶16** All damages are sought from all defendants. Broom's Complaint includes counts for Breach of Contract, Negligence, Gross Negligence, Conversion, Equitable Relief and Unjust Enrichment. Great River's assertion these allegations do not constitute "property damage" because they are simply "economic damages" is contrary to the law, and ignores the plain allegations of Broom's Complaint.

The "property damage" alleged by Broom was caused by an "occurrence", which the policy defines as "an accident, including continuous or repeated exposure to substantially the same general and harmful conditions." The General Liability portion of the policy does not define "accident" – though the Business Auto portion defines it as "including continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage'". **RE 12; EX1, 362** The substantive contract law in this State requires a policy be considered as a "whole, with all relevant clauses together." *Architex Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So.3d 1148, ¶21 (Miss., 2010). Given the policy's definition of "accident" above, exposure to *any* conditions that result in "property" damage constitutes an "occurrence".

Alternatively, if the definition of "accident" in a different section of Rea's policy is deemed not "relevant", undefined words in an insurance policy are to be given their "ordinary and popular meaning." *Corban v. United Services Auto. Ass'n*, 20 So.3d 601, ¶17 (Miss.2009) "Accident" is defined in *The Random House College Dictionary* (Revised Edition, 1975) as "an unintentional or unexpected happening ...." The policy does not direct whether to consider "accident" from the standpoint of the injured party or the insured. When Great River first refused to defend Rea's based on its conclusion there was no alleged "occurrence", Mississippi law required undefined "accident" in an insurance policy to be viewed from the standpoint of the injured party. In *Georgia Casualty Co. vs. Alden Mills*, 127 So. 555 (Miss. 1930), this Court considered an insurance policy that covered "damages . . . *accidentally* suffered." (at 556)

(emphasis in original). This Court was forced to interpret the scope of coverage within the context of a policy that did not define the controlling term, "accidentally". This Court concluded

> Whether an injury is accidental, is to be determined from the standpoint of the person injured. If the injury comes to him through external force, not of his own choice or provocation, then as to him the injury is accidental.

127 So. at 557.[4] accord *Zurich American Ins. Co. v. Goodwin*, 920 So.2d 427, ¶8 (Miss.,2006) ("Under Mississippi law, unless the policy specifically states that it is viewed from the perspective of the insured, ["accident"] will be viewed from the perspective of the *injured.*" (emphasis in original) Without question, the property damage alleged by Broom was not "expected or intended" by Broom.

Even if one were to consider "accident" from the standpoint of the insured, as Great River argued you must in the lower Court, the "property damage" alleged by Broom was "accidental" from the standpoint of Rea's. Great River argued that Broom was seeking purely contractual damages, that Rea's breached contractual duties to Broom, and that such damages do not constitute an occurrence under the law. Cookston expressly advised Great River "we have not found a case from any Mississippi Court specifically addressing the issue, [however] courts from other jurisdictions have held that damages flowing from breach of contract are not the result of an 'occurrence' as defined in the policy at issue." **RE 75** More importantly, Great River admits it was "[equally] possible that a Mississippi judge would side with a [jurisdiction] which found such facts do create an occurrence [as opposed to those who find they do not]." **RE 149**

That is exactly what this Court has since done in *Architex.* ("Faulty workmanship, defective work, et al., may be accidental, intentional, or neither.") 27 So.3d at ¶28 Just like Architex,

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[4] The subsequent case of *Allstate vs. Moulton*, 464 So.2d 507 (Miss.1985) did not change the rule announced in *Alden Mills*. It dealt with a differently worded policy. ["The policy states unequivocally that 'occurrence' is to be interpreted 'from the standpoint of the insured.' Thus by the terms of the policy we are precluded from interpreting 'occurrence' or 'accident' from the standpoint of the injured party."] (emphasis added).

Rea's paid additional premiums to secure coverage for "Contractors – subcontracted work – in connection with street or highway construction or repair". **RE 3** Rea's also paid specific premiums for coverage related to "Grading of Land" and "Street or Road Construction or Reconstruction". **RE 2** Rea's policy, like Architex's, includes the "subcontractor exception" to its exclusions. **RE 6, 10** Broom's Complaint expressly alleges "W.C. Pitts" dumped 71 loads of waste material onto her property, but seeks compensation for the cost of removing same and "reclaiming and restoring" her property from all Defendants. At best, given the allegations in Broom's Complaint, Pitts was a subcontractor of Rea's and/or the other defendants.

Having recognized arguments existed both ways about whether a Mississippi Court may find the facts alleged by Broom (even as interpreted by Great River) constitute an "occurrence", supra, Great River had an absolute duty to defend Rea's. "[W]here there are two or more reasonable interpretations of a clause, the court will adopt the interpretation that provides coverage. Moreover, any doubt as to the existence of a defense obligation is likewise resolved in favor of the insured". *Liberty Mutual Fir Ins. Co. vs. Canal Ins. Co.*, 177 F.3d 326, 331 (5th Cir. 1999) Counsel for Great River made it emphatically clear in the Hearing on Great River's MSJ that Great River was resting on the issue of whether there was an "occurrence" to deny Rea's claims. "[O]ur position in the case, for purpose of summary judgment [is that there is] no occurrence, therefore there's no coverage in this case. There's no duty to defend." **T 51**

In arguing one or more of the policy exclusions applies, Great River is confusing its ultimate duty to indemnify with its duty to defend. The

> . . . ultimate liability by the insurer is not dispositive of its duty to defend. To the contrary, the duty to defend is broader than the insurer's duty to indemnify under its policy of insurance: The insurer has a duty to defend when there is any basis for potential liability under the policy.

Cullop v. Sphere Drake Insurance Company, 129 F.Supp.2d 981, 982 (S.D. Miss. 2001) (citations omitted) Whether facts developed in litigation may have afforded Great River the right

to refuse indemnity under an exclusion is not at issue here. Great River had a duty to defend because Broom's Complaint alleged "property damage" caused by an "occurrence".

Each of the exclusions urged by Great River requires findings of specific facts in order to apply. Exclusion J(5) requires a finding that the damage to Broom's property was to the "the particular part of real property on which you or any [subcontractor] are performing operations." J(6) requires a finding the damage resulted from "your work" being "incorrectly performed", and does not apply to damage included in the "products completed operations hazard" (for which Rea's paid separate premiums for a separate coverage limit (**RE 1-2**)). Exclusion m requires a finding that property damage was caused to "impaired property" by a defect in "your work" or the insured's (or its subcontractor's) failure to perform a contract in agreement with its terms. **RE 5-7** Even Cookston informed Great River that it was "arguable" these exclusions apply, implicitly acknowledging they may not apply – and were fact determinative. supra Of course, Cookston's opinions were premised on the false and unreasonable conclusion that Rea's had performed some work on Broom's land for which it had a duty to conform to the terms of some (admittedly unknown) contract.

Given the factual requisite for these exclusions to apply, Great River must demonstrate the Chancellor "abused his discretion [or] was manifestly wrong." *Baumgardner*, ¶15 This Great River cannot do, as the substantial, un-refuted evidence is that Rea's had no contractual duty to Broom, and that none of Rea's subcontractors who may have done work on Broom's property did so on Rea's behalf. supra Great River's complaint the Chancellor "did not address or discuss the policy's exclusions" is untimely. Miss.R.Civ.P. 52 requires a Trial Court conducting a bench trial to make findings on specific issues if requested by a party within 10 days after entry of the Court's judgment. Uniform Chancery Ct. Rule 4.01, which incorporates Rule 52, likewise requires such a request be made in writing. Great River made no such request or motion.

Accordingly, this Court "may presume that the trial court made all findings of fact that were necessary to support its ruling." *Stutts v. Miller*, 37 So.3d 1, ¶16, N5 (Miss.,2010)

Had Great River defended Rea's as it was required to, it may have been able to prove Rea's had no obligations to Broom, and avoided any settlement by or judgment against Rea's. Having refused to defend, however, Great River is responsible for Rea's attorneys' fees and settlement amount. *Mississippi Ins. Guar. Ass'n vs. Byars*, 614 So.2d 959, 964 (Miss. 1993); *Marvar Shrimp & Oyster Co., Ltd. Vs. USF&G*, 187 So.2d 871, 875 (Miss. 1966) ("Having unjustifiably refused to defend, the Insurance Company is liable not only for the attorneys' fees, expenses, and court costs, but also for the amount of the settlement") (citing 7A *Appleman, Insurance Law and Practice* § 4683 (1962).

Discussing Coverage Part A, Cookston noted the need to look at the factual allegations in the Complaint – not just the legal counts. Turning to "personal injury" under Coverage Part B of the policy, however, Cookston gave no heed to the factual assertions and simply stated Broom's articulated claims of negligence, gross negligence, etc. "are not among the enumerated torts in the 'personal injury' coverage afforded under the policy at issue." **RE 76** Broom's *factual* allegations that "none of the roadwork on said property was accomplished" (¶ 32) and that 71 loads of waste material were dumped on her property also gave rise to the "possibility" of coverage under the "personal injury" provisions of the policy.

Rea's policy provided coverage for "'Personal injury' caused by offenses arising out of your business ....", and the definition of "personal injury" includes "**c.** The wrongful eviction from, wrongful entry into, or invasion of a right to private occupancy of a room, dwelling, or premises that person occupies by or on behalf of its owner, landlord or lessor." (emphasis added) **RE 6-7, 10** Broom's factual allegations constitute "possible" claims the Defendants evicted her from, wrongfully entered, and/or invaded her right to privacy on the premises of her property. None of

the enumerated exclusions to coverage for "personal injury" are even remotely implicated by Broom's Complaint. **RE 7**

When Great River denied Rea's claim for a second time, on September 13, 2002, Great River had ample evidence in front of it that Broom was seeking damages for "physical injury to tangible property" and "loss of use of tangible property that is not physically injured"; and that the "property damage" alleged by Broom was "accidental" from both the standpoint of Broom and Rea's. Broom's testimony confirmed that in addition to seeking damages for ruts and total "devastation" of her property, she was seeking damages for not being able to grow hay or raise cattle on the entire 50 acre field. The evidence before Great River in September, 2002 also made it clear that Broom's claims constituted "property damage" caused by an "occurrence", thus triggering Great River's duty to defend. Although it had all applicable contracts before it, none of the contracts in Great River's possession obligated Rea's to do anything with regard to Broom's property, such that there was no basis to conclude any of Broom's alleged damages were expected or intended by Rea's. supra

At the time of the second denial, Great River also knew Broom was seeking damages for "personal injury" arising out of Rea's business. Broom's deposition testimony confirmed that, in addition to allegations of property damage, she was alleging the Defendants wrongfully entered her premises (property) and invaded her right to private occupancy thereof by removing her locked gate and gate post, and by causing damage so bad she could not drive her car onto the premises or walk in the vicinity of the pits. **RE 207A, 209, 215A, 214A**

4. The Trial Court Correctly Denied Directed Verdict

Great River's alleged Motion for Directed Verdict consisted of the following exchange:

> **Great River:** I don't know if need to make a directed verdict here. And I know you don't want to hear it, but just to preserve our record for purposes of appeal.
> **The Court:** It's made. It's overruled. And we'll go on.

T 190 As discussed above, on issues not directly addressed in the Chancellor's Judgment, this Court may presume the Chancellor made all findings of fact necessary to support its ruling. Given the facts in the Record, supra, the Court's denial of Great River's "motion" was not error.

5. The Trial Court Correctly Entered a Judgment in Favor of Rea's

As discussed above, and demonstrated by the facts in the Record, Rea's was entitled to a judgment against Great River because Great River (which admits Cookston advised it Broom's Complaint presented arguments "both ways" and a "possibility" of coverage under Mississippi law) breached its duty to defend; and, as a direct and proximate result thereof, Rea's paid and incurred $134,844.47 in actual damages. Great River's argument that Wayne Rea's testimony confirms the damages alleged by Broom were "expected or intended" by Rea's ignores the evidence in the Record. Wayne Rea unequivocally testified that when he got the bid to complete the MDOT Hwy 45 project from MDOT he signed a contract to complete Kent's bonded contracts, but that Broom's contract with Kent was not bonded; that Rea's never had a contract with Broom; and that Rea's never consented to any other party having a contract with Broom. **RE 342** Wayne Rea testified that though Rea's subcontracted with LJC, LJC's trucks never went on Broom's property, and that the dirt Rea's got from LJC came from another pit, not Broom's. **RE 353-54** Wayne Rea testified that Rea's never did, directed or supervised any work on Broom's property, and that Broom never asked them to. **RE 358-60** Wayne Rea testified that Rea's did not consent to any agreements being entered into with Pitts on Rea's behalf, and that Pitts did not conduct any activity on Broom's property pursuant to a contract with Rea's. **R 187** Though Great River cross examined Rea, this testimony was un-refuted. The Record also contains the testimony of Pitts, who Great River contends actually did the damage to Broom's property, that he had no contract with Rea's and did not work on Broom's property on Rea's

behalf (**RE 242-245**); as well as Broom's argument that the LJC/Broom contract (under which Great River contends Pitts was operating) was void and unenforceable. **TE13, 614-16**

Great River's argument Rea's paid to settle "contractual claims" instead of "property damage" claims is misrepresents the Record. Great River asked Wayne Rea about this issue on cross, and he explained he made sure it was communicated to Broom with his settlement that he was not paying for "property damage", because Rea's had been sued for property damage and he was not going to admit any wrong doing. **RE 355** Ultimately, Wayne Rea's testimony that Rea's would not have settled Broom's claims, or paid attorney's fees to defend those claims if Great River had been defending Rea's is un-refuted. **T 159**

6. The Trial Court Correctly Ruled Rea's Is Entitled To Attorneys' Fees and Expenses

Great River argues Rea's could only be entitled to recover attorneys' fees and expenses, for having to hire lawyers and litigate through trial to enforce its contractual rights, if its refusal to defend was made without an arguable reason. As proved above, Great River believed arguments existed "both ways" about whether a Mississippi Court may find coverage for Rea's when it denied its claim. Great River was required to resolve this dispute in favor of defending Rea's. see *Muirhead, Burton, Moeller, American Guarantee, Liberty Mutual,* supra In fact, applying *Alden Mills*, Great River was compelled to look at whether there was an "accident" from the standpoint of Broom, or to apply the definition of "accident" in another part of the policy, and defend. The Chancellor's Judgment acknowledged the law regarding an award of attorneys' fees. Since Great River did not petition the Trial Court to amend its Judgment to include findings on this issue, this Court may presume the Chancellor made the necessary findings to support a conclusion Great River refused Rea's request without an arguable reason. *Miller*, 37 So.3d at ¶16 Given the Record, such findings certainly would not constitute manifest error. Notably, Great River stipulated to the "authenticity and reasonableness" of attorneys' fees and

expenses submitted by Rea's. **Re 312-13**

Rea's contends an award of attorneys' fees and expenses would have been appropriate even in the absence of a lack of an "arguable reason" to deny the claim, however. In *Universal Life Ins. Co. v. Veasley*, this Court recognized that its "purpose in establishing a measure of damages for breach of contract is to put the injured party in the position where she would have been but for the breach." 610 So.2d 290, 295 (Miss.1992) This Court also recognized "the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions." *Id.* Granted, many subsequent Courts have struggled with interpreting when "*Veasley* damages" are appropriate. Perhaps it is time to conclusively settle the issue.

When an insurance company breaches its duty to defend, it certainly can foresee that a wrongful denial will cause its insured to incur attorneys' fees and expenses for having to sue to enforce its contractual rights – in addition to costs incurred in defending itself against the underlying action. More importantly, this Court's stated "purpose in establishing a measure of damages for breach of contract", "to put the insured in the same position she would have been but for the breach", cannot be accomplished if the insured is prohibited from recovering the attorneys' fees and expenses it incurred to enforce its contractual rights. Prohibiting the recovery of such damages unequivocally results in unequal treatment between insureds. One insured, whose claim is honored, gets the benefit he bargained for; while another, who paid the same premiums for the same coverage, but whose claim is wrongly denied and who has to retain counsel to recover contract benefits, will get less than the benefits he paid for (after paying attorneys fees and expenses). In cases like Rea's', where the insured is a corporation, there can be no award for "mental anxiety and emotional distress" to soften the blow. If Rea's is prevented from recovering the full amount of attorneys' fees and expenses incurred in pursuing this litigation to enforce its contractual rights, it will not be made whole – and will not have

received the benefit of its bargain with Great River. Good sense, and this Court's stated policy for contract damages, mandate that an insurance company, not its insured, bear the cost of the company's wrongful denial of the insured's claim, whether it be simple error or bad faith.

7. The Trial Court Correctly Ruled Rea's Is Entitled To Pre- and Post-Judgment Interest

Miss. Code. Ann. §17-7-7 (1989) mandates "all judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the Complaint." This Court recently settled questions regarding recovery of pre-judgment interest on damages awarded in a breach of contract case:

> As a general rule, "in actions for a breach of contract of insurance, when the amount which the insured is entitled to under the contract is withheld after payment is due, interest on such amount can be allowed as damages." ... For interest to be allowed, the amount due must have been liquidated when the claim was originally made, or the denial of the claim must have been frivolous or in bad faith. ... Even if the claims are liquidated, interest may be denied where "'there is a bona fide dispute as to the amount of damages as well as the responsibility for the liability therefore.'" ...
>
> The purpose of prejudgment interest is not to penalize wrongdoing, but to provide "compensation for the detention of money overdue." ... It compensates insureds for the time value of money. ... The decision to award such interest rests within the trial court's discretion. ...

Arcadia Farms Partnership v. Audubon Ins. Co., 77 So.3d 100, ¶¶ 18-19 (Miss.,2012) (emphasis added) (citations omitted) This court concluded Miss. Code § 75-17-7 does not preclude pre-judgment interest prior to the filing of the Complaint. *Id.* at ¶27.

Rea's Third Party Complaint was filed on October 3, 2002. **R 1432** Rea's prayed for pre-judgment and post-judgment interest. **R 1444** The Trial Court, exercising statutory discretion, awarded Rea's pre- and post-judgment interest at the rate of 6% per annum. Although it could have set that rate to start running at the time Rea's contract was breached (April 20, 2001), the Trial Court set the rate to begin on March 6, 2003 – the date Broom's claims were settled and Rea's damages became liquidated (of course, Rea's had paid substantial sums of attorneys' fees, on a monthly basis over a span of two years, prior to March 6, 2003 (**TE15**)

8. The Trial Court Correctly Included Union Standard and Berkley in its Judgment

Berkley failed to obtain a hearing on its April 29, 2003 Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim Upon Which Relief May be Granted prior to trial. Berkley and Union Standard allowed Rea's claims to be tried against them by consent. Rea's Third Party Complaint included multiple claims against Berkley and Union Standard, including allegations each of the Third Party Defendants negligently or grossly negligently failed to adequately and properly investigate and adjust Rea's claims, and acted in reckless disregard for Rea's rights. **R 1338-40.** Under Mississippi law,

> ... an insurance adjuster, agent or other similar entity ... may be held independently liable for its work on a claim if ... its acts amount to any one of the following familiar types of conduct: gross negligence, malice, or reckless disregard for the rights of the insured.

Gallagher Basset Services vs. Jeffcoat, 887 So.2d 777, ¶¶ 23-27 (Miss.2004). This Court holds that where an entity not the "insurer" is determined to be a "co-principal" "with respect to the duties and obligations of adjusting claims", it may be held liable for mere negligence. *Fonte vs. Audubon Insurance Company*, 8 So.3d 161, ¶ 9, N.4 (Miss. 2009). This Court held the question of whether a "co-principal" relationship exists depends on the amount of control exercised by the alleged "co-principal", and that this question is for the [fact finder] to determine. *Id.* at ¶ 5.

At trial, Rea's introduced evidence including, but not limited to: Crites is Vice President of Claims for Union Standard Insurance Company and Great River, and Senior Vice President for other Berkley subsidiaries. His office for all companies is at the same address. **TE11, 2** Any lawsuits filed against any of the multiple Berkley companies filed in Mississippi go to Van Hook to decide what needs to be done. **TE11, 7-9** Executive officers from Berkley serve on the Board of Great River. **TE10, 24** Van Hook works for Union Standard Insurance Company and Great River Insurance Company, but receives paychecks from Union Insurance Company (a third company). She is corporate secretary and corporate counsel for both Union Insurance and Great

River, and Assistant Vice President of Union Insurance. **TE10, 1-2** Van Hook shares offices with Crites (**TE10, 13**); and claims for many of Berkley's subsidiaries, including but not limited to Great River and Union Standard, are handled by the same people out of the same office. **TE10, 62** She works for Union Standard and Great River out of the same office. **TE10, 67** In May, 2000, Van Hook became the entire "legal department" for Union Standard, Union Insurance, and Great River. **TE10, 8** The parent of all the companies Van Hook works for is Berkley. **TE10, 9** Van Hook retained Cookston's services by letter on Union Standard letterhead, signed as "Claims Counsel" on behalf of Union Standard and Great River. **TE 5** Crites left it to Van Hook to "proceed with the investigation as she saw fit" (**RE 191**); and Van Hook (who did no personal investigation of Rea's claim) in turn hired Cookston to "do any investigation he thought necessary." **TE10, 25** The only written claims procedures identified by Great River, which weren't followed, are published by Berkley for all of its subsidiaries to follow. **RE 160-80** Berkley and Union Standard did not offer any evidence in support of their defenses, or make any effort to refute Rea's claims against them at trial.

At the conclusion of trial, Rea's moved the Court to conform the pleadings to the evidence, which Motion was granted without objection. **T 191** Certainly, in light of the Record, supra, there is no evidence of manifest error in the Trial Court issuing its Judgment against all Third Party Defendants. Again, this Court may presume the Chancellor made the necessary findings to support a conclusion Berkley and Union Standard were "co-principals" of Great River, and/or directed or controlled the inadequate investigation of Rea's claim. *Miller*, 37 So.3d at ¶16

9. The Trial Court Erred in Not Awarding Rea's the Full Amount of Its Damages

Rea's concedes the Trial Court appears to have made an error in its calculation of attorneys' fees incurred by Rea's in defending against the Broom claim. As set forth in **TE15**, and summarized in **TE18**, the amount of those costs was $61,511.47, not $63,937.79. This is

harmless error, however, as the Court's total judgment of $193,684.95 was justified. The only error lies in the fact that the Judgment was insufficient – because it failed to award Rea's all of the undisputed damages proven at trial.

At trial, Wayne Rea testified that **TE18** sets forth an itemization of expenses incurred during the course of the litigation and the settlement of the litigation. **TE18** was admitted into evidence pursuant to Great River's stipulation that it set forth a summary of damages claimed by Rea's, with the understanding that Great River did not concede it was responsible for those claimed amounts. **RE 351-52** On Cross, Rea explained that the additional expenses (over and above the $60,000 paid to settle Broom's claims and the $61,511.47 in incurred attorneys' fees) reflected on **TE18** (totaling $13,333) were for 4 round trips to Jackson for a total of 1,096 miles to meet Kilpatrick and to go to arbitration; that the 2 round trips to Laurel were for Broom's deposition, and that all of the trips were in conjunction with the lawsuit. **RE 356-57.** Great River made no effort to contest the amount of these damages at trial, and thus waived any right to do so.

The case cited by Great River, *Steele vs. Kinsey*, 801 So.2d 297 (Fl Ct. App. 2001), is inapplicable. *Steele* dealt with an action for supplemental payments under a contract of insurance that had been *honored* by the insurance company in the first instance. The controversy arose because the insured wanted the insurance company to settle the case it was defending for policy limits, and the insurance company, which had the right to settle or defend, chose to defend. The insured claimed entitlement to individual expenses incurred during the litigation – but not at the insurance company's request. The Court concluded that, in the course of providing coverage under the contract (by defending against the plaintiff's claim), the insurance company did not "request", and therefore the insured was not entitled to recover for services it performed.

Rea's policy expressly provided for recovery of "all reasonable expenses incurred by the insured at our request assist us in the investigation or defense of the claim [including loss of

earnings]". **RE 8** It was certainly foreseeable to Great River that Rea's would incur such expenses if it breached its duty to defend. Great River must not be allowed to benefit from its wrongful denial of Rea's claim.

Similarly, Rea's presented un-refuted evidence that the actual expenses owed to its attorneys' for prosecuting its Third Party Claim, over and above the 40% contingency fee, totaled $19,817.41. **RE 306-10** Great River "acknowledged the authenticity and reasonableness of the costs and expenses submitted by [Rea's]." **RE 312-13** The Trial Court's finding, in light of the stipulated reasonableness of these expenses, that "this Court has never reimbursed for copies and postage", and its random reduction of recoverable expenses to $10,000, was arbitrary and capricious.

The Trial Court properly ruled that Great River breached its duty to defend Rea's, and that Rea's was entitled to the damages resulting therefrom. The Trial Court abused its discretion in failing to award Rea's the full amount of un-refuted damages proved at trial, particularly to the extent their amounts and reasonableness were stipulated by Great River.

10. The Trial Court Erred in Not Awarding Punitive Damages

An award of punitive damages is justified upon a showing an insurer "lacked an arguable or legitimate basis for denying the claim, . . . or acted with gross and reckless disregard for [the insured's] rights." *Liberty Mutual Ins. Co. vs. McKneely*, 862 So.2d 530, ¶ 9 (Miss. 2003). When presented with Rea's claims, Great River was "required to perform a prompt and adequate investigation of the circumstances surrounding the claim." *Id.* At ¶ 12. Punitive damages may be awarded under Mississippi law, "notwithstanding the presence of an arguable basis, where there is a question that the mishandling of a claim or the breach of an implied covenant of good faith and fair dealing may have reached the level of an independent tort." *Stewart v. Gulf Guaranty Life Ins. Co.*, 846 So.2d 192, ¶ 34 (Miss. 2002). The question is whether Great River "breached its

contract with [Rea's] in such a way as to amount to an intentional wrong, or in doing so whether its conduct was so grossly negligent that the breach constituted an independent tort." *Id.*, ¶ 35. Additionally,

> This Court has held that the denial of a claim without proper investigation *204 may give rise to punitive damages. *Lewis*, 637 So.2d at 187; *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d at 276. . . . This Court explained in *Lewis*:
>
> "[B]efore denying a claim, the insurer, at a minimum, must determine whether the policy provision at issue has been voided by a state or federal court, interview its agents and employees to determine if they have knowledge relevant to the claim, and make a reasonable effort to secure all medical records relevant to the claim."

Stewart at ¶46 Moreover, Great River had a continuing duty to investigate Rea's claim after its 4/20/01 denial. *Gregory vs. Continental Ins. Co.*, 575 So.2d 534, 541 (Miss. 1990)

Defendants: (1) Failed to train or supervise claims personnel, or even provide them with written claims procedures; (2) failed to conduct an adequate or reasonable investigation that, if conducted, would have easily revealed evidence showing the basis for denying Rea's claim was meritless (this would have been learned even if Defendants had interviewed their own insured); (3) failed the duty of continuing investigation that, if carried out, would have demonstrated no basis to deny Rea's claim; (4) failed to conduct <u>any</u> investigation between its 4/20/01 denial and July, 2002; and (5) continued asserting what it knew were baseless grounds for denying Rea's claim through trial, and forced Rea's to incur the time and expense of litigation. Defendants had no quality control measures in place to ensure their insured's claims were handled appropriately, and Defendants' Vice President in Charge of all claims still does not think it necessary to conduct a physical review of Rea's claim. Crites and Van Hook both emphatically testified that, given the chance to do it all over again, they would handle Rea's claim the exact same way. <u>supra</u> Defendants' conduct clearly and convincingly illustrates callous disregard for the rights of Rea's; and the evidence is irrefutable Defendant's failed to conduct the minimally required investigation, which would have demonstrated no basis to deny Rea's claim (constituting an independent basis for punitive damages).

Rea's set these facts, and applicable law, before the Trial Court. **RE 275-87** Under the facts of this case, it was an abuse of discretion for the Trial Court to deny Rea's claim for punitive damages.

Great River's asserted "reliance on advice of counsel" gives it no shelter. Purported reliance on "advice of counsel" is not an automatic bar to punitive damages, it is "but one factor to be considered in deciding whether the carrier's reason for denying a claim was arguably reasonable." *Murphree vs. Federal Ins. Co.*, 707 So.2d 523, 533 (Miss. 1997) The facts are undisputed Cookston is the only person who conducted any investigation on Rea's claim, and that Defendants merely left it up to him to determine what investigation was needed, without any guidelines to assist him. Investigating an insurance claim is part of an insurance company's ordinary course of business, and Great River cannot avoid the consequences of its failure to do so by simply "delegating" that duty to a lawyer it has not trained or supervised. Moreover, as the Trial Court properly found, Cookston did not advise Great River to deny Rea's claim – but expressly warned it of the dangers of doing so – including punitive damages.

CONCLUSION

Rea's is asking this Court to Affirm the Trial Court on its ruling that Great River breached its duty to defend Rea's in the Underlying Litigation, and that Rea's is entitled to an award, from all Third Party Defendants, of actual damages and attorneys' costs and fees incurred in this litigation in the amount of at least $193,684.95, plus pre- and post-judgment interest from and after March 6, 2003 in the amount of 6% per annum.

Rea's asks this Court to reverse and render the Trial Court on the limited issue of the amount of damages due Rea's, and mandate Rea's be awarded the full amount of un-refuted, incurred damages proven at trial, and that Defendants pay Rea's a total judgment in the amount of **$208,599.67** ($60,000 paid to settle Broom's claim + $61,511.47 of attorneys' fees incurred

defending Broom's claim + $13,333 additional expenses and loss of earnings for Wayne Rea having to participate in defense of Broom's claim + $53,937.79 attorneys' fees [40% of damages] for having to go to trial to enforce contractual rights + $19,817.41 actual expenses incurred in enforcing contractual rights through trial); plus pre- and post-judgment interest from and after March 6, 2003 in the amount of 6% per annum.

Rea's further prays that this Court reverse the Trial Court's denial of punitive damages, and remand this matter to the Trial Court on the limited issue of the amount of punitive damages that should be assessed against the Defendants for their conduct in relation to their bad faith denial of Rea's request for a defense and failure to conduct an adequate investigation which, if conducted, would have demonstrated no basis to deny Rea's claim.

Respectfully submitted this the 13th day of July, 2012.

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CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee / Cross Appellant to the following:

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