

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-IA-00645-SCT**

MARGARET AND DR. MAGRUDER S. CORBAN

APPELLANTS

VS.

**UNITED SERVICES AUTOMOBILE
ASSOCIATION a/k/a USAA INSURANCE AGENCY**

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI**

**BRIEF OF JIM HOOD, ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI, *EX REL.* THE STATE OF MISSISSIPPI,
AS AMICUS CURIAE**

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STATEMENT OF THE CASE

Jim Hood, Attorney General of the State of Mississippi files this Brief of Amicus Curiae on behalf of the State of Mississippi pursuant to M.R.A.P. 29(a). The State has an interest in the outcome of this matter based upon the State's duties to its citizens to secure an honest marketplace, promote proper business practices, protect Mississippi consumers, and advance the economic well-being of its residents. Due to the magnitude and wide-reaching effect of the issues presented in this case, the State is compelled to participate in this cause to protect the public rights.

On August 29, 2005, Hurricane Katrina struck the Mississippi Gulf Coast, causing unprecedented and widespread damage and destruction. In the aftermath of Katrina and in response to the thousands of insurance claims filed by devastated Gulf Coast property owners, insurance companies that had provided property and casualty insurance policies to residents and/or property owners of the Mississippi Gulf Coast asserted an interpretation of their property and casualty policies which excluded any liability for damage loss caused in whole or in part by storm surge. As a result, on September 15, 2005, the State filed suit in the Chancery Court of Hinds County, Mississippi, against defendant insurance companies¹ doing business in Mississippi, seeking to declare void and unenforceable those provisions contained in the defendants' insurance policies seeking to exclude from coverage property loss and damage brought about by Hurricane Katrina. The intended goal of this litigation was to resolve these critical state law issues of insurance coverage in an expedient and judicially economic manner.

¹Defendants included Allstate Property and Casualty Insurance Company ("Allstate"), Nationwide Mutual Insurance Company ("Nationwide"), State Farm Fire and Casualty Company ("State Farm"), Mississippi Farm Bureau Mutual Insurance Company ("Farm Bureau"), and United Services Automobile Association ("USAA").

Unfortunately, however, the State's lawsuit against the defendant insurance companies has been plagued by delay, beginning with a fifteen-month interruption caused by the defendants' unfounded removal of the case to federal court. Following transfer of the State's case against Allstate and Nationwide to the Rankin County Chancery Court, the State is now engaged in pending litigation in both Rankin County and Hinds County. Dispositive motions are currently pending before both chancery courts, including the same issues presented to this Court in this interlocutory appeal. In fact, the Rankin County Chancery Court has indicated that it is holding its ruling on those dispositive motions in abeyance pending the outcome of this appeal. As a result, the State now files this amicus curiae brief in support of the arguments presented by the Appellants regarding the invalidity and inapplicability of the anti-concurrent causation ("ACC") clause in insurance contracts in the context of hurricane damage.

SUMMARY OF ARGUMENT

In the wake of Hurricane Katrina, insurance companies have not disputed that their insurance policies cover damage caused solely by hurricane winds. It is their position that the policies do not cover damage contributed to or caused by hurricane storm surge, even if the damage was initially caused solely by wind. Insureds point to similarly worded water exclusion provisions containing ACC clauses as the basis for their coverage denials. However, as is fully addressed in the initial Appellants' Brief, the language of the water exclusions, including the anti-concurrent causation clauses, is void and unenforceable because it is ambiguous and is contrary to Mississippi public policy.

Alternatively, the anti-concurrent causation language in the insurance contracts is simply not implicated. Where, as in the case of hurricane wind and surge, two perils independently cause

separate damage to property, the ACC clause does not come into play even if the same item of property is damaged by both perils in some sequence. The fact that Hurricane Katrina's hurricane-force winds undisputedly occurred prior to the arrival of its maximum storm surge helps demonstrate that the wind and the water do not constitute concurrent causes of the same damage, because each force acted separately to create unique damage. Wind damage occurring before the arrival of storm surge acts in a sequence of events, but the wind damage is not caused, directly or indirectly, by storm surge flooding, so the two forces cannot be said to act concurrently with each other, and the ACC clause is not applicable. The issue then is which peril—wind or water—caused the loss. Under Mississippi law, once an insured demonstrates an accidental loss to property covered under an all-peril policy, it becomes the insurer's burden to prove that the loss was caused by a non-covered peril, to the exclusion of any covered peril, or to pay the claim in full.

ARGUMENT

I. The State Joins in the Appellants' Arguments That Mississippi Law Prohibits Interpretation of Anti-Concurrent Causation Clauses as Excluding Coverage for Hurricane Damage Proximately Caused by Wind.

Insurance companies, including USAA and the other defendants in the chancery court actions initiated by the State, sold policies to residents purporting to provide coverage for hurricane damage. It is undisputed that these insurance policies provide coverage for the peril "windstorm," and under Mississippi law a hurricane is a "windstorm" covered by that term in insurance policies. *See, e.g., Grain Dealers Mut. Ins. Co. v. Belk*, 269 So. 2d 637, 640 (Miss. 1972). Although the insurance companies admit that their policies cover damage caused solely by hurricane winds, they also claim that their policies do not cover damage contributed to or caused by hurricane storm surge. In support of this argument, the companies point to similarly-worded exclusionary clauses for damage to the

property caused by water. USAA’s standard homeowners policy contains the following exclusionary language:

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
...
 - c. Water Damage, meaning:
 - (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind.

The standard homeowners policy sold by Allstate, an amicus curiae in this appeal, contains a similar water exclusion with the following language:

- We do not cover loss to covered property described in Coverage A – Dwelling Protection or Coverage B – Other Structures Protection when:
- a) there are two or more causes of loss to the covered property; and
 - b) the predominant cause(s) of loss is (are) excluded under Losses We Do Not Cover, items 1 through 22 above.²

State Farm, another amicus curiae in this case, sells policies containing the following ACC clause as part of its water exclusion:

We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these [excluded perils.]

Similarly, Nationwide’s standard homeowners policy contains an anti-concurrent causation clause in advance of its exclusions for dwelling, other structures, and personal property coverages, stating, “We do not cover loss to any property resulting directly or indirectly from any of the following.

²It has been contended that this language in Allstate’s policies is not an anti-concurrent causation clause. As discussed below, this point is immaterial in the context of hurricane losses.

Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.”

It has been the position of the insurance companies that their similarly worded water exclusions, including ACC provisions, operate to exclude from coverage any damage caused in whole or in part by hurricane storm surge, even if the property in question also sustained wind damage—a peril specifically covered by the policies.³ However, as is fully addressed by the Appellants in their initial brief, the language of the water exclusions, with their ACC clauses, is open to varying interpretations, and is therefore ambiguous and unenforceable. Each company’s ACC clause contains language purporting to exclude coverage for any “loss” caused in whole or in part by water, but does not define the term “loss.” The result is that the clauses may reasonably be interpreted in at least two distinct ways. If the “loss” is the ultimate cause of the overall destruction of the home, then application of the anti-concurrent causation language would preclude any recovery whatsoever in the case of a home completely destroyed by hurricane, even if wind contributed to the “loss.” On the other hand, if “loss” means some separable portion of damage to the property, such as a missing roof or broken windows, then application of the anti-concurrent causation language would require the fact finder to apportion the damage attributable to a covered peril versus that damage caused in whole or in part by an excluded peril. In such a situation, where a policy provision can be reasonably be interpreted to have two or more meanings, it is ambiguous and a finding of ambiguity necessarily equates to a finding of coverage. *J&W Foods Corp. v. State Farm Mut. Auto.*

³ Insurers refused to pay for damage caused by wind, claiming that the water would have later totally destroyed the structure anyway. By way of example, many homes in the Jackson area sustained roof damage, but insurers refused to pay for similar damages in the Coast area, where the wind speeds were indisputably much greater.

Ins. Co., 723 So. 2d 550, 552 (Miss. 1998). In fact, this Court recently held that USF&G's water exclusion, when read in conjunction with the provision for sewer or drain back-up coverage, was ambiguous and therefore construed in favor of the insured because it could be reasonably understood to have two different meanings—one excluding coverage and one logically providing coverage. *United States Fid. & Guar. Co. of Miss. v. Martin*, No. 2007-CA-00193-SCT, 2008 WL 4740031, *4-5 (Miss. Oct. 30, 2008).

The ambiguity of the anti-concurrent causation language is exacerbated by the insurers' application of the anti-concurrent causation language to deny coverage even when the property sustained wind damage, because such an interpretation is void and unenforceable as contrary to Mississippi public policy. The insurance industry's attempted exclusion from coverage of property losses resulting directly or indirectly from water, whether or not driven by wind, and whether or not in combination with wind, improperly seeks to alter, abrogate or invalidate longstanding Mississippi law governing proximate causation by refusing coverage even if the covered peril windstorm was the proximate cause of the loss.

The lower court's reliance on the Fifth Circuit's opinion in *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419 (5th Cir. 2007), is misplaced on several grounds. In *Leonard*, the parties appealed from the Mississippi district court's holding that Nationwide's anti-concurrent causation clause was unenforceable as ambiguous and contrary to well-established Mississippi law on efficient proximate causation. *Id.* at 428. While acknowledging that these legal rulings had no effect on the damages recovered by the Leonards, the Fifth Circuit panel unnecessarily proceeded, in dicta, to reverse the district court's ruling. *Id.* at 428-36. The court further refused to certify these issues of state law to this Court and instead made an "Erie guess" as to how the state's highest court would

resolve the questions. *Id.* at *8. In doing so, the panel completely misinterpreted and discarded the long line of cases arising from Hurricane Camille in which this Court premised recovery for policyholders on the application of the efficient proximate cause rule. *Id.* at 431-33. Ignoring the plain language of this Court’s legal analysis, the federal appellate court panel looked to the underlying facts in those cases and held that they did not support the district court’s decision because the opinions “did little more than uphold jury findings that the damages suffered by policyholders were caused exclusively by wind, not by concurrent wind-water action.” *Id.* at 432.

The panel also reasoned that the Camille cases were not controlling “because none of the policies they involve contain ACC clauses similar to the one at issue here, nor do those cases purport to enshrine efficient proximate causation as an immutable rule of Mississippi insurance policy interpretation.” *Id.* at 433. On the contrary, the policy language at issue in the Camille cases did include anti-concurrent causation language purporting to exclude coverage for damage “[c]aused by, resulting from, contributed to or aggravated by . . . [f]lood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not” See *Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217, 219 (Miss. 1972); *Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765, 765 (Miss. 1971). Yet this Court consistently applied the well-established efficient proximate cause rule in those cases. *Grace*, 257 So. 2d at 224; *Boatner*, 254 So. 2d at 767.

It is unclear what further requirement beyond nearly fifty years of case law might be necessary to “enshrine” the efficient proximate cause rule in Mississippi so as to satisfy the Fifth Circuit panel’s apparent standard for establishing public policy. See *Glen Falls Ins. Co. v. Linwood Elevator*, 130 So. 2d 262, 270 (Miss. 1961) (reasoning that if the “nearest efficient cause of the loss

is not a peril insured against, recovery may nevertheless be had if the dominant cause is a risk or peril insured against”). This Court need not follow the Fifth Circuit’s erroneous dicta analysis of efficient proximate causation under Mississippi law.

Although the parties to a contract generally may contract away rights, an exception exists for long-standing common law principles such as proximate causation. *See Cappert v. Junker*, 413 So. 2d 378 (Miss. 1982). Indeed, this inability to enter into contracts that violate the public policy of Mississippi has been repeatedly recognized in the specific context of insurance policies. *See, e.g., United States Fid. & Guar. Co. v. Ferguson*, 698 So. 2d 77 (Miss. 1997). Further, contrary to arguments raised by the insurance companies in the chancery court litigation filed by the State, the power of the courts to hold insurance policy provisions ineffective as violative of public policy is not nullified by the Mississippi Department of Insurance’s prior approval of the policy form. *See, e.g., Ferguson, supra; Atlanta Cas. Co. v. Payne*, 603 So. 2d 343 (Miss. 1992); *Employers Mut. Ins. Co. v. Tompkins*, 490 So. 2d 897 (Miss. 1986); *Lowery v. State Farm Mut. Auto. Ins. Co.*, 285 So. 2d 767 (Miss. 1973). “Under applicable Mississippi law, the construction of the terms of any insurance policy are subject to judicial review, notwithstanding the fact that they have been approved by the Mississippi Department of Insurance.” *Leonard v. Nationwide Mut. Ins. Co.*, 438 F.Supp.2d 684, 695 (S.D. Miss. 2006); *see also Amer. Bankers’ Ins. Co. of Fla. v. Wells*, 819 So. 2d 1196, 1204-05 (Miss. 2001) (the filed rate doctrine does not bar all claims by a plaintiff related to an insurance policy, even if it has been approved by the Mississippi Department of Insurance); *Ware v. Entergy Miss., Inc.*, 887 So. 2d 763, 768-69 (Miss. 2003) (only those claims requiring a determination of the reasonableness of the rate charged fall within the ambit of the filed rate doctrine). Therefore, the State joins the Appellants in their arguments before this Court seeking

