IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-TS-00109

MICHAEL AND
MARY ROBICHAUX — APPELLANTS

V.

NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY AND JAY FLETCHER INSURANCE — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
JACKSON COUNTY CIRCUIT COURT CAUSE NO. 2006-00,303(1)

APPELLANT'S BRIEF
(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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

Circuit Court Judge:	Honorable Billy G. Bridges
Appellants:	Michael and Mary Robichaux
Appellees:	Nationwide Mutual Fire Insurance Company Jay Fletcher Insurance
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Respectfully submitted,

BY: _____

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Cases ***Page No.***

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF ISSUES

1. Whether the "Hurricane Coverage and Deductible Provision" and the "Anti-Concurrent Causation Provision" or "Weather Conditions" exclusion create an ambiguity that should be resolved in favor of the insureds?

2. Whether in considering an "all risk" homeowners' policy containing an ACC clause, the insurance company bears the burden of establishing causation for that part of the loss that is excluded?

3. Whether the trial court erred in its interpretation of the ACC clause?

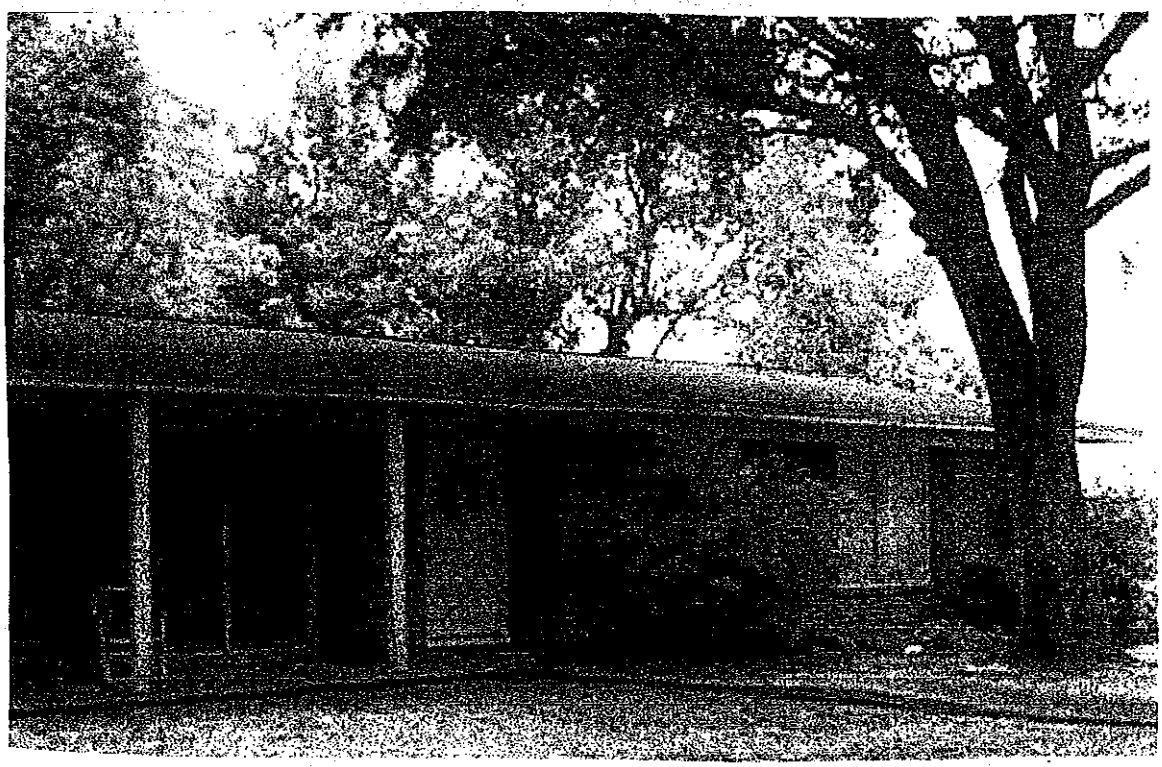
4. Whether an insurance company's adjustment of the claims of its policyholders is relevant to that company's treatment of policyholders with like policies in the same geographical area?

5. Whether the trial court erred in dismissing Plaintiffs' claims against Jay Fletcher Insurance?

II. STATEMENT OF THE CASE

A. Statement of Facts

This case concerns the devastating effects of Hurricane Katrina on the home of Michael and Mary Robichaux[1]. In 1991, Michael Robichaux, a Deputy Sherriff with the Jackson County Sherriff's Department, and Mary Robichaux, an office manager for Dr. Christopher E. Wiggins, M.D. of Bienville Orthopedic Specialists purchased their dream home on Washington Avenue in Pascagoula, Mississippi. The home, built in 1975, is depicted below as it looked prior to Hurricane Katrina.



In 1993, the Robichauxs chose Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide") to provide homeowner's insurance for their family. At the time of Hurricane Katrina, the home was insured under an "all risk" policy providing coverage of $131,000.00 against "accidental direct physical loss". (R. 136) Additionally, the policy insured other

[1] Plaintiff, Mary Robichaux, untimely died on May 8, 2010. Plaintiff subsequently filed a Notice of Suggestion of Death on May 19, 2010.

structures on the property against "direct physical loss" in the amount of $13,100.00 and the Robichauxs' personal property for up to $97,405.00. (R. 211)

Prior to Hurricane Katrina, Fletcher Insurance represented to the Robichauxs that they had full and comprehensive insurance coverage under the subject policy and Hurricane Endorsement for any and all damage that is typically caused by a hurricane, including damage proximately and efficiently caused by hurricane wind and damage caused from storm surge proximately caused by hurricanes. (R. 182) At the urging of Fletcher Insurance, the Robichauxs, rather than increasing the amount of coverage under their flood policy, purchased a Hurricane Endorsement. (R.182) The Hurricane Endorsement states in pertinent part:

HURRICANE COVERAGE

Coverage under this policy includes loss or damage caused by the peril of **windstorm** during a **hurricane.** It includes damage to a building's interior or property inside a building, caused directly by rain, snow, sleet, hail, sand or dust if direct force of the **windstorm** first damages the building causing an opening through which the above enters and causes damage.

Fletcher Insurance expressly represented that the Hurricane Endorsement would provide full and comprehensive coverage for those damages caused by hurricanes. (R. 182)

On August 28, 2005, Hurricane Katrina made landfall along the Mississippi Gulf Coast completely destroying the Robichauxs' Washington Avenue home to the slab. Forensic meteorologist Rocco Calaci reasons that "sustained wind speeds over Pascagoula were in the 120 mph to 125 mph range with higher gusts." As Calaci explains, "[t]his number is supported by wind speeds of 137 mph and 140 mph measured at the Pascagoula Emergency Operations Center prior to the loss of power." (R. 1067) Storm surge from Hurricane Katrina impacted the property long after winds damaged the Robichauxs' home, washing away all evidence of causation. In Calaci's opinion, a majority of the damage done to the Robichaux's home can be attributed to severe weather including microbursts and tornadic activity as well as extreme wind

speeds and flying debris. (R. 1083) As Calaci explains, the water that ultimately moved over the Washington Avenue property merely served to "mask the initial cause of damage." (R. 1083)

In response to the absolute and catastrophic loss by its insureds of over 13 years, Nationwide paid the Robichaux family $500 for food loss (R. 851) and $2,500.00 for alternative living expenses (R. 848) claiming all other damage was excluded by its water damage exclusion, including the "anti-concurrent cause" clause (hereinafter "ACC") contained in the policy. (R. 170) Specifically, while admitting an absolute accidental direct physical loss, Nationwide relied on the following provisions for denial of the Robichaux claim:

Property Exclusions
(Section I)

1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another cause or event contributed concurrently or in any sequence to cause the loss.

   b. Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:

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

      (2) water or water-borne material which:

         (a) backs up through sewers or drains from outside the dwelling's plumbing system;

         or

         (b) overflows a sump pump, sump pump well or other system designed to remove subsurface water or water-borne material from the foundation area.

      (3) Water or water-borne material below the surface of the ground, including water or water-borne material which exerts pressure on, seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool, or other structure.

Nationwide's complete denial of Plaintiffs' claim is notable for several reasons. Although its engineering firm, Haag Engineering, was aware that a forensic analysis would be crucial in determining whether wind or water caused the loss, none was ordered. Nationwide also did not hire a meteorologist to determine what the wind forces were at the Robichaux home

prior to the arrival of storm surge before denying the claim. Even more puzzling, Nationwide's own engineering report submitted on January 16, 2006 clearly leaves open the possibility of wind damage where it states "Wind damage, if any, would have been limited to cladding items such as roof shingles." (R. 863) This finding was ignored and Nationwide undertook no further investigation until long after it denied the Robichaux claim on March 24, 2006.

Nationwide's conduct toward the Robichauxs is most striking when compared to the company's handling of the claims of the Robichaux's neighbors. Nationwide extended the benefits of substantially similar policies to both of the Robichaux's immediate neighbors. (R. 1300 and R. 1351) Nationwide was made aware of this inconsistency on two (2) separate occasions in the form of letters from Plaintiffs' counsel on September 11, 2006 (R. 1284-5) and again on October 17, 2006. (R. 1283) Despite being advised of its inconsistent handling of the claims of its insureds in close proximity to each other, Nationwide held firm in its denial of the Robichaux claim. Nationwide has continued to ignore its handling of other similarly situated claims.

B. Course of Proceedings Below

This matter was originally filed in the Circuit Court of Jackson County on October 26, 2006. (R. 46-94) Shortly thereafter, Nationwide had the matter removed to the United States District Court for the Southern District of Mississippi largely on the basis that Defendant Jay Fletcher Insurance was improperly joined. (R. 35) This argument was ultimately rejected by the Southern District and the case was remanded back to the Jackson County Circuit Court. (R. 302) Because all Circuit Court judges for Jackson County recused themselves from Katrina-related matters, this case was assigned to Special Judge Billy G. Bridges.

In anticipation of trial, the parties filed a total of thirty-two (32) pre-trial motions including Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for

Summary Judgment. Plaintiffs' motion argued that the ACC provision conflicted with the Hurricane Coverage and Deductible Provision Endorsement and that the ambiguity created by the two should be resolved in Plaintiffs' favor. (R. 954-993) For its part, Nationwide sought summary judgment on the basis of the effect and enforceability of the ACC provision as it related to the loss of the Robichaux home. (R.473-920)

1. September 2, 2009 Hearing

On September 2, 2009, the parties presented oral arguments on Plaintiffs' Motion for Partial Summary Judgment and partial oral arguments on Defendants' Motion for Summary Judgment. At the conclusion of oral arguments on Plaintiffs' motion, Judge Bridges said, "All right. What you're saying is that it's ambiguous when you read the two provisions, and I think so, too. I'm going to grant your motion." Hrg. Transcr. 15:14-17 (Sept. 2, 2009).

At this point, the trial court heard arguments on another motion and after denying same, the court entertained arguments on Defendants' Motion for Summary Judgment. Nationwide's Motion for Summary Judgment was multi-faceted and sought summary judgment on virtually every policy provision. In an effort to reduce confusion at the hearing, the parties addressed each argument before moving to the next. This pattern held up until, at the conclusion of Nationwide's argument regarding Plaintiffs' claims for equitable estoppel and equitable reformation for fraud, the following exchange occurred:

> JUDGE BRIDGES: Are you through?
>
> MR. ATTRIDGE (Counsel for Nationwide): No, Your Honor.
>
> JUDGE BRIDGES: -- as to that, your summary judgment?
>
> MR. ATTRIDGE: As to equitable estoppel, equitable reformation of fraud, yes, I've finished all of that if he wants to address that.
>
> MR. BARIA (Counsel for Plaintiffs): Very briefly, Your Honor.
>
> JUDGE BRIDGES: I thought you had.

MR. BARIA: No, sir, not those particular issues.

JUDGE BRIDGES: All right.

Id. at 94:17-95:3. At this point, Plaintiffs' counsel offered its argument on the subject of equitable estoppel and equitable reformation of fraud followed by Defendant's reply. As the parties were preparing to move to the remaining portions of Nationwide's motion, Judge Bridges abruptly stated:

> JUDGE BRIDGES: Okay. I'm going to grant your motion, but I will rehear any motion that might change the circumstances as a result of the *Corban* case being finally adjudicated. I don't know—I don't know how it would change this, but I would—I would be open to hearing this again if – if the Supreme Court decides differently than what we've heard today."

Id. at 100:21-29. Plaintiffs' understanding that the trial court was only granting those equitable portions of Nationwide's motion was immediately obvious as Plaintiffs' counsel replied:

> MR. BARIA: Well, Your Honor, I don't think anything—and I don't know the *Corban* case inside and out, but I don't think anything the *Corban* court has before it will impact on the issue of the agent's responsibility under a fraud claim, but I could definitely be wrong.

Id. at 101:1-7. Moments later confusion washed over the proceedings as, without hearing the rest of Nationwide's argument on its own motion, Judge Bridges continued:

> JUDGE BRIDGES: All right. My ruling stands, though.
>
> MR. ATTRIDGE: Granting summary judgment to the defendants?
>
> JUDGE BRIDGES: Yes. Okay. What's the next one?
>
> MR. ATTRIDGE: Judge, I think that moots all the other motions if summary judgment has been granted in the defendants' favor.
>
> MR. BARIA: It's on the issue of – as I understand the Court, its (sic) on the issue of equitable estoppel, equitable reformation of fraud.
>
> JUDGE BRIDGES: Yeah. Yeah. The ones you argued—why would you—what other motions would it cover?

MR. ATTRIDGE: Well, all of the coverages, Your Honor, we argued all of the coverages.

JUDGE BRIDGES: Yeah. So which ones would those be, for the benefit of the record?

MR. ATTRIDGE: Well, we argued all of the coverages under the policy, including Coverages A, B, C, and D and K and any other coverages that plaintiffs would claim.

MR. JONES: I think, just to be clear—

MR. ATTRIDGE: Just let me finish if I could.

MR. JONES: Okay.

MR. ATTRIDGE: And we also argued with respect to constructive trust and unjust enrichment.

JUDGE BRIDGES: Yeah.

MR. ATTRIDGE: And then we just finished the argument with respect to equitable estoppel and reformation of fraud. And the plaintiffs had previously indicated they were not going to contest our Motion for Summary Judgment on Injunction, Specific Performance and Indemnity Claims.

MR. BARIA: Your Honor, I think counsel misunderstood the Court's ruling on this, and there are at least six issues as I pointed out when I first began my argument. We were only arguing organizing one of those six issues in that last portion of the argument, and my understanding is that's what the Court was granting summary judgment on, that one particular issue concerning equitable estoppel, equitable reformation of fraud, those claims in the complaint.

JUDGE BRIDGES: Yeah.

MR. BARIA: The Court said it wasn't going to reach the bad faith portion of the summary judgment today. So those are issues that we haven't even argued at this point. And then there are the issues concerning policy coverages that we argued before our break. There's an issue of constructive trust, unjust enrichment, and then we conceded the two that counsel advised the Court and we earlier advised the Court we were conceding.

JUDGE BRIDGES: I'm not sure that I'm smart enough to understand what you argued and what I need to rule on. I'm certainly ruling on the—I think I'm ruling on the unjust enrichment aspect of it. Do you have a—do you have that motion with the attachments so that I can kind of look at it? I'm sorry, I didn't—either one of you.

MR. ATTRIDGE: We will. Just a second, Your Honor.

MR. JONES: Here's the Summary Judgment Motion, Your Honor.

MR. ATTRIDGE: That's the attachments.

JUDGE BRIDGES: Se we've covered—okay. As to Coverage A, B, C and D, it's granted. The motion is granted. As to number, Roman Numeral II, the constructive trust and unjust enrichment, the motion is granted.

Now, I might have to be reminded about the specific performance, injunction and specific performance.

MR. BARIA: We conceded that portion of the motion, Your Honor.

JUDGE BRIDGES: All right. And as to Roman Numeral IV?

MR. BARIA: We conceded that portion of the motion.

JUDGE BRIDGES: Okay. All right. You didn't concede as to Roman Numeral V—

MR. BARIA: No, sir.

JUDGE BRIDGES: --equitable estoppel. Okay. My ruling applies to that. And that—

MR. BARIA: Well, Your Honor, somebody can correct me if I'm wrong, but if that's the Court's ruling, then you've granted summary judgment on all claims, because without actual damages, I'm not sure that we can go forward with a bad faith case under Mississippi law, so you've just ended the case.

Id. at 102:19-106:12.

The uncertainty and confusion of the moment persisted when the trial court inquired as to remaining motions and the upcoming trial date and finally, addressed the court's oral approval of two competing motions for summary judgment:

JUDGE BRIDGES: Does that get all the motions then?

MR. BARIA: Well, there's no case left. So we don't have to go into motions in limine. You just granted a summary judgment on all issues.

JUDGE BRIDGES: All right. Okay. Off the record.

(Off the record.)

JUDGE BRIDGES: Both sides will submit findings of fact and conclusions of law. You want to be first?

MR. ATTRIDGE: Or simultaneous.

JUDGE BRIDGES: Okay. Simultaneously, then. Ten days enough? Two weeks? We're getting—

MR. BARIA: Two weeks is fine.

JUDGE BRIDGES: We're getting to the date of the trial of this case, so—

MR. BARIA: Your Honor, I am very confused now. I don't understand what the Court is doing. There won't be a trial if you've granted summary judgment on all issues. That's why we don't need to take up the motions in limine. And I'm afraid the Court—you first granted our Motion for Summary Judgment.

JUDGE BRIDGES: Uh-huh.

MR. BARIA: In that the policy, itself, is ambiguous and should be construed in favor of the insureds. And then we've gone through the defendants' Motion for Summary Judgment which you've just granted in whole.

So I don't think the two are necessarily in agreement, and there—

JUDGE BRIDGES: Well, they may not be. Well, give me your—

MR. ATTRIDGE: They certainly—we, obviously, respectfully disagree with the earlier ruling by the Court, but it doesn't in any way indicate that the Court's ruling is incorrect with respect to our summary judgment option.

JUDGE BRIDGES: Well—

MR. ATTRIDGE: So back to the Court's question, we're happy to submit proposed findings and conclusions—

JUDGE BRIDGES: Do that.

MR. ATTRIDGE: -- simultaneously or in sequence, whatever the Court prefers.

JUDGE BRIDGES: Let me have it in 10 days, and I could reverse some ruling, but I think I understand, fully, what you've argued here today, and I think my ruling is correct. If you want to show me differently in your findings and conclusions, I'll be glad to reconsider it, but that's my ruling at this point.

MR. ATTRIDGE: And in light of that, I agree with Mr. Baria that the trial date is off.

JUDGE BRIDGES: Yeah. Okay.

MR. ATTRIDGE: Thank you for your time and attention, Your Honor.

JUDGE BRIDGES: Yes, sir, all right. Thank you.

Id. at 106:26-109:5.

2. Findings of Facts, Conclusions of Law and Judgment

On October 5, 2009, the Court entered its Findings of Facts, Conclusions of Law and Judgment denying Plaintiffs' Motion for Partial Summary Judgment, granting Defendants' Motion for Summary Judgment, and rendering judgment in favor of the Defendants. (R. 2002-2017) In his lengthy opinion, Judge Bridges acknowledged that at the time of the hearing, he granted Plaintiffs' Motion for Partial Summary Judgment but had since changed his mind. Oddly, the trial court provided no explanation for this reversal, save the following conclusory statement, "Upon consideration, the Court reverses and withdraws its ruling on Plaintiff's' (sic) Motion for Summary Judgment, and denies said motion." (R. 2003) To this date, the only substantive utterance by the trial court on the subject of Plaintiffs' contention that Nationwide's insurance contract is ambiguous is the court's statement of agreement during the September 2, 2009 hearing.

The trial court's judgment in this matter is largely a coverage by coverage denial of Plaintiffs' claim. However, there are two notable findings made early in the conclusions of law section that seem to frame the case for the trial court. First, the court states that Plaintiffs' cannot prove their case because "[t]here were no eyewitnesses to the damage to the Robichaux home during Hurricane Katrina." (R. 2008)[2] Second, the trial court provides its truncated view of burden of proof in these matters, namely, that it is plaintiffs who must not only provide evidence

[2] There can be no mistaking that the trial court is under the impression that in order to prevail, Plaintiffs would have to offer eyewitness testimony. During the September 2, 2009 hearing, Judge Bridges asked Plaintiffs' attorney, "Well, do you have—are you going to have proof or do you have proof that somebody saw the wind do damage before the water?" Hrg. Transcr. 52:7-10 (Sept. 2, 2009). Several minutes later, the trial judge broached the subject of eyewitnesses again asking, "Well, how are you going to show that? What witness have you got to say that during some time that rain came in and destroyed the contents rather than the surge?" *Id.* at 66:5-9.

of a direct, physical loss to property but must also connect that loss to a condition or event covered in the policy. (R. 2009)[3]

On October 9, 2009, Plaintiffs filed their Motion to Reconsider directing the trial court's attention to this Court's ruling in *Corban v. USAA*, 20 So.3d 601 (Miss. 2009). (R. 2018-2022) On December 28, 2009, the trial court entered its Order denying Plaintiffs' motion without reference to *Corban.*

The lower court ruling in this matter ignores this Court's precedent in hurricane related cases and has the potential to deprive Mississippi homeowners of essential insurance coverage. This case now comes on direct appeal to this Honorable Court.

III. SUMMARY OF THE ARGUMENT

Plaintiffs advance five distinct reasons reversal of the lower court decision is merited. Each alternative argument provides a sufficient basis for reversal of that decision. At the same time, each issue carries significant, adverse, and erroneous consequences for Mississippi citizens in a variety of circumstances. While reversal is appropriate if Plaintiffs prevail on any one ground, the public would benefit from this Court's pronouncement of Mississippi law on each issue.

A. THE "HURRICANE COVERAGE AND DEDUCTIBLE PROVISION" AND THE "ANTI-CONCURRENT CAUSATION PROVISION" OR "WEATHER CONDITIONS" EXCLUSION, WHEN CONSIDERED TOGETHER, CREATE AN AMBIGUITY WHICH SHOULD BE RESOLVED IN FAVOR OF THE INSUREDS.

The policy issued by Nationwide in this matter contains both an ACC clause and Hurricane Coverage and Deductible Provision Endorsement. Nationwide's denial of coverage

[3] The concept of burden of proof in instances where insureds suffer a total loss was obviously problematic for the trial court as evidenced by this question to Plaintiffs' counsel during the September 2, 2009 hearing, "Well, whose burden is it to show the wind damage loss?" Hrg. Transcr. 53:23-24 (Sept. 2, 2009).

on the basis of its ACC clause is invalid in light of its endorsement specifically granting hurricane coverage. Simply stated, Nationwide cannot give with one hand what it takes away with the other.

B. WITH RESPECT TO AN "ALL RISK" HOMEOWNER'S POLICY CONTAINING AN ACC CLAUSE, THE INSURANCE COMPANY BEARS THE BURDEN OF PROVING THAT THE CAUSE OF LOSS IS EXCLUDED BY THE POLICY.

In light of this Court's recent pronouncement on the subject, an insurance company's burden, in the context of an all risk policy, to demonstrate that a particular part of a loss is excluded, is a settled point of law. The lower court's opinion that insureds must show precisely how their property was damaged threatens to undo the important work of this Court in establishing burden of proof in these matters. As in all cases of this kind, Nationwide must meet its burden. If the insurance company cannot demonstrate whether wind or water caused any particular part of the loss, it owes for the entire loss.

C. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE ACC CLAUSE

In its Judgment, the trial court has adopted the position that any loss that storm surge would have caused, irrespective of previous damage, is excluded. The trial court has disregarded this Court's holdings regarding independent wind damage and instead adopted wholesale the reasoning offered by Nationwide in its recent appearance before this Court. The outcome of Plaintiffs' claim should be a question of delineating which losses can be justifiably excluded under the policy and which losses are compensable.

D. AN INSURANCE COMPANY'S TREATMENT OF ITS POLICYHOLDERS IS RELEVANT TO THAT COMPANY'S TREATMENT OF POLICYHOLDERS WITH LIKE POLICIES IN THE SAME GEOGRAPHICAL AREA.

The record in this case is replete with evidence that Nationwide investigated the claims of Plaintiffs' immediate neighbors to the east and west. Despite finding wind damage in both locations and compensating its policyholders for such damage, Nationwide refused to pay Plaintiffs for any losses. In dismissing the insurance company's own findings of wind damage at locations surrounding Plaintiffs' property, the trial court has endorsed the company's approach to Plaintiffs' claim, namely that Nationwide is on your side—your right side and your left side. Evidence of losses that occurred to neighboring properties that are also covered by a plaintiff's insurer must be relevant to the adjustment of a plaintiff's claim.

E. PLAINTIFFS CLAIMS AGAINST JAY FLETCHER INSURANCE WERE IMPROPERLY DISMISSED

The trial court dismissed Plaintiffs' claims against their insurance agent on the basis that Plaintiffs purchased flood insurance and Nationwide's policy language is clear. In this way, Plaintiffs have been penalized for protecting their primary investment and prevented from moving forward on their claim for questioning the language of a policy that has plagued thousand of homeowners and been the subject of extensive litigation. The weight and worth of Plaintiffs' allegations against their insurance agent should be left for a jury, not prematurely dismissed.

Each of the above reasons, whether considered alone or in their entirety, require a reversal of the lower court's opinion.

IV. ARGUMENT

A. THE "HURRICANE COVERAGE AND DEDUCTIBLE PROVISION" AND THE "ANTI-CONCURRENT CAUSATION PROVISION" OR "WEATHER CONDITIONS" EXCLUSION, WHEN CONSIDERED TOGETHER, CREATE AN AMBIGUITY WHICH SHOULD BE RESOLVED IN FAVOR OF THE INSUREDS.

On September 9, 2004, Plaintiffs entered into a contract for homeowners' insurance with Nationwide. The subject policy contains language commonly referred to as the "Anti-Concurrent Causation Provision" or "Weather Conditions" exclusion. Nationwide has characterized its ACC provision as preventing any recovery for wind damage when the insured property also sustains damage caused by another weather condition.

Incorporated into the subject policy and made part and parcel of the insurance contract was a "Hurricane Coverage and Deductible Provision Endorsement" (hereinafter "Hurricane Endorsement"). (R. 182) The Hurricane Endorsement specifically grants hurricane coverage and contradicts the ACC provision by rejecting theories of anti-concurrent causation and instead declaring coverage where the "direct force of [a] windstorm ***first*** damages [a] building causing an opening through which [other weather events enter] and [cause] damage." (emphasis added).

The ACC provision is invalid in light of the Hurricane Endorsement which specifically grants hurricane coverage. Taken together, these provisions are inconsistent. Further, the total elimination of coverage for losses caused by tandem weather events is contrary to any reasonable interpretation of the subject insurance policy or any policy that purportedly covers the peril of windstorm. Finally, the Plaintiffs reasonably expected that the subject endorsement provided the coverage it purported to provide, namely that coverage referenced in its title, "Hurricane Coverage".

1. Mississippi Contract Law

Under Mississippi law, "[t]he initial question of whether the contract is ambiguous is a matter of law, while the subsequent interpretation of an ambiguous contract is a finding of fact." *Phillips v. Enterprise Transp. Service Co.*, 988 So.2d 418, 421 (Miss. App. 2008). It is black letter law in Mississippi that, "ambiguities in a contract are to be construed against the party who drafted the contract." *Thomas v. Scarborough*, 977 So.2d 393, 398 (Miss. App. 2007) (citing

Mason v. Mason, 919 So.2d 200, 204 (Miss. App. 2005). Applying this law to insurance contracts, this Court has held that, "[t]here is an ambiguity in an insurance contract when the policy can be interpreted as having two or more reasonable meanings." *Mississippi Farm Bureau Cas. Ins. Co. v. Britt*, 826 So.2d 1261, 1265 (Miss. 2002)(citing *Universal Underwriters Ins. Co. v. Ford*, 734 So.2d 173, 176 (Miss. 1999). Mississippi law has ruled that "[i]nsurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties, with any ambiguities interpreted liberally in favor of the insured." *Lewis v. Allstate Ins. Co.*, 730 So.2d 65, 70 (Miss. 1998).

2. Nationwide's HO-23 Homeowner's Policy and its Hurricane Endorsement

The ACC provision contained in Nationwide's HO-23 Homeowners Policy appears in a section titled "Property Exclusions" on page D-1 of the policy. This provision states in pertinent part:

> Property Exclusions
> (Section 1)
> 1. We do not cover loss to any property resulting directly or indirectly from any of the following. ***Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.***
> ***
> (b) Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne materials damage means:
> (1) flood, surface water, waves, tidal waves, overflow of a body of water, spray from these whether or not driven by wind;
> ***
> 2. We do not cover loss to any property resulting directly or indirectly from the following if another excluded peril contributes to the loss:
> ***
> (c) Weather conditions, if contributing in any way with an exclusion listed in paragraph 1. of this Section.

(emphasis added) (R. 138-9)

The H-6107 Hurricane Coverage and Deductible Provision Endorsement states in pertinent part:

> **Hurricane Coverage**
> Coverage under this policy includes loss or damage caused by the peril of windstorm during a hurricane. It includes damage to a building's interior or property inside a building, caused directly by rain, snow, hail, sand or dust if direct force of the windstorm ***first*** damages the building causing an opening through which the above enters and causes damage.

(emphasis added). (R. 168)

Nationwide claims that the ACC provision in its homeowners policy prevents any recovery for wind damage when an insured property also sustains flood damage. Nationwide's interpretation of its ACC provision; that it excludes losses caused by wind where damage is also caused by water or flood, stands in direct conflict with the plain language of its Hurricane Endorsement which provides coverage for losses caused by wind where wind damage proceeds another peril or weather event. Therefore, Nationwide's reliance on its "weather exclusion" is invalid in light of the endorsement specifically granting hurricane coverage.

The inclusion of these two conflicting provisions in the Plaintiffs' homeowners policy creates an ambiguity which must be resolved in favor of the Plaintiffs. As a result, the Nationwide policy provides windstorm coverage as defined and provided for in the Hurricane Endorsement. This endorsement includes the companion statements: 1) "Please attach this important addition to your policy"; and 2) "For the premium charged, the policy is amended as follows." As Nationwide alone was responsible for the drafting of its insurance policy and the confection of its endorsements, the inclusion of this endorsement makes it part of the policy and an enforceable provision in the insurance contract. *State Farm Mut. Auto. Ins. Co. v. Scitzs*, 394 So.2d 1371 (Miss. 1981); *Progressive Gulf Ins. Co. v. We Care Day Care Center*, 953 So.2d 250 (Miss. App. 2006).

3. *Dickinson v. Nationwide*

Nationwide has already argued this issue before the United States District Court for the Southern District of Mississippi in *Dickinson v. Nationwide Mutual Fire Insurance Co., et al.*; 2008 WL 941783 (S.D. Miss.) In *Dickinson*, the District Court found that "Nationwide's reliance on its 'weather exclusion' is invalid in light of the endorsement specifically granting hurricane coverage. These provisions are, in my opinion, inconsistent, and the elimination of coverage for losses in which 'weather' plays a part is contrary to any reasonable interpretation of this policy or any policy that covers the peril of windstorm." (R. 989-90)

As noted above, the trial judge seemed to agree with Judge Senter's position at the time of the hearing on this matter when he said, "All right. What you're saying is that it's ambiguous when you read the two provisions, and I think so, too. I'm going to grant your motion." Hrg. Transcr. 15:14-17 (Sept. 2, 2009). Interestingly, the trial court's reversal on this point was stated without explanation, "Under reconsideration, the Court reverses and withdraws its ruling on Plaintiff's' (sic) Motion for Summary Judgment, and denies said motion." (R. 2003)

This Court should adopt the Southern District's position and the trial court's original position that Nationwide's contract is ambiguous.

B. WITH RESPECT TO AN "ALL RISK" HOMEOWNER'S POLICY CONTAINING AN ACC CLAUSE, THE INSURANCE COMPANY BEARS THE BURDEN OF PROVING THAT THE CAUSE OF LOSS IS EXCLUDED BY THE POLICY.

Among the more erroneous rulings in the lower court's Judgment is its pronouncement regarding burden of proof. On this subject the court states:

> Plaintiffs relied during the September 2, 2009 hearing on the assertion that they had no burden to demonstrate wind damage under Mississippi law; however, "[t]he burden of proving that coverage exists for a peril under an insurance policy rests with the policyholder." *Leonard v. Nationwide Mut. Fire Ins. Co.*, 499 F.3d 419, 429 (5th Cir.2007), *cert denied* 128 S. Ct. 1873.

(R. 2009) The trial court's holding on this point is troubling both for its inaccurate characterization of Plaintiff's arguments at the September 2, 2009 hearing and for its mischaracterization of long standing Mississippi law regarding burden of proof, most notably this Court's recent holding in *Corban*. *Corban*, 20 So.3d 601, 619 ¶ 51.

In discussing burden of proof during the September 2 hearing, the following exchange occurred between the trial court and an attorney for the Plaintiffs:

> JUDGE BRIDGES: Well, whose burden is it to show the wind damage loss?
>
> MR. BARIA: Well, Your Honor, we show that there is a loss under the policy, under an all perils policy. The burden is on the defendant insurance company to prove that the loss was caused by an excluded peril, and they can't show that the whole loss was caused by an excluded peril in this case.

Hrg. Transcr. 53:25-54:2 (Sept. 2, 2009). This statement is consistent with this Court's holding in *Corban*, which reasoned,

> This Court finds that with respect to the "all-risk" coverage of "Coverage A-Dwelling" and "Coverage B- Other Structures," the Corbans are required to prove a "direct, physical loss to property described." Thereafter USAA assumes the burden to prove, by a preponderance of the evidence, that the causes of the losses are excluded by the policy, in this case," [flood] damage.

Corban, 20 S0.3d 601, 619 ¶ 51.

1. "All Risk" Basics and the Policyholder's Burden

The pertinent facts are not disputed. This Nationwide policy is an "all risk" policy as to dwelling coverage, as its contractual coverage provision states, "We cover accidental direct physical loss to property described in Coverages A and B except for losses excluded under Section I—Property Exclusions." (R. 136) As explained in *Couch*, "traditional policies—sometimes called 'named perils' or 'specific perils' policies—exclude all risks not specifically included in the contract, while 'all risk' policies take the opposite approach—all risks are included in the coverage unless specifically excluded in the terms of the contract." *See 7 Couch on Insurance*, § 101:7 (3 ed. 2005).

Under well established principles regarding "all risks" policies, once the insured demonstrates a loss to the covered property, the burden of proof shifts to the insurer to establish that the loss falls within an exclusion. *Id.* at 17 § 254:15. The insured assumes "the burden of showing a fortuitous loss," with "the insurer then assuming the obligation to show the applicability of any named exclusions." *Id. Couch* is again helpful: "the insured has the initial burden of showing the existence of a loss under an 'all risk' policy with the burden then shifting to the insurer to show exceptions to coverage." *Id.* at 10 § 148:52.

All risk insurance was created "for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surround the (loss of or damage to) property." *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980), quoting, *Atlantic Lines Limited v. American Motorists Ins. Co.*, 547 F.2d 11, 13 (2nd Cir. 1976). While legal decisions discuss the various "burdens of proof" that apply at trial, insurance disputes should be resolved without the necessity of years of protracted litigation. When a claim is being handled, the insurer has the responsibility of paying claims covered under the contract of insurance written by it. It is inconsistent with the protective purpose of "all risk" insurance to require the insured to establish the precise cause of the loss or damage. *Morrison Grain, supra.* Clearly, under an all risk policy, "the insured is not required to negate each of the policy exceptions in order to recover"; instead, the insurer has the burden of proving an exclusion of coverage exists. *Id.* at n. 16.

It was erroneous for the lower Court to conclude that the Plaintiffs did not meet their burden of proving a loss under the policy. That Plaintiffs suffered a complete direct physical loss is not disputed by Nationwide. Upon showing that their home was completely destroyed during Hurricane Katrina, it was improper for the trial court to then require Plaintiffs to prove that that their loss was caused entirely by wind. At this point, the proper inquiry for the trial

court would have been whether Nationwide could demonstrate the application of one or more of its exclusions. Even then, the strength of Nationwide's proof is a determination that should be left for a jury. The lower court both misinterpreted and misapplied the law in this respect.

2. Nationwide Cannot Meet Its Burden

It is undisputed that Plaintiffs' home suffered a direct physical loss during Hurricane Katrina. Thus, all damage to Plaintiffs' home is covered under Nationwide's insurance policy unless Nationwide can establish the applicability of a valid exclusion. Mississippi law is clear that the burden to prove that an exclusion applies falls on the insurer. *Corban*, 20 S0.3d 601, 619 ¶ 51 (Miss. 2009); *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777, 782 (Miss. 1971); *see also Britt v. Travelers Ins. Co.*, 566 F.2d 1020, 1022 (5th Cir. 1978)(comparing burden in all risk policy [*Byrne*] to burden under "named perils" policy) (*Lunday v. Lititz Mutual Ins. Co.*, 276 So.2d 696 (Miss. 1973)).

The Mississippi Department of Insurance issued several bulletins in the wake of Hurricane Katrina. These bulletins served as claim handling directives for insurance companies. Among the bulletins issued by the Department was Mississippi Insurance Bulletin 2005-6 issued on September 7, 2005. (R. 1272) This Bulletin does not contemplate application of an ACC clause or scenario where water damage is excluded where such damage contributes "concurrently or in any sequence to cause the loss." (R. 1272) Instead, the Bulletin directs that "in instances where the insurance company believes the damage was caused by water, I expect the insurance company to be able to prove to this office and the insured that the damage was caused by water" and that "where there is any doubt, that doubt will be resolved in favor of finding coverage on behalf of the insured." (R. 1272) As explained more fully below, Nationwide adopted Mississippi Insurance Bulletin 2005-6 and directed its claims personnel to clearly establish that damage was "caused by water and not wind" before it issued a denial. This

is significant because there is no question that Plaintiffs' claim presented a situation identical to that described in Bulletin 2005-6 as nothing was left of Plaintiffs' claim.

Also, Nationwide's own engineers, HAAG Engineering Company, have suggested that wind damage occurred prior to the rise of water. The Haag report, in referencing damage to the home directly to the east of the Plaintiffs' home, noted, "Some wind damage was noted to the roof shingles on this home." (R. 1277:¶3) Further, the HAAG report in concluding its assessment of the damage caused to Plaintiffs' home noted, "Wind damage, is any, would have been limited to cladding items such as roof shingles." (R. 1278:¶7) The engineer who examined the subject property on behalf of the Plaintiffs found that winds damaged the Plaintiffs' home prior to the arrival of storm surge. (R. 1287)

Notably, Nationwide, through its 30(b)(6) designee Charles Higley, has acknowledged that the company cannot say that no wind damage occurred at the Plaintiffs' home during Hurricane Katrina. During his deposition, Mr. Higley stated, "Well, we don't know if there's any wind damage in that the home was totally destroyed,--" (R.1388, Deposition page 88:11-12) Continuing, Mr. Higley stated, "—so we don't know what happened, if any, but—and the other thing I make of that is that wind would most likely damage things that would be most susceptible to wind damage, the weakest elements of the house, and those type things are typically a cladding item." (R. 1388, Deposition page 88:14-19) Rather than compensating Plaintiffs for losses it could not account for, Nationwide rejected Plaintiffs claim and stubbornly relied on its tortured reading of its ACC clause. (R. 1388-9, Deposition page 88:7-89:12; R. 1393, Deposition page 108:13-20; and R. 1405, Deposition page 154:2-10)

Under the terms of its contract with the Plaintiffs, Nationwide is obligated to pay the full amount for direct physical losses to Plaintiffs' property unless and until it can prove that a portion of those losses was caused by an exclusion under the policy. It is insufficient for

Nationwide to argue, as it has repeatedly, that Katrina's storm surge was ultimately sufficient to cause damage to the Plaintiffs' home.

C. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE ACC CLAUSE

1. The ACC clause has no application for losses caused by wind

In addressing the ACC clause contained in Plaintiffs' policy, the trial court adopted the precise position rejected by this Court in *Corban*. On this subject, the trial court held:

> Further, even had Plaintiffs offered competent evidence of wind damage, there is no dispute that it would have occurred "concurrently or in any sequence" with flood damage. When Mr. Robichaux last saw his property, even though there was no apparent wind damage, there was already a foot and a half of water. And Mr. Mott concluded that, had there been any wind damage, it would "have been still occurring as the storm surge was arriving." Thus, any wind damage would have been excluded under Plaintiffs' policy language. *Leonard*, 499 F.3d at 430. As a result, Defendants would be entitled to summary judgment even if there were evidence of wind damage. Miss. R. Civ. P. 56(c).

(R. 2009-10) Aside from the fact that the trial court disregarded all evidence of wind damage, the court essentially stated that any loss that storm surge would have caused anyway is excluded. This is the same position urged upon this Court by Nationwide in *Corban,* in which this Court stated:

> We conclude that the ACC clause has no application for losses caused by wind peril. An insurer may not abrogate its duty to indemnify for such loss by the occurrence of a subsequent, excluded cause or event, a position advanced by *amicus* Nationwide. According to Nationwide, the loss occurred in the same event, which they contend was a hurricane. Nationwide unconvincingly posits that loss is not determined until the hurricane is over. Nationwide contends that any loss which the "storm surge" would have caused anyway is excluded. Such an interpretation fails to consider the common understanding of "loss," and would avoid payment for covered "losses," an unreasonable result. Such an interpretation is contradicted by the principle that all "[e]xclusions and limitations on coverage are . . . construed in favor of the insured."
> *Martin*, 998 So.2d 963.

Corban, 20 So.3d at 616-7 ¶46.

By ignoring *Corban* and taking the position that the timing of storm events and an insurance company's ability to show proof thereof is immaterial, the trial court rejects this Court's analysis on the meaning of "concurrence" in insurance policies:

> We respectfully reject the proposition that, under the subject ACC clause, "indivisible damage caused by both excluded perils or other causes is not covered." *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 353, 354 (emphasis added). We neither agree nor find support for an analysis focusing on "damage" rather than "loss," or the premise that "storm surge" flooding which inundates the same area that the wind, acting independently, previously damaged constitutes "indivisible damage" or "the same damage...." *See Tuepker*, 507 F.3d at 354; *Leonard*, 499 F.3d at 431. Only when facts in a given case establish a truly "concurrent" cause, i.e., wind and flood simultaneously converging and operating in conjunction to damage the property, would we find, under Mississippi law, that there is an "indivisible" loss which would trigger application of the ACC clause.

Id. at 618 ¶48.[4] Nationwide offered no evidence that wind and water converged to cause Plaintiffs' loss. Therefore, as in *Corban*, the outcome of Plaintiffs' claim should have been a question of delineating which losses could be justifiably excluded under the policy and which losses were compensable. Instead, Nationwide simply determined that because Plaintiffs' home experienced flooding, the entire claim would be denied. The lower court incorrectly agreed that Nationwide's denial under the ACC clause was proper.

2. Nationwide's ACC clause is contrary to public policy and thus, void.

Nationwide's ACC clause is void and unenforceable because it violates the public policy of the State of Mississippi as established by the Mississippi Legislature. In 1987, the Mississippi Legislature passed the Mississippi Windstorm Underwriting Act contained in § 83-34-1 *et. seq.* The legislative history provides:

> The Legislature of the State of Mississippi hereby declares that an adequate market for windstorm and hail insurance is necessary to the economic welfare of the State of Mississippi and that without such insurance the orderly growth and development of the State of Mississippi will be severely impeded; that furthermore, adequate insurance

[4] Plaintiffs' counsel went to great lengths to make the trial court aware of this Court's holdings in *Corban* in its Motion to Reconsider. (R. 2018-22)

> upon property in the coast area is necessary; and that while the need for such insurance is increasing, the market for such insurance is not adequate and is likely to become less adequate in the future. ***It is the purpose of this act to provide a mandatory program to assure an adequate market for windstorm and hail insurance in the coast area of Mississippi.***

(Emphasis added). As it existed at the time of Hurricane Katrina, this act declared that "essential property insurance" would be defined as "insurance against direct loss to property as defined and limited in the Windstorm and Hail Insurance form approved by the commissioner." § 83-34-1(a). The "Windstorm and Hail Insurance form" approved by the Commissioner, and in force at the time of Hurricane Katrina, is known as Mississippi No. 4001. This form, decreed to be "essential property insurance" to which all Mississippi Gulf Coast residents are entitled, provides for coverage for "direct loss by windstorm and hail". Although it contains a water exclusion clause, the minimum allowed policy does not contain an ACC, or any reference to damage which occurs "in any sequence".

In short, through the Mississippi Windstorm Underwriting Act, the Mississippi Legislature declared that each citizen of the Mississippi Gulf Coast is entitled to a bare minimum of "essential property insurance" and that such minimum insurance is necessary to the "economic welfare of the State of Mississippi". Furthermore, by decreeing Form 4001 to be the minimum standard, the legislature declared that the "essential property insurance" ***shall not*** contain an ACC clause which could operate to deprive Gulf Coast residents of required coverage from the effects of devastating hurricanes. Because the ACC clause contained in Nationwide's policy violates Mississippi public policy, it must be stricken and not considered or enforced, at least in the context of hurricane claims. Mississippi law is clear that it will not enforce insurance provisions that are contrary to public policy. *Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So.2d 777, n. 3 (Miss. 2004).

The Mississippi Windstorm Underwriting Act applies explicitly to the rights of Gulf Coast residents with respect to coverage for hurricanes. Thus, Mississippi public policy relating to coverage from hurricane damage cannot be fairly determined without reference to this Act and its legislative history. Because Nationwide's ACC clause is unenforceable under Mississippi public policy, the efficient proximate cause doctrine applies in full force and effect and covers all of Plaintiffs' Hurricane Katrina damages.

3. Nationwide's ACC clause is inapplicable because Nationwide chose to broaden coverage.

Page L1 of Nationwide's policy states as follows:

> 1. HOW YOUR POLICY MAY BE CHANGED
>
> a) Any part of this policy which may be in conflict with statutes of the state in which this policy is issued is hereby amended to conform.
>
> b) Any **insured** will automatically have the benefit of any broadening of coverage in this policy, as of the effective date of the change, provided it does not require more premium.
>
> c) A waiver or change of a part of this policy must be in writing by **us** to be valid. **Our** request for an appraisal or examination does not waive **our** rights.

(emphasis theirs). It is noteworthy that the phrase "in writing by us" is not defined in the policy nor is it accompanied by any requirement that the change be signed by an officer of Nationwide.

The Mississippi Department of Insurance issued several bulletins in the wake of Hurricane Katrina. In many cases, these bulletins served as claim handling directives for insurance companies. Nationwide's records show that representatives from the company sent an e-mail to its claim personnel, dated September 9, 2005, instructing personnel to "read and comply" with Mississippi Insurance Bulletin 2005-6. Similarly, Nationwide disseminated Insurance Bulletin 2006-2 to its claim personnel in an e-mail from Bill McKinley with instructions to follow the directives set forth therein.

Mississippi Insurance Bulletin does not contemplate application of an ACC clause or a scenario where water damage is excluded where such damage contributes "concurrently or in

any sequence to cause the loss." Instead, the Bulletin directs that "in instances where the insurance company believes the damage was caused by water, I expect the insurance company to be able to prove to this office and the insured that the damage was caused by water", and that "where there is any doubt, that doubt will be resolved in favor of finding coverage on behalf of the insured."

There is no question that the Plaintiff's claim presented a situation identical to that described in Bulletin 2005-6 as nothing was left of the Plaintiffs' structure following Hurricane Katrina.

Nationwide chose to adopt and apply Insurance Bulletins 2005-6 and 2006-2 to the Plaintiffs' claims, made its adoption of these directives in writing, and did not require the Plaintiffs to pay any additional premiums to receive the benefits of these directives. By managing the claims handling process in this manner, Nationwide tacitly adopted these directives and expanded its insurance policy. Its efforts in the handling of the Plaintiffs' claim and in the present motion is in direct conflict with the directives urged by the Mississippi Department of Insurance. This ambiguity, as all others that occur under Mississippi insurance law, must be resolved in favor of the insured.

D. AN INSURANCE COMPANY'S TREATMENT OF ITS POLICYHOLDERS IS RELEVANT TO THAT COMPANY'S TREATMENT OF POLICYHOLDERS WITH LIKE POLICIES IN THE SAME GEOGRAPHICAL AREA.

The lower court, in its Findings of Fact, Conclusions of Law and Judgment, goes to great lengths to demonstrate that Plaintiffs produced no evidence that wind related damage ever occurred at their home. In addition to offering an improper interpretation of the burden of proof in these matters and ignoring the findings of Nationwide's own engineers and Plaintiffs' experts,

the trial court fails to respond to the material relating to Nationwide's adjustment of the claims of its policyholders with homes within mere feet of the Plaintiffs' home.[5]

The United States District Court for the Southern District of Mississippi has addressed the question of whether an insurance company's treatment of claims of other policyholders in close proximity is relevant to the analysis of that company's handling of a claim. United States District Judge Senter has stated:

> Nationwide's request to exclude evidence, testimony, or arguments relating to claims other than Plaintiffs' own claims against Nationwide is GRANTED IN PART and DENIED IN PART. Nationwide expects Plaintiffs to attempt to introduce testimony or evidence relating to the treatment of claims submitted by third parties (including those covered by different insurance companies). Such evidence may pose the danger of confusion of the issues, which may tend to mislead the jury and would otherwise cause delay and waste of time. Fed.R.Evid. 403. ***However, to the extent that the Court has also allowed discovery in other cases for losses that occurred to neighboring properties that are also covered by a Plaintiff's insurer, in this case Nationwide, then that evidence may be relevant.***

(emphasis added) *Dickinson v. Nationwide Mut. Fire Ins. Co.*, No. 1:06cv198-LTS-RHW, 2008 WL 2568140, *2 (S.D. Miss. June 24, 2008); *see also Ross v. Met. Prop. & Cas. Ins. Co.*, No. 1:07cv521-LTS-RHW, 2008 WL 4553060, *2 (S.D. Miss. Oct. 9, 2008).

That this material might be germane during an insurance investigation was not a point lost on the Mississippi Department of Insurance in the immediate aftermath of Hurricane Katrina. In Bulletin 2006-2, issued on February 3, 2006, the Department expressly required insurance companies to consider damage to surrounding structures as part of their investigations into causes of loss. (R. 1273)

Nationwide's claims file indicates that the company considered the hurricane damage caused to Plaintiffs' neighbors relevant to their investigation of Plaintiffs' claim. In an interview of Plaintiff Michael Robichaux, conducted by a Nationwide investigator on October 24, 2005,

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[5] This material was referenced both in Plaintiffs' Response to Nationwide's Motion for Summary Judgment wherethe Activity Logs for both neighbors were included and in Plaintiffs' oral arguments during the September 2, 2009 hearing.

the investigator asked, "What happened to your neighbors homes?" (R. 1248) Further, during his 30(b)(6) deposition, Nationwide's Associate Director for Property, Charles Higley, indicated that Nationwide considered surrounding properties as a part of its investigation into the Plaintiffs' claim and that such considerations are part of Nationwide's normal business practice. (R. 1385, Deposition pages 73:18-15:17(Feb. 24, 2009)). Nonetheless, despite this recognition of the value of such evidence, Nationwide simply ignored it in its adjustment of the Robichaux's claim.

1. Nationwide was Inconsistent in its Handling of Plaintiffs' Claim

Prior to the filing of this lawsuit, Nationwide was aware of wind damage to Plaintiffs' property prior to storm surge both in the form of its own engineering report and as a result of its investigation of the claims of Plaintiffs' neighbors who were also Nationwide policyholders. Months before any lawsuit was filed, Nationwide was alerted to its inconsistent handling of the Plaintiffs' claim in light of its handling of the claims of Plaintiffs' neighbors both to their immediate west and east. (R. 1283-5) Despite this information, Nationwide maintained its unjustified position that Plaintiffs' suffered no compensable wind damage. In comparing Plaintiffs' file to that of their neighbors, the unreasonableness of Nationwide's claim handling becomes obvious.

As opposed to its efforts on the Plaintiffs' claim, Nationwide extended the benefit of its policy to the Plaintiffs' neighbors. In those cases, Nationwide looked to indemnify wind damage that preceded storm surge. Most glaring is Nationwide's payment of damages under multiple coverages to neighbors of the Plaintiffs with the same Nationwide policy whose home, like the Plaintiffs, was built on a slab. Nationwide had the benefit of engineers' reports for the Plaintiffs and their neighbors. Despite the fact that each of these reports describe wind damage that preceded storm surge, Nationwide has steadfastly maintained that its all risk policy provides no

coverage for Plaintiffs' losses. (R. 1405, Deposition page 154:2-10), while compensating Plaintiffs' neighbors for identical losses.

Nationwide expressly ignored Plaintiffs' letters and its own handling of claims mere feet from the Plaintiffs' property and has continued to assert an unreasonable and factually unreliable claim position. Nationwide's behavior with respect to the Plaintiffs' Hurricane Katrina claim has demonstrated a blatant disregard for insurance industry standards, the standards of various state licensing authorities, and Nationwide's own internal standards. Nationwide's action with respect to the Plaintiffs' claim placed its policyholders at an unreasonable risk of financial harm and attendant emotional harm. This was not merely a matter of negligent adjustment of a claim. Information was available to Nationwide over one year through the multiple adjusters and claim managers who reviewed the claim and Nationwide had multiple opportunities to correct claim deficiencies. During the course of discovery, Nationwide has both implied and blatantly stated that it would employ the same procedure on future claims.

Nationwide's inconsistent treatment of the Plaintiffs claim was apparent at the beginning of the claims handling process. With respect to Coverage D under Nationwide's policy, Nationwide advanced both neighbors $5,000 for additional living expenses while advancing the Plaintiffs $2,500 in additional living expenses. There is no reasonably justifiable logic for this discrepancy. It is, however, notable that Nationwide issued payment to Plaintiffs under Coverage D considering the company's position that wind damage did not render Plaintiffs' home uninhabitable.

The first adjuster for the Plaintiffs' neighbors, the Walkers, inspected the property and computed a building estimate for wind damage. This adjuster correctly looked for a way to extend coverage in accordance with Nationwide's all risk policy. The handling of the Walkers

claim was, however, the exact opposite of the handling of the Plaintiffs' claim, wherein Nationwide claim handlers went to great lengths to avoid coverage and deny the claim.

During its deposition, Nationwide testified that the Plaintiffs' claim was adjusted in accordance with Nationwide company claims practices and procedures. (R. 1368, Deposition page 7:5-7) In reviewing the neighbors claims, it is clear that Nationwide did not follow these practices and procedures in adjusting the Plaintiffs' claim. In adjusting the neighbors' claims, Nationwide initially advanced twice as much additional living expenses to Plaintiffs' neighbors. In adjusting the neighbors' claims, Nationwide followed the engineering reports which established wind damage prior to storm surge. In adjusting the neighbors' claims, Nationwide expressly considered like damage to neighboring properties. In adjusting the neighbors' claims, Nationwide made substantial wind damage payments including payments to a neighbor whose home was built, like Plaintiffs', on a slab. In short, Nationwide adjusted Plaintiffs' claim with disregard and indifference to the policy, without consideration of its own expert reports, without consideration of the industry goal of extending coverage where possible, and without consideration of Nationwide's express goal of adjusting claims consistently and fairly.

In this case, Nationwide has compelled litigation. On September 11, 2006 and again on October 17, 2006, Plaintiffs' counsel pleaded with Nationwide to provide an explanation of its claim handling in advance of filing a complaint. (R. 1283-5) These letters were ignored prior to the filing of the subject lawsuit. In this way, Nationwide clearly compelled Plaintiffs to litigate this matter to recover amounts reasonably due under the insurance policy contract. The National Association of Insurance Commissioners ("NAIC") model code (NAIC 900-1) expressly lists this as an unfair claim practice (*see* NAIC 900-1 section 4 (E)). On information and belief, Nationwide's adjusters have been familiar with this code since 1977.

Plaintiffs urge this Court to join the United States District Court for the Southern District of Mississippi, the Mississippi Department of Insurance, and Nationwide in acknowledging the relevance of those materials relating to the company's handling of similar claims in close proximity to the Plaintiffs.

E. PLAINTIFFS' CLAIMS AGAINST JAY FLETCHER INSURANCE WERE IMPROPERLY DISMISSED

In their Complaint, Plaintiffs asserted claims against Jay Fletcher Insurance (hereinafter "Fletcher Insurance") for indemnity, unjust enrichment, equitable fraud and fraud.[6] In support of these claims, Plaintiffs have posited various factual allegations including "Fletcher Insurance represented to Plaintiffs that they had full and comprehensive insurance coverage under the subject policy and Hurricane Endorsement for any and all damage that is typically caused by a hurricane, including damage proximately and efficiently caused by hurricane wind and damage caused from storm surge proximately caused by hurricanes." (R. 57-8) At the urging of Fletcher Insurance, Plaintiffs, rather than increasing the amount of coverage under their flood policy, purchased a Hurricane Endorsement. Fletcher Insurance expressly represented that the Hurricane Endorsement would provide full and comprehensive coverage for those damages caused by hurricanes. In support of Plaintiffs' claims, Plaintiffs provided a sworn affidavit. (R. 182)

In its Judgment, the trial court reasoned that "there is no evidence that Plaintiffs relied on any representations by Jay Fletcher Insurance." (R. 2016) As a basis for this conclusion, the trial court cited Plaintiffs' purchase of flood insurance. (R. 2015-6) Additionally, the trial court pointed to the "clear terms of [Plaintiffs'] insurance policy" as an indication that any reliance on the promises of their insurance agent would be unreasonable. (R. 2016)

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[6] During the September 2, 2009 hearing, Plaintiffs conceded their claim of indemnity against Fletcher Insurance.

1. The Weight and Worth of Mr. Robichaux's Testimony should be decided by a jury

This Court has long held that the weight and worth of the testimony of witnesses should be left to a jury. *Davis v. State*, 377 So.2d 1076, 1079 (Miss. 1979). Although the trial court's Judgment says nothing of Mr. Robichaux's credibility, this is the essential inquiry in dealing with such averments and a question that should be decided by a jury. *Mack Truck, Inc. v. Tackett*, 841 So.2d 1107, 1112 (Miss. 2003); *Cousar v. State*, 855 So.2d 993, 997 (Miss. 2003).

Here, the trial court has effectively stripped Plaintiffs of their claims against Fletcher Insurance without any serious engagement of their allegations. Plaintiffs have presented a fact question that should not be dismissed on the basis that Plaintiffs actively sought to purchase as much insurance as was necessary to protect their foremost investment. Similarly, Plaintiffs should not lose their opportunity to present their claims against Fletcher Insurance to a jury because of Nationwide's contention that its policy is so clearly written that it would be unreasonable to ever rely on the face to face promises of one of its agents. These are issues that should be weighed by a jury in the light of cross examination and not preemptively taken away.

2. Plaintiffs' Claims Against Fletcher Are Not Time Barred.

Although not referenced in the trial court's Judgment, Nationwide's chief contention regarding Plaintiffs' claims against Fletcher Insurance is that these claims are time barred because the alleged conversations between Michael Robichaux and his insurance agent, Jay Fletcher, occurred more than three years before Plaintiffs' claim was filed. Contrary to Nationwide's assertion in its briefs to the District Court, the Circuit Court, and during the September 2, 2009 hearing, Plaintiffs' claims are not barred by Miss. Code Ann. § 15-1-49 (1972). This Court has held that "a cause of action 'accrues' when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested." *Forman v. Miss. Publisher's Corp.*, 195 Miss. 90, 14 So.2d 344, 346 (1943). This Court has further held, "it is well-

established that prescription does not run against one who has neither actual [n]or constructive notice of the facts that would entitle him to bring an action." *PPG Architectural Finishes, Inc. v, Lowery*, 909 So.2d 47, 50 (Miss. 2005) (quoting *Sweeney v. Preston*, 642 So.2d 332, 334 (Miss. 1994). Further, this Court has recently reasoned that if an individual brought suit before damage had occurred, that individual would not successfully survive a Rule 12(b)(6) motion; thus, no claim for prospective or possible damages is recognized by Mississippi. *Bullard v. The Guardian Life Ins. Co. of America*, 2006 So.2d (2005-CA-00849-SCT) (Miss. 2006).

In the instant case, Nationwide has asserted that because Plaintiffs have had a homeowner's policy with Nationwide for thirteen (13) years and have not filed a lawsuit until 2006, Plaintiffs' claims are barred by the limitations period in Miss. Code Ann. § 15-1-49 (1972). (R. 38) This specious claim is laughable in light of the fact that Plaintiffs held a policy which, through its Hurricane Endorsement, purported to provide Plaintiffs with coverage in the event of a hurricane. With Hurricane Endorsement in hand, the Plaintiffs assumed that Defendant Nationwide would provide protection if and when a hurricane caused damage to their insured property. This notion was reinforced not only by the verbal reaffirmations provided by Nationwide's agent, Fletcher Insurance, but also by language contained in the Hurricane Endorsement. The Hurricane Endorsement defines a "hurricane" as a "storm system declared to be a hurricane by the National Hurricane Center of the National Weather Service." "Windstorm" is defined as "wind, wind gust, hail, rain, tornadoes or cyclones caused by or resulting from a hurricane." The Hurricane Endorsement's definition of "hurricane" and its use of the term "storm system" contemplates not only damage from hurricane winds, but also damage caused by rain, microbursts and other phenomena typically associated with a hurricane "storm system." Plaintiffs expressly agreed to the Hurricane Endorsement in consideration for hurricane coverage, and therefore reasonably expected that any such damage would be covered under the

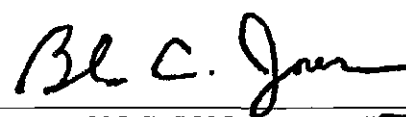
subject policy. Thus, the subject policy, through the Hurricane Endorsement, rather than inviting Plaintiffs to file preemptive lawsuits, encouraged Plaintiffs in their belief that Nationwide would provide insurance coverage in the event their home was damaged by a hurricane, consistent with Fletcher's representation in that regard. Thus, there was no basis upon which to form a belief that Fletcher had insinuated anything to Plaintiffs about the policies failure to provide the coverage Plaintiffs believed they had purchased.

V. CONCLUSION

The trial court's order declaring that Nationwide's policy is not ambiguous, that Plaintiffs have the burden of showing precisely how their property is damaged, that any loss storm surge *would have caused* is excluded, that a company's treatment of like policyholders in the same geographical area is irrelevant, and that Plaintiffs' claims against their insurance agent cannot survive summary judgment should be reversed and this action remanded for further proceedings.

Respectfully submitted this the 26th day of January, 2011.

MICHAEL AND MARY ROBICHAUX

BY: 

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CERTIFICATE OF FILING
THE BRIEF OF THE APPELLANTS AND
RECORD EXCERPTS WITH BRIEF OF THE APPELLANTS

COMES NOW, the undersigned attorneys of record for the Appellants, Michael and Mary Robichaux, and certifies to this Honorable Court, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, that on the 26th day of January, 2011, they have delivered to the Clerk for filing in the above-referenced cause, via Federal Express, the original and three (3) copies of the Brief of Appellants, and four (4) copies of the Record Excerpts Filed With Brief of Appellants, to the Clerk. Upon this certification, pursuant to the aforementioned Rule, the Brief of Appellants and Record Excerpts Filed With Brief of Appellants, are timely filed this day January 26, 2011.

SO CERTIFIED, this the 26th day of January, 2011.

MICHAEL AND MARY ROBICHAUX

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CERTIFICATE OF SERVICE

I, BRANDON C. JONES, do hereby certify that I have this day served, via US Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellants and Record Excerpts Filed with Brief of Appellants to the following:

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