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

MARGARET AND DR. MAGRUDER S. CORBAN — **APPELLANTS**

VERSUS

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

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

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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.

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ALL HOMEOWNERS IN THE STATE OF MISSISSIPPI

Respectfully submitted,

BY: _____

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I. STATEMENT OF ISSUES

1. Is the water damage exclusion purporting to exclude concurrent or sequential contributing causes ambiguous and therefore void as to hurricane losses where multiple courts and parties have struggled for years and are unable to determine what the language means and how it affects Hurricane Katrina losses?

2. If construed to exclude losses caused by wind merely because water later impacted the property or to alter contract law requiring an insurer to prove what part of the loss was caused by an excepted event, does the water exclusion violate Mississippi public policy in the context of hurricane claims?

3. In an "all risk" homeowners' policy containing an anti-concurrent cause clause as part of its exclusion, which party -- the insurance company or the insured -- must establish **causation** of that part of the loss that is excluded?

4. Did not the Fifth Circuit Court of Appeals err in its "Erie-guess" in *Leonard* and *Tuepker* that under Mississippi insurance contract law **"indivisible damage"** caused by both wind and water in a hurricane is excluded under the **contract terms** of homeowners' policies at issue?

5. Does the USAA insurance policy preclude recovery for hurricane loss where the efficient proximate cause is a covered event?

6. Did the trial court err in its interpretation of the anti-concurrent cause clause?

II. STATEMENT OF THE CASE

A. Statement of Facts

This case involves the devastating effects of Hurricane Katrina on the Mississippi Gulf Coast and the home of Dr. and Mrs. Corban. In 1989, Dr. Magruder Corban, then a practicing orthopedic surgeon, and his wife Margaret purchased their dream home in Long Beach, Mississippi. The historic home, built in 1896, is depicted below in its pre-Katrina grandeur. (R. 1451)

Having been insured with the company since 1958, Dr. Corban chose USAA for homeowner's coverage. At the time of Hurricane Katrina, the home was insured under an "all risk" policy providing coverage of $750,000.00 "against risks of direct, physical loss". (R.E. 38) In addition, the separate structures on the property, e.g., garage, were covered against "direct physical loss" for

$135,000.00; and the Corbans' personal property was insured for named perils including "windstorm" for up to $562,500.00. (R.E. 25, R.E. 29 and R.E. 39)[1]

As reported, "Hurricane Katrina's winds and storm surge reached the Mississippi coastline on the afternoon of August 28, 2005, beginning a two-day path of destruction through central Mississippi." www.wikipedia.org/wiki/effect of Hurricane Katrina on Mississippi. (R.E. 66) The Corban home was in the most vulnerable northeast quadrant of the storm. "The Long Beach area experienced Hurricane Katrina for over 17 hours. There were hurricane force winds over Long Beach until 4PM on August 29, 2005, well after the eye made landfall and moved northward." (R. 884) Wind speeds at the Corban home reached 130 mph sustained winds, with gusts up to 150 mph. (R. 898) These destructive winds removed the porch and roofing, exposing the interior to the winds and rains of the storm.[2] As noted by forensic engineer Ted Biddy:

> In the case of the Corban residence . . . the obvious mechanism of destruction by the winds was due to breached and opened windward sides of walls from wind blown debris and blowouts on the lee sides of the building . . . . Specifically, the house's southeast sides were opened by wind blown debris which then caused blowouts of lee side windows, doors and walls. The destroyed and blown away detached structures either suffered the same type failure as the house or failure of bottom of wall pullouts which allowed these small structures to blow away. (R. 754)

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[1]The "windstorm" provision provides coverage for loss caused by "rain, snow, sleet, sand or dust" so long as "the direct force of wind or hail damages the building causing an opening in a roof or wall." (R.E. 39)

[2] While the cause of a loss obviously cannot be ascertained from photographs alone, additional photographs of the damage are contained in the expert reports of Ted Biddy (R. 725 - 882) and Rocco Calaci (R 883 - 903).

Post-Katrina photographs appear below:

(R. 1453)

(R. 772)

Storm surge from Katrina impacted the property long after the winds wreaked havoc on the structure, washing away much of the evidence of causation. Forensic meteorologist Rocco Calaci explained that storm surge arrives at the end of a hurricane because "the wind direction and speed would act as a strong deterrent until the last few hours when the hurricane eye shifts the wind direction to the southwest." (R. 894) By the time the water arrived, the house was largely destroyed. Calaci concluded that "[o]nce the front porch was ripped away by easterly winds, it allowed the oncoming water to rush through the house causing more interior damages." Nonetheless, "the property . . . was destroyed hours before the water levels rose to any point of significance." (R. 903)

In response to the catastrophic loss of over $1 million by its insured of over 50 years, USAA paid only $39,971.91[3], claiming the remainder of the damage was excluded by its water damage exclusion, including the "anti-concurrent cause" clause (ACC) contained in the policy provisions. Specifically, while not contesting that Hurricane Katrina was a "risk of direct, physical loss" covered under the policy, USAA relies on the following provision for denial of Dr. Corban's claim:

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[3]This payment was for roof replacement, minor painting, and pressure washing the exterior. Nothing was paid for the loss of exterior walls, interior damage, or contents.

SECTION I - EXCLUSIONS

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

. . .

c. **Water Damage**, meaning:

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

(R.E. 40) The part of the exclusion which reads "such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss" is referred to as the "anti-concurrent cause clause" ("ACC").

B. Course of Proceedings Below

This case was set for trial to commence on March 3, 2008. Prior to that time, the parties filed cross motions for partial summary judgment seeking a ruling on the effect and enforceability of the ACC provision as it related to the loss of the Corban home. (R. 284; R. 390 and R. 57). The parties were allowed oral argument on pre-trial motions, and the trial judge subsequently conducted a telephone conference to discuss some of her rulings prior to entry. During that conference, the parties and the lower court agreed that interlocutory appeal was

appropriate. Accordingly, an order of continuance and stay was entered on February 28, 2008, stating in part as follows:

> The Court finds that appellate review of the important issues raised by the parties in this case will materially advance the termination of litigation and avoid exceptional expense to the parties. Moreover, the Court finds that such review will resolve issues of general importance in the administration of justice relative to critical legal issues present in Hurricane Katrina litigation. [R. 1385]

On March 27, 2008, the lower court entered its "Order Granting Partial Summary Judgment to Defendant and Denying Partial Summary Judgment to Plaintiffs Regarding Anticoncurrent Causation Clause and Storm Surge Issues (with Findings of Fact and Conclusions of Law)". (R.E. 12-21) The trial judge expressed her personal opinion that the language of the water damage exclusion, including the ACC, would not exclude wind damage merely because water later came onto the property, stating:

> Using the simple rules learned in middle school or high school English classes, the exclusion provides that it does not cover a loss caused by water damage. The second sentence refers to "[s]uch loss" being excluded even if in combination with or in any sequence to other causes. The term "[s]uch loss" can only refer to the loss caused by water damage mentioned in the first sentence of the exclusion. It is that loss and that loss only that is excluded by the plain language of the provision. The remainder of the second sentence goes on to elaborate on the exclusion by providing that the water damage is excluded no matter what other causes exist and whether the water damage occurs first, last, or simultaneously with some other cause. This simple, basic interpretation of the language used and sentence structure used bars coverage for water damage and **only** the water damage, whether occurring alone or in any order with another cause.

(R.E.17; emphasis in original).

Although the trial judge construed the policy as excluding only water damage, she then rejected her own interpretation and followed the contrary holdings of the Fifth Circuit Court of Appeals in *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007), and *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007). In this regard, the lower court ruled as follows:

> This Court's interpretation of the ACC clause language in the Corbans' policy may or may not be correct. That interpretation, though, will not be substituted for that of the only appeals court precedent available on this issue. Further, it is not clear that the appeals courts of Mississippi would decline to adopt the analyses and decisions of the Fifth Circuit in this regard. The decisions of the Fifth Circuit will, therefore, be applied in this case. The Corbans' motion seeking partial summary judgment on the issue of the applicability of the ACC clause will be denied. **Pursuant to *Leonard* and *Tuepker*, the ACC clause will be applied herein. The Corbans may not recover for any damage caused by water as defined in the policy or a combination of that water and wind.**

(R.E. 19-20; emphasis added). This ruling effectively reverses decades of this Court's precedent in hurricane cases and deprives Mississippi homeowners of essential insurance coverage.

By virtue of the lower court ruling, thousands of policyholders including Dr. and Mrs. Corban will not be permitted to recover for the totality of their losses caused by wind if water subsequently impacted the property. Recognizing the impact of this issue on Mississippi policyholders, this Honorable Court accepted Plaintiffs' Petition for Interlocutory Appeal.

III. SUMMARY OF THE ARGUMENT

Plaintiffs advance five distinct reasons requiring reversal of the lower court decision. 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 required if Plaintiffs prevail on any one ground, the public would benefit from this Court's pronouncement of Mississippi law on each issue.

A. THE WATER DAMAGE EXCLUSION PURPORTING TO EXCLUDE CONCURRENT OR SEQUENTIAL CONTRIBUTING CAUSES IS AMBIGUOUS AND THEREFORE VOID

After three years of Hurricane Katrina litigation, one thing is clear: no court, party, or attorney can consistently and reasonably interpret the portion of USAA's water damage exclusion known as the "anti-concurrent cause clause." Decisions from the Fifth Circuit Court of Appeals are conflicting and varied. Parties and attorneys for parties have given interpretations of the policy language that later had to be retracted or "clarified." This clause, which has been used to deny losses caused by wind, is ambiguous. It should be stricken by this Honorable Court as void. Alternatively, the clause should be construed as excluding only such part of any particular loss as the insurance company can prove was caused by water.

B. IF CONSTRUED TO EXCLUDE LOSSES CAUSED BY WIND, THE ACC IS CONTRARY TO PUBLIC POLICY IN HURRICANE CASES

If the lower court and the Fifth Circuit Court of Appeals correctly interpreted the ACC as excluding damages caused by a combination of wind and water, then

that clause is contrary to Mississippi public policy and should be stricken as void. Mississippi's public policy, as pronounced in decisions from this Honorable Court, directives from the Mississippi Insurance Department (MID), and legislative declarations that coverage for hurricane losses is "essential," does not permit an insurer to write an all risk policy and then exclude losses where the efficient proximate cause of the loss is not excluded.

C. IN AN "ALL RISK" HOMEOWNERS' POLICY CONTAINING AN ACC, THE INSURANCE COMPANY MUST ESTABLISH CAUSATION OF THAT PART OF THE LOSS THAT IS EXCLUDED

An insurance company has the responsibility under an all risk policy written by it to prove any particular part of a loss is excluded. In the context of Hurricane Katrina claims, an insurer must pay for all "direct physical loss" caused by the hurricane, except and only to the extent it can prove specific portions of the loss were caused by water. If it cannot be determined whether wind or water caused any particular part of the loss, then the insurer owes for the entire loss. The ACC does not affect Mississippi law concerning USAA's burden of proof.

D. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN ITS "ERIE-GUESS" IN *LEONARD* AND *TUEPKER* THAT UNDER MISSISSIPPI INSURANCE CONTRACT LAW "INDIVISIBLE DAMAGE" BY BOTH WIND AND WATER IN A HURRICANE IS EXCLUDED

The insurance company has the burden of proving an exclusion applies to any part of a loss in order to avoid coverage. Thus, the Fifth Circuit and lower court opinions declaring that the ACC excludes "indivisible damage," i.e., damage to which causation cannot be determined, are erroneous. In fact, under

Mississippi law, if apportionment between a covered loss and an excluded loss cannot be made, then the insurer owes the entire loss.

E. THE USAA POLICY DOES NOT PRECLUDE RECOVERY FOR HURRICANE LOSS WHERE THE EFFICIENT PROXIMATE CAUSE IS A COVERED EVENT

The water damage exclusion purports to exclude only such losses "caused" by water damage. Because Mississippi utilizes the efficient proximate cause doctrine to determine whether a loss is covered, and because the efficient proximate cause of all Hurricane Katrina losses is wind, Katrina losses cannot be "caused" by excluded water. Under the efficient proximate cause doctrine, USAA owes for all of the Corbans' losses that were proximately caused by wind.

F. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE ANTI-CONCURRENT CAUSE CLAUSE

The lower court erred in adopting the holdings of the Fifth Circuit Court of Appeals in *Leonard* and *Tuepker* and concluding that all damages caused by a combination of wind and water are excluded from coverage. Each of the above reasons, whether considered alone or in their entirety, require reversal of the lower court's opinion.

IV. ARGUMENT

A. THE WATER DAMAGE EXCLUSION PURPORTING TO EXCLUDE CONCURRENT OR SEQUENTIAL CONTRIBUTING CAUSES IS AMBIGUOUS AND THEREFORE VOID

The insurance industry's response to the most devastating catastrophe of all time has been to deny claims by the calculated, albeit incorrect, use of the

portion of the water damage exclusion known as the "anti-concurrent cause clauses" ("ACC") in homeowners' policies issued to Katrina insureds. More than three years have passed since Hurricane Katrina destroyed much of the Gulf Coast yet this policy language continues to hinder resolution of Katrina claims. The time has come for this Honorable Court to declare the clause void and unenforceable as interpreted by the lower court and the Fifth Circuit Court of Appeals.

Taking advantage of the fact that it is difficult, if not impossible, to determine what portion of many Katrina losses was caused by wind and what portion was caused by water, insurers **assume** that everything potentially touched by the storm surge is not covered despite the fact that up to 150 mph winds pummeled the Coast for hours before surge waters arrived. The proper construction of the ACC and how it affects coverage is the major impediment to thousands of Katrina claims that remain unpaid.[4] This important appeal allows this Honorable Court to announce the ACC cannot be used to deny Mississippi homeowners the benefits of their insurance policies.

1. Insurance Contract Rules of Construction

> Parties are bound by what they promise in writing. But, we are not bound to adopt a construction not compelled by the instrument in which we would have to believe no man in his right mind would have

[4]Over 600 cases remain pending in the Federal District Court for the Southern District of Mississippi alone.

> agreed to. A construction leading to an absurd, harsh or unreasonable result in a contract should be avoided, unless the terms are express and free of doubt.

Frazier v. Northeast Miss. Shopping Center, Inc., 458 So.2d 1051, 1054 (Miss. 1984). In the context of interpreting a contract for a lease agreement, this Court acknowledged the existence of ambiguity where the Court and members of the bar cannot reach a uniform interpretation of the words:

> To say this paragraph is free from doubt ignores the fact that intelligent lawyers reading it have come to opposite views. It is not clear to this Court. In the absence of the two parties who signed it informing us precisely what was meant, the most enlightened argument from here to the millennium would never remove the cloud cast by the words. [*Id.* at 1054.]

Obviously, where a contract is clear and unambiguous, its meaning and effect are matters of law which may be determined by the Court. *Overstreet v. Allstate Ins. Co.*, 474 So.2d 572, 575 (Miss. 1985); *Dennis v. Searle*, 457 So.2d 941, 945 (Miss. 1984). However, since it is a contract of adhesion, ambiguous terms in an insurance policy must be construed in favor of coverage. As this Honorable Court has held:

> Initially, in interpreting an insurance policy, this Court should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result. *Continental Cas. Co. v. Hester,* 360 So.2d 695, 697 (Miss. 1978). Nevertheless, this Court interprets and construes insurance policies liberally in favor of the insured, especially when interpreting exceptions and limitations. *State Farm Mut. Auto. Ins. Co. v. Latham*, 249 So.2d 375, 378 (Miss. 1971); *American Hardware Mut. Ins. Co. v. Union Gas Co.*, 238 Miss. 289, 293, 118 So.2d 334, 335 (Miss. 1960). Mississippi law also recognizes the general rule that provisions of an insurance contract are to be construed strongly against the drafter. *Nationwide Mut. Ins.*

> *Co. v. Garriga*, 636 So.2d 658, 662 (Miss. 1994); *Williams v. Life Ins. Co. of Georgia*, 367 So.2d 922, 925 (Miss. 1979) . . . .
>
> An ambiguity in an insurance policy exists when the policy can be interpreted to have two or more reasonable meanings. *See Insurance Co. of North America v. Deposit Guaranty Nat. Bank*, 258 So.2d 798, 800 (Miss. 1972). When the language of a policy is subject to more than one reasonable interpretation, this Court will apply a construction permitting recovery. *State Farm Mut. Auto. Ins. Co. v. Scitzs*, 394 So.2d 1371, 1372 (Miss. 1981); *State Farm Mut. Auto. Ins. Co. v. Taylor*, 233 So.2d 805, 811 (Miss. 1970). If there is an ambiguity within a policy of insurance, then the intention of the parties to the insurance contract should be determined based upon what a reasonable person placed in the insured's position would have understood the terms to mean. *See Key Life Ins. Co. of S.C. v. Tharp*, 253 Miss. 774, 781, 179 So.2d 555, 558 (1965). Where a clause of an insurance policy subject to dispute involves exceptions or limitations on the insurer's liability under the policy, this Court construes the policy even more stringently.

J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So.2d 550, 552 (Miss. 1998). As this Honorable Court has more recently and succinctly held, "[l]anguage in exclusionary clauses must be 'clear and unmistakable,' as those clauses are strictly interpreted." *United States Fidelity & Guaranty Co. v. Martin*, __So.2d __, 2008 WL 4740031 (Miss. 2008) at ¶13.

2. The Exclusion's ACC Clause is Hopelessly Ambiguous

More than any other factor, the differing and conflicting interpretation of ACC clauses in homeowners' policies is responsible for the unreasonable delay that has attended resolution of Hurricane Katrina claims. The ambiguity of the clause is best demonstrated by those varying and differing interpretations.