

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

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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)

¹The "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 \$39,971.91³, 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:

³This 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

⁴Over 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.

a. Court Opinions

The Southern District of Mississippi, Southern Division has been the court most involved in interpreting ACC clauses in Hurricane Katrina coverage disputes.⁵ In its first opportunity to address the effect of the clause, that court found it to be ambiguous and unenforceable. In *Tuepker v. State Farm Fire & Cas. Co.*, 2006 WL 1442489 (S.D. Miss. 2006), Senior District Judge L.T. Senter held as follows with regard to State Farm’s ACC clause:⁶

I find that this language in the State Farm policy creates ambiguities in the context of damages sustained by the insured during a hurricane. These provisions purport to exclude coverage for wind and rain damage, both of which are covered losses under this policy, where an excluded cause of loss, e.g. water damage, also occurs. I find that these two exclusions are ambiguous in light of the other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a “hurricane deductible” as part of the policy.⁷

To the extent that plaintiffs can prove their allegations that the hurricane winds (or objects driven by those winds) and rains entering the insured premises through openings caused by the hurricane winds proximately caused damage to their insured property, those losses will be covered under the policy, and this will be the case even if flood damage, which is not covered, subsequently or simultaneously occurred. [*Id.* at 5.] (Footnote added).

⁵Most insurers are “residents” of states other than Mississippi, thus creating diversity jurisdiction in federal court. Even when originally filed in state court, insurers promptly remove claims where diversity exists to federal court. This case was non-removable because USAA is deemed to reside in all states in which it has a member, including Mississippi.

⁶Although the ACC clauses of some policies differ slightly from the language in the USAA policy, those differences have been found to be inconsequential. *See, Tuepker*, 507 F.3d at 353 (declaring State Farm’s exclusion to be “almost identical” to Nationwide’s).

⁷As noted on the declaration sheet, the Corban policy also contains a “hurricane deductible”, i.e., a special deductible applicable only for “wind and hail” losses. (R.E. 25)

Judge Senter again found ambiguity in the context of Nationwide's ACC in *Leonard v. Nationwide Mut. Ins. Co.*, 438 F.Supp.2d 684 (S.D. Miss. 2006). There, the district court held "[t]he provisions of the Nationwide policy that purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damage caused by the effects of wind (a covered loss) are ambiguous." *Id.* at 693. Explaining further, the district court noted that "[t]o the extent property is damaged by wind, and is thereafter also damaged by water, the insured can recover that portion of the loss which he can prove to have been caused by wind, but the insurer is not responsible for any additional loss it can prove to have been later caused by water." *Id.* at 695.⁸

Both *Leonard* and *Tuepker* were appealed to the Fifth Circuit Court of Appeals which issued inconsistent and confusing rulings, further supporting a finding of ambiguity. *Leonard* was the first Hurricane Katrina case to reach the Fifth Circuit, which affirmed the ultimate result but criticized and reversed Judge Senter's interpretation of the ACC.

The clause unambiguously excludes coverage for water damage 'even if another peril' - - e.g., wind - - 'contributed concurrently or in any sequence to cause the loss.' The plain language of the policy leaves the district court no interpretive leeway to conclude that recovery can be obtained for wind damage that 'occurred concurrently or in sequence with the excluded water damage.' . . .

⁸As discussed *infra*, Judge Senter's opinions provide conflicting conclusions concerning the burden of proof issues so critical to the Hurricane Katrina litigation. Under well settled Mississippi law, the insurer must establish what part of any direct physical loss is excluded from coverage under an all risk policy.

The fatal flaw in the district court's rationale is its failure to recognize the three discrete categories of damage at issue in this litigation: (1) damage caused exclusively by wind; (2) damage caused exclusively by water; and (3) damage caused by wind 'concurrently or in any sequence' with water. The classic example of such a concurrent wind-water peril is the storm-surge flooding that follows on the heels of a hurricane's landfall. The only species of damage covered under the policy is damage caused *exclusively* by wind. But if wind and water synergistically caused the *same* damage, such damage is excluded. Thus, the Leonards' money judgment was based on their roof damages solely caused by wind. Contrary to the court's damage matrix, however, had they also proved that a portion of their property damage was caused by the concurrent or sequential action of water -- or any number of other enumerated water-borne perils -- the policy clearly disallows recovery.

Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 430-431 (5th Cir. 2007) (ital. in original). Continuing on its incorrect course the Fifth Circuit then stated:

If, for example, a policyholder's roof is blown off in a storm, and rain enters through the opening, the damage is covered. Only if storm-surge flooding - - an excluded peril - - then inundates the same area that the rain damaged is the ensuing loss excluded because the loss was caused concurrently or in sequence by the action of a covered and an excluded peril. The district court's unsupported conclusions that the ACC clause is ambiguous and that the policyholder can parse out the portion of the concurrently caused damage that is attributable to wind contradict the policy language.

Id. at 431 (ital. in original; bold added).

Thus, although the Nationwide policy only excluded water damage (i.e., "such loss"), the Fifth Circuit erroneously interpreted it to also exclude damage caused by wind, if water subsequently came into contact with the property. In short, the *Leonard* opinion would require claims be denied *in toto* even if 90% of the damage was caused by wind if storm surge later took what remained. The policy does not support such a result.

Moreover, the Fifth Circuit's opinion omitted a critical, fourth category of damage that was widespread on the Gulf Coast - - damage caused by Hurricane Katrina where it is difficult or impossible to tell whether the damage occurred before or after the arrival of storm surge. The MID expressly sought to address this category in Bulletin 2005-6, issued on September 7, 2005, which directed that "where there is any doubt [about the cause of loss], that doubt will be resolved in favor of finding coverage on behalf of the insured." (R.E. 65)

Subsequently having the opportunity to clarify and correct its errors announced in the *Leonard* opinion, the Fifth Circuit instead chose to further erode Mississippi law to the detriment of Mississippi policyholders. In *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007), the Fifth Circuit accepted an interlocutory appeal arising from denial of a motion to dismiss filed by State Farm based in part on the ACC. Again facing a ruling from Judge Senter holding that the ACC "does not negate coverage for damage which is caused by the covered risk of wind," (*Tuepker*, 507 F.3d, at n. 1, quoting district court opinion), the Court instead continued down the incorrect course charted in *Leonard*. Indeed, the Fifth Circuit went so far in *Tuepker* as to hold that "the ACC Clause in combination with the Water Damage Exclusion clearly provides that indivisible damage caused by both excluded perils and covered perils of other causes is not covered." *Tuepker, supra*, at 354. Neither the State Farm nor the USAA ACC supports such a broad declaration. Indeed, the "clear" reading of both clauses leads to the inescapable conclusion that they exclude only water damage and not wind

damage, whether divisible or indivisible.⁹ While **water** damage is excluded regardless of whether it later combines with wind, nothing in the exclusion purports to exclude **wind** damage that is combined with water.

Following the Fifth Circuit decisions in *Leonard* and *Tuepker*, Judge Senter adopted yet another interpretation of the ACC. In *Dickinson v. Nationwide Mut. Fire Ins. Co.*, 2008 WL 941783 (S.D. Miss. 2008), Judge Senter found that, despite having consumed the attention of courts for years, the ACC in fact had no application to Hurricane Katrina cases.

The meticulous analysis by David Rossmiller concerning the history, purpose, and meaning of the anti-concurrent cause provision, published at *New Appleman on Insurance: Critical Issues in Insurance Law*, makes it clear that an anti-concurrent cause provision has no application in a situation (such as Hurricane Katrina) where two distinct forces (wind and water) act separately and sequentially to cause different damage to insured property. Each force may cause damage to different parts or items of the insured property, as occurred in the Leonard case, or the two forces may cause damage to the same item of insured property at different points in time. But the two forces, i.e. wind and water, remain separate and not concurrent causes of this damage. In either case, the damage caused by wind is covered under the policy while the damage caused by water is not. Water damage is the excluded “loss” referred to in the anti-concurrent cause provision of the Nationwide policy. [*Dickinson*, at 5.]

The plain language of the ACC clause supports Judge Senter’s conclusion that the provision adds nothing to the wind versus water analysis. Because the perils of wind and water operate independently, they “are not in fact concurrent in most cases because they caused different damage and different losses.” See,

⁹The divisibility of any such damage goes only to the critical burden of proof issue discussed *infra*.

Maxus Realty Trust, Inc. v. RSUI Indem. Co., 2007 WL 4468697 at 2 (W.D.Mo. 2007), quoting Rossmiller, *supra*, at 44. (R.E. 143) While Judge Senter's more recent attempt to properly interpret the ACC as excluding only water damage is commendable, the extent to which his opinions and those of the Fifth Circuit reach contradictory results establishes the provision's ambiguity.

In the case *sub judice*, the lower court noted the differing and conflicting federal court interpretations of the ACC clause and further that those interpretations were contrary to her own reading of the clause. Nonetheless, the lower court elected to adopt the federal appellate interpretations notwithstanding her disagreement with same. (R.E. 19-20) Adopting *Leonard* and *Tuepker*, the lower court found that "[t]he 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. 20) Although the trial judge did not address the issue of ambiguity, the contrasting interpretations provided by her and the federal courts present compelling evidence of ambiguity. That courts have come to such opposite ideas about the interpretation and effect of the ACC demonstrates the clause's ambiguity.

b. The Interpretations of the Insurers

Not only have the courts reached differing and conflicting interpretations of the ACC clause, but USAA and other insurers have likewise adopted varying meanings of the policy language. Ambiguity is shown by the insurance industry's own inability to say what the policy language means.

In the lower court proceedings herein, USAA originally argued that the ACC would exclude even wind damage if water later impacted the same part of the property. (Tr. 33-34) USAA later offered a completely different interpretation, and acknowledged that “damage caused solely by wind is covered”, but then contradicted itself again by claiming that “damage caused or contributed to by storm surge is excluded.” (Brief of USAA at 9) At the same time, however, counsel for USAA acknowledged the differing opinions from Judge Dodson and Judge Senter, attempting to find continuity by pointing out “clarifications” and “mistakes” of interpretation. *Id.* at 8.

While arguing in this case that ACC clauses are clear and unambiguous, amicus curiae State Farm has contributed greatly to the conflicting interpretations of such clauses. State Farm originally contended before the federal district court that the entire loss would be excluded if water was at any point “in the chain of causation.” In this regard, State Farm maintained:

Pursuant to the terms and conditions of the policy, **irrespective of the timing of the losses, or the number of said losses, if but one of those causes of loss is excluded pursuant to Paragraph 2, then the entire loss is excluded.** . . . [E]ven if Plaintiffs were successful in proving that a specific portion of their property was damaged by wind to a particular degree prior to the arrival of the water, because water was in the chain of causation of the destruction of the property, including that portion damaged by wind, then the loss is not covered.

Palmer v. State Farm Fire & Cas. Co., Civil Action No. 1:07-cv-39-LTS-RHW (State Farm Motion to Dismiss, p. 8-9 (3/22/07) (emphasis added). Subsequently, State Farm retracted this argument and offered a different interpretation of the ACC:

To the extent that State Farm's Motion to Dismiss made the argument that . . . wind loss preceding the total destruction of the insured property by flood is excluded under the anti-concurrent cause language in State Farm's homeowners policy (Motion, Point I.B), **that argument does not accurately reflect State Farm's position.** Rather, State Farm's position is that independent wind damage that would have occurred in the absence of the excluded water peril is covered, even if the property also sustains water damage before, at the same time as or after the wind damage. **Thus, State Farm acknowledges, and has heretofore acknowledged, that if there is evidence that hurricane winds caused independent damage to an insured dwelling, that damage would be covered, even if storm surge later destroyed the entire dwelling.**

Palmer, supra, State Farm's Motion to Alter or Amend, p. 2 (5/31/07) (footnote omitted) (emphasis added).¹⁰

The MID documented that State Farm's employees likewise interpret the ACC clause in different ways, leading to inconsistent results.

One State Farm manager who was designated as an expert witness in one case interpreted the clause to say that if water would have taken the whole property that nothing was covered, even if wind got there first and caused damage first. (This appears to corroborate testimony from some claims representatives that if water touched it, wind was not covered.) The State Farm Catastrophe Section Manager stated, "I believe that the anti-concurrent cause language in paragraph 2 of the policy says that if you have a covered event working, you know, in any sequence, before or after, with a non-covered event or noninsured event, then that means that it's not a payable loss". When given a scenario where there was evidence of wind damage to a roof and the structure had surge damage, all from the storm, he stated the roof would be covered. This appeared to be contradictory to his interpretation and further evidence of confusion.

¹⁰Both pleadings are available on the Federal Court's PACER system at ECF 10 and 27, and pertinent pages are contained at R E. 80-81 and R E. 84. It is interesting to note that counsel for State Farm in *Palmer* who was forced to retract and modify his initial interpretation of the ACC, is the same counsel now representing amici American Insurance Association and National Association of Mutual Insurance Companies, who maintain the clause is unambiguous. Indeed, the ACC clause is so confusing that most lawyers engaged in Hurricane Katrina litigation have offered conflicting interpretations of its meaning from time to time.

. . .
Inconsistencies relative to payments for wind damage noted in the sample claim files considered with the conflicting interpretations of the ACC noted above, point to a conclusion that there was confusion in the application of the ACC in the handling of Katrina claims in the lower three counties of Mississippi.

“Report of the Special Target Examination of State Farm Fire and Casualty Company, Mississippi Department of Insurance, (R.E. 88 at 126).

Nationwide Mutual Insurance Company argues an even harsher interpretation of the ACC clause. As noted in *Dickinson, supra*, “Nationwide has taken the position - - for the first time in any litigation concerning damage sustained in Hurricane Katrina - - that the anti-concurrent cause provision in its homeowners policy prevents any recovery for wind damage when the insured property also sustains substantial flood damage.” *Dickinson, supra*, at 5.

c. This Court has Found the ACC Clause to Be Ambiguous

This Honorable Court recently had the opportunity to consider an ACC substantially similar to that contained in the USAA policy and found it to be ambiguous. *United States Fidelity & Guaranty Co. v. Martin*, __ So.2d __, 2008 WL 4740031 (Miss. 2008). At issue was whether the insured’s damage from sewage backup was covered despite being caused by water, an exclusion to coverage. USF&G’s motion for summary judgment was denied, and the lower court found

the ACC ambiguous.¹¹ Reiterating the familiar maxims of contract interpretations, this Court noted:

Since this is an issue of first impression in this Court, we must rely on the legal principles and apply them to the facts in this case. This Court's precedent has restated the rules set out in *Scitzs*.^[12] It is now firmly established that if a contract is clear and unambiguous, then it must be interpreted as written. See, e.g., *Noxubee County Sch. Dist. v. United Nat'l Ins. Co.*, 883 So.2d 1159, 1165 (Miss. 2004). A policy must be considered as a whole, with all relevant clauses together. *J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So.2d 550, 552 (Miss. 1998). If a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party. *Id.*; *Crum v. Johnson*, 809 So.2d 663, 666 (Miss. 2002). Ambiguities exist when a policy can be logically interpreted in two or more ways, where one logical interpretation provides for coverage. *Crum*, 809 So.2d at 666; *Universal Underwriters Ins. Co. v. Buddy Jones Ford Lincoln-Mercury, Inc.*, 734 So.2d 173, 176 (Miss. 1999). However, ambiguities do not exist simply because two parties disagree over the interpretation of a policy. *HeartSouth, PLLC v. Boyd*, 865 So.2d 1095, 1105 (Miss. 2003). Exclusions and limitations on coverage are also construed in favor of the insured. *Noxubee County Sch. Dist.*, 883 So.2d at 1165. Language in exclusionary clauses must be "clear and unmistakable," as those clauses are strictly interpreted. *Miss. Farm Bureau Mut. Ins. Co. v. Jones*, 754 So.2d 1203, 1204 (Miss. 2000). Nevertheless, "a court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured." *Titan Indem. Co. v. Estes*, 825 So.2d 651, 656 (Miss. 2002) (citing *Scitzs*, 394 So.2d at 1373).

Id. at ¶13, footnote added.

¹¹As in this case, USF&G argued that the Mississippi court should adopt the finding of the Southern District of Mississippi in *Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F.Supp.2d 606 (S.D. Miss. 2001), finding a similar ACC clause to be clear and unambiguous in the context of an earth movement claim. The Court declined the invitation to follow *Eaker*.

¹²*State Farm Mut. Ins. Co. v. Scitzs*, 394 So.2d 1371 (Miss. 1981).

Holding the ACC to be ambiguous, this Court noted:

Since the relevant provisions in the Policy are subject to two reasonable interpretations and because exclusion clauses must be strictly construed, the terms of the Policy will be interpreted in favor of the non-drafter, the insured. In other words, the Policy will be interpreted as a whole to cover damage caused by water from sewer or drain backup, even when some damage may have resulted from flood, surface water, or overflow or any body of water. [*Id.* at ¶16.]

Here, as in *Martin*, the ACC is ambiguous and may not be enforced in this policy. As noted above, the policy insures “against risks of direct, physical loss to property.” The critical terms of “loss” and “risk” are not defined in the policy.¹³ “Wind” and “windstorm” are specifically included as covered in the policy; both on the declarations page which states that “loss” for wind and hail is covered if exceeding \$7,500 and under coverage C for personal property which specifically enumerates coverage for “windstorm.” The use of the ACC as an attempt to get around coverage for hurricane damage caused by wind merely because “water damage” contributes to said “loss” creates an inherent ambiguity which cannot be resolved without striking said clause.

¹³ Moreover, the exclusion’s definition of “water” does not include “storm surge.” The maxim of *expressio unius est exclusio alterius* applies to the omission of storm surge from the policy. See, *Evana Plantation*, 214 Miss. 321, 58 So.2d 797, 800 (1952), reasoning that, in a policy that covered damage caused by “hail,” excluded damage by “ice” and did not mention “sleet” at all, damage by sleet was not excluded because “[i]f [the insurance company] had desired to exclude sleet from coverage, it would have been a simple matter to do so, since both sleet and hail are ice, and sleet is neither specifically included or excluded.” **The lower court’s order finding storm surge to fall within the definition of “water damage” reached by resorting to definitions outside the policy was clearly erroneous. The policy itself defines “water damage” and purposely does not include storm surge within that definition.** (R.E. 40)

The lower court's opinion, while failing to address the Corbans' claims of ambiguity, establishes the merit of those claims. The trial judge herself interpreted the clause in one manner -- namely as excluding only water damage, and not wind damage caused prior to water -- but then relegated that interpretation to the Fifth Circuit's completely contrary one. Moreover, even the Fifth Circuit has given the clause varying interpretations. Compare *Leonard* with *Tuepker*. See also, Judge Senter's different constructions in *Leonard, supra*, 438 F.Supp.2d at 693 and *Dickinson, supra*.

The clause, having spawned so many different interpretations, is obviously ambiguous and should be stricken and/or construed in favor of the interpretation urged by Petitioners. Without the ACC, the efficient proximate cause doctrine applies and all hurricane damage to Appellants' property is covered since wind is the efficient proximate cause of same.

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

If this Honorable Court were to conclude that the *Leonard* interpretation of the ACC is correct, Appellants maintain that the clause should be voided as contrary to public policy. Mississippi law should not permit an insurer to deny coverage for loss caused by a hurricane when the efficient proximate cause of the loss, i.e., wind, is covered and when to allow such an exclusion would result in illusory coverage.

Although the right to contract is fundamental, contracts contrary to public policy are unenforceable. *Hertz Commercial Leasing v. Morrison*, 567 So.2d 832, 834 (Miss. 1990); *First Nat. Bank of Vicksburg v. Caruthers*, 443 So.2d 861, 864 n.3 (Miss. 1983). Our statutes are enactments of the public policy of this state. *Grisham v. Hinton*, 490 So.2d 1201, 1209 (Miss. 1986) (Robertson, J., concurring). Indeed, regarding invalidation of contracts on public policy grounds, this Court has said that the public policy of this state is “found in its constitution and statutes, ‘and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials.’” *Cappaert v. Junker*, 413 So.2d 378, 380 (Miss. 1982), quoting *State ex rel Knox v. Hines Lbr. Co.*, 115 So. 598, 605 (1928). *Lanier v. State*, 635 So.2d 813, 816 (Miss. 1994) (overruled on other grnds). In determining “public policy”, this Court looks beyond strict statutory constraints to interpretation of our laws by the public officers charged with overseeing them and holds that “contracts contrary to public policy” include “those which tend to be injurious to the public or against the public good”; and are “illegal and void, even though actual injury does not result therefrom.” *Independent Linen Service Co. v. Sennett*, 12 So.2d 530, 532 (Miss. 1943), (citing 17 C.J.S. Contracts, § 211). Mississippi follows the common law principle that contracts contrary to public policy are unenforceable, even if clear or unambiguous. *See, Hertz, supra*, at 834-35.

Mississippi law has long held that damages caused by the winds of a hurricane are covered under a property insurance policy notwithstanding the

contribution of other factors, so long as the wind was the proximate cause of the damage. In the Hurricane Betsy case of *Firemen's Ins. Co. of Newark, N.J. v. Schulte*, 200 So.2d 440 (Miss. 1967), this Court affirmed a verdict in favor of the policyholder for the total amount of the loss notwithstanding evidence that rising water from the hurricane would have invaded the insured property. The policy in question excluded loss "caused by, resulting from, contributed to or aggravated by" flood, whether driven by wind or not. *Id.* at 440-41. In affirming the jury's verdict for the full amount of the loss, this Court cited *Ebert v. Pacific Nat. Fire Ins. Co.*, 40 So.2d 40 (La.App.1949), as an example of "cases dealing with this or similar provisions and either indicating or finding that an issue of fact was presented by somewhat similar facts." *Id.* at 442. The *Ebert* case is instructive. *Ebert* concerned a loss from the 1947 hurricane to plaintiff's camp, "located on the South side of Highway 90 between Chef Menteur and the Rigolets." *Id.* at 41. The named perils policy covered windstorm but excluded water, whether driven by wind or not. The Louisiana appellate court noted as follows:

The description of the situs of the insured's camp readily conveys the associated idea that the camp is surrounded by water, and it is inconceivable to us, who have lived all of our lives in this general area, to believe that a storm or hurricane could occur of any sort whatsoever, without a corresponding rise in the tide. . . . **If a tornado or windstorm policy does not afford protection from a storm accompanied by winds of ninety-eight miles per hour or more, it occurs to us that authors of the contracts of windstorm insurance may just as well insert a clause in the policy to the**

effect that it should not be operative when a hurricane is accompanied by high tides. [*Id.* at 46]¹⁴

The *Schulte* court also cited and relied upon the Fifth Circuit decision in *Home Ins. Co., New York v. Sherrill*, 174 F.2d 945 (5th Cir. 1949), which affirmed a verdict in favor of the policyholder based on evidence that wind damage occurred prior to the arrival of associated rising water. The insurer argued that it was entitled to judgment as a matter of law because the high water was at least a contributing cause. Affirming the lower court verdict, the Fifth Circuit properly noted “[w]e will not split hairs as to whether the water rather than the wind did some minor damage to the debris after the building collapsed.” *Id.* at 946. See also, *Royal Ins. Co. v. Martinolich*, 179 F.2d 704 (5th Cir. 1950).

The causation rule in Mississippi regarding damages caused concurrently by a covered peril and an excluded peril under an insurance policy is that the insured may recover if the covered peril was the “dominant and efficient cause” of the loss. *Evana Plantation, supra*, 58 So.2d at 798. To recover under this rule, typically referred to as the efficient proximate cause doctrine, in the context of a homeowners policy that covers wind damage but excludes damage by water, “it is sufficient to show that wind was proximate or efficient cause of the loss . . . notwithstanding other factors contributed.” *Lititz Mut. Ins. Co. v. Boatner*, 254

¹⁴ See also, *Pennsylvania Fire Ins. Co. v. Sikes*, 168 P.2d 1016, 1019 (Okla.1946) (allowing recovery where “neither the house nor the truck was affected by the flood water until the wind had blown them from their sites and anchorage. Whatever flood damage may have resulted thereafter was incidental, and a somewhat logical sequence to the wind disturbance.” Cited in *Ebert, supra*.

So.2d 765, 767 (Miss. 1971). This doctrine was used to allow coverage in the flurry of insurance cases to come before the Mississippi Supreme Court following the devastation of Hurricane Camille. See, e.g., *Grace v. Lititz Mut. Ins. Co.*, 257 So.2d 217 (Miss. 1972); *Boatner, supra*,¹⁵ *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777 (Miss. 1971). In these Hurricane Camille cases, the policyholders' claims were deemed covered under their policies because the proof established that wind caused the damage before the arrival of any excluded flood waters.¹⁶

In short, Mississippi law has long embraced the concept that if the efficient proximate cause of the loss is covered under a property policy, then the loss should be paid notwithstanding clauses seeking to exclude coverage based on contributing non-covered causes. Thus, if Defendant's construction of the ACC is correct - - namely that it excludes wind damage that occurred concurrently or sequentially with water damage - - then that ACC is contrary to Mississippi public policy and should be invalidated.¹⁷

¹⁵ The use of the efficient proximate cause doctrine to allow coverage notwithstanding the presence of an excluded event is consistent with Mississippi law in other insurance contexts. See, e.g., *United States Fidelity & Guaranty Co. v. Smith*, 164 So.2d 462, 470 (Miss. 1964) (in accidental death policy, "if the accident . . . sets in motion a train of events leading directly to death, then the death results from the accident"); *New Hampshire Ins. Co. v. Robertson*, 352 So.2d 1307 (Miss. 1977) (where policy covered damage due to leaking plumbing but excluded damage due to settling or cracking, claim made under the policy after a leak caused settling and cracking was deemed to be covered under the policy).

¹⁶ Both *Grace* and *Boatner* relied upon *Schulte, supra*. Moreover, the *Boatner* court relied upon *Kemp v. American Universal Ins. Co.*, 391 F.2d 533 (5th Cir. 1968), wherein the Fifth Circuit once again upheld coverage because wind was a proximate cause of the damage even though other factors contributed.

¹⁷Other states have held that an ACC clause may not be used to defeat the efficient proximate cause doctrine as such a construction would be contrary to the reasonable expectations of the parties. See, e.g., *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 15 (W. Va. 1998); *Safeco Ins. Co. v. Hirschmann*, 773 P.2d 413, 414-16 (Wash. 1989). See also, *Howell v. State Farm Fire & Cas. Co.*, 218 Cal.App.3d 1446, 267 Cal. Rptr.

Directives and bulletins from the MID likewise indicate that our public policy would prohibit the construction urged by Defendant, adopted by the Fifth Circuit, and reluctantly applied in this case by the lower court. On September 7, 2005, the MID issued a Bulletin to insurers emphatically stating that the mere existence of flood waters from Hurricane Katrina should not be used to void coverage. In this regard, Commissioner Dale stated:

In some situations, there is either very little or nothing left of the insured structure and it will be a fact issue whether the loss was caused by wind or water. In these situations, the insurance company must be able to clearly demonstrate the cause of the loss. I expect and believe that where there is any doubt, that doubt will be resolved in favor of finding coverage on behalf of the insured. 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 not by wind. (R.E. 65)

In an interview with the *Sun Herald* published on September 9, 2006, Commissioner Dale specifically addressed the ACC clause and made it clear that the MID's interpretation was that "if there is wind involved, at whatever stage of the claim, wind should be paid." (R. 1698) The Fifth Circuit failed to consider this strong indication of public policy in its decisions.

In a recent publication, the MID reiterated that "[w]hen there are one or more perils involved, such as wind and water, and the water is excluded, it is incumbent **upon the company** to calculate the separate damage attributable to

708 (Ct.App. 1990); *Garden State Indem. Co. v. Miller & Pincus*, 340 N.J.Super. 148, 773 A.2d 1204 (2001).

each peril and adjust the claim according.” Report of Special Target Investigation at 18, *supra*. (R.E. 114) (emphasis added)

Mississippi law is clear that it will not enforce insurance provisions that are contrary to public policy. *See, e. g., Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So.2d 777, n.3 (Miss. 2004) (“[A]s a matter of public policy . . . stacking of UM coverage is mandatory . . . and . . . anti-stacking clauses as applied to UM coverage are unenforceable.”)

Just as a minimum amount of coverage for Mississippi citizens injured because of the fault of uninsured motorists is mandated under Mississippi public policy, the Legislature has also declared that our public policy requires a minimum amount of coverage for hurricanes. That public policy is expressed in the Mississippi Windstorm Underwriters Act (MWUA), in addition to this Court’s precedent and pronouncements from the Mississippi Department of Insurance.

In 1987, the Mississippi Legislature passed the MWUA contained in § 83-34-1 *et. seq.* The legislative history to said Act 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 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, that 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. (R. 1693) 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,¹⁸ **the minimum allowed policy does not contain an ACC.**

In short, through the MWUA, 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, the Legislature declared that “essential property insurance” would contain “insurance against direct loss” from windstorm and, by approval of the form, that it would not contain

¹⁸ “This Company shall not be liable for loss caused by, or resulting from, contributed to or aggravated by any of the following - a. flood, 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; b. water which backs up through sewers or drains; c. water below the surface of the ground including that which exerts pressure on or flows, seeps, or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows, or any other openings in such sidewalks, driveways, foundations, walls or floors.” This same language has been held to allow recovery for wind damage even though water arrives later. While Defendant and amici claim this exclusionary language operates as an ACC clause, this Honorable Court in *Fireman’s Ins. Co. v. Schulte, supra*, and cases cited therein clearly held that wind damage would not be excluded merely because combined with subsequently occurring water despite such policy language.

an ACC clause which could operate to deprive Gulf Coast residents of required coverage from the effects of devastating hurricanes.

Mississippi law, through legislative enactment of the MWUA, decades of judicial precedent, and official directives and findings from the MID has consistently established that damage occurring as a proximate result of wind should be paid, notwithstanding the contribution of water at some other stage of the loss. USAA's reliance on its ACC for avoiding payment for losses caused by wind merely because water may concurrently or sequentially combine to cause damage to the same portion of the property is contrary to Mississippi public policy. The ACC should be invalidated. Given that the ACC is unenforceable under Mississippi public policy, the efficient proximate cause doctrine applies and covers all Appellants' Hurricane Katrina damages.

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

The lower court decision changes long standing Mississippi law that requires the insurer to prove that any particular part of a loss is excluded under the policy. The question of who has the burden of establishing causation is often the deciding factor in cases like the Corbans' and thousands of other Mississippians whose homes were undisputedly contacted with storm surge at the end of the hurricane. In other words, is the direct physical loss covered or not covered if causation cannot be determined?

Mississippi law has long held that the insurer has the burden of proving applicability of an exclusion in an all risk policy. However, this elemental proposition has become obscured in Hurricane Katrina litigation by crafty insurer arguments and misguided federal court opinions. This important appeal allows this Honorable Court to announce that these well settled principles of Mississippi law are alive and well - - and fully applicable to Hurricane Katrina claims.

1. “All Risk” Basics and the Policyholder’s Burden

The pertinent facts are undisputed. This USAA policy is an “all risk” policy as to dwelling coverage, as its contractual coverage provision states: “We insure against risks of direct, physical loss to property.” (R.E. 38).¹⁹ See, 7 *Couch on Insurance*, § 101:7 (3 ed. 2005). 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.” *Id.* (“All Risk” Versus “Named Perils Contracts”).²⁰

Under well established principles regarding “all risk” 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. 17 *Couch on*

¹⁹USAA admits that its “homeowners policy is an ‘all-risk’ policy providing coverage to the dwelling and outbuilding structures. This means that all risks to the structures are covered, other than those risks specifically excluded from coverage.” (USAA’s Combined Response and Brief Regarding Petition for Interlocutory Appeal at 3).

²⁰While the contents coverage is on a “named perils” basis, one of those named perils is “windstorm.” (R.E. at 39) It is undisputed that Hurricane Katrina was a “windstorm”.

Insurance § 254:15 (“Basic Burdens of Insured and Insurer...Principles Applicable to All Risk Policies”). 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.* As succinctly stated, “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.” 10A *Couch on Insurance* § 148:52. See also, *Byrne, supra*, at 782, and *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618 (5th Cir. 2008) (construing Miss. law).

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 negative 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.

An “all risk” policy is distinguished from a “named perils” policy, as were the Lititz Mutual policies which gave rise to many cases following Hurricane Camille. *See, Boatner, supra; Grace, supra; Lititz Mut Ins. Co. v. Buckley*, 261 So.2d 492 (Miss. 1972), etc. Moreover, when a policy is “all risk” as to dwelling but “named peril” as to contents, the burden of proof rests on the insurer to establish exclusions exist for both types of coverages. *Byrne, supra* at 781-82.

Unlike the post-Camille “named perils” cases that required apportionment of the loss between that “part” caused by water and that “part” caused by wind, this “all risk” policy does not require the homeowner to prove what damage was caused by any specific named peril. To meet the *prima facie* burden under the USAA all risk dwelling coverage, the insured only has to show the “fortuitous loss” of the insured home, i.e., “direct physical loss to the property” from any cause whatsoever. It then becomes USAA’s burden to prove that any portion of the loss is one to which its water damage exclusion applies. If the insurer cannot prove what specific portion of the loss was caused by excluded water damage, then it must pay for the entire loss.

USAA chose to offer the Corbans an insurance policy that covered “risks of direct, physical loss.” By writing the contract in this manner, USAA accepted for itself the responsibility of paying for all such losses unless the company can prove what part of the loss, if any, was caused by an excluded peril. The ACC does not and cannot relieve USAA of that obligation.

The lower court demonstrated a misunderstanding of the burden of proof by implicitly holding that the Corbans must shoulder that responsibility. In reluctantly adopting the federal holdings, the trial judge noted “the difficulty of proof in dividing that damage caused by wind from any additional damage to the same item or area caused by water may well reach the same end result as totally excluding recovery for any combined damage.” (R.E. 19, n.1) In fact, the opposite is true. Because USAA must prove which part of the loss is excluded, the “difficulty of proof” results in the insurer having to pay the entire loss.

2. USAA’s Position

While the well-established law concerning burdens of proof clearly establishes the Corbans’ right to receive contractual benefits for all Hurricane Katrina damage that USAA cannot prove was caused by water, the insurance industry, including USAA, has turned Mississippi law on its head by paying only for the damages that could only have been caused by wind.²¹ Any damage that occurred to a portion of the property that was ultimately impacted by storm surge prior to the end of the hurricane has been denied, regardless of whether proof exists negating pre-flood wind damage. Stated simply, USAA contends its policy’s ACC excludes damage that is indivisible between wind and water. Using its own words, USAA maintains that only “damage caused by a covered peril alone (in this

²¹The MID Market Conduct Special Target Examination finds that, like USAA, State Farm paid lip service to the appropriate burden of proof while failing to meet its duty to pay all amounts it could not prove were caused by an exclusion. Exam at 17-18. (R.E. 113-114)

instance, wind) is covered; damaged (sic) caused by water or by wind and water together is not.” Combined Response and Brief of USAA Regarding Petition for Interlocutory Appeal, p.1. USAA then maintains that “[w]hat damage is caused solely by wind, and the extent of that damage, is a fact question for the jury.” *Id.* at p. 9.

By its refined arguments²², USAA seeks to shift the burden of establishing the cause of the loss to the insured. Thus, the insurance industry, by manipulation of the ACC , has forced Mississippi policyholders to prove the extent to which the loss of their homes was caused “exclusively” by wind - - a result totally contrary to the directive of the MID in Bulletin 2005-6. (R.E. 65) Contrary to the insurance industry’s position, under Mississippi law the full extent of the hurricane damage is covered other than that which the insurer conclusively proves is excluded. In the context of Hurricane Katrina litigation, this subtle distinction marks a difference between a policyholder who is promptly paid and therefore can rebuild and a policyholder who has to spend years in court and engage in a battle of the experts on causation before being paid contractual benefits. The examples provided by USAA prove the point. USAA maintains that if:

the roof was breached and rain entered, dampening (but not destroying) a carpet, USAA would pay the cost of drying and cleaning a carpet. This is so, even if storm surge later entered the house and

²²USAA’s attorney originally argued that the ACC excludes even wind damage if water later impacted the same part of the property. (Tr. 33-34). USAA changed its interpretation on appeal.

destroyed the carpet. USAA would not owe for replacement of the carpet - - only the cost of drying and cleaning a carpet.

Combined Response and Brief of USAA Regarding Petition for Interlocutory Appeal at p. 9. This “example” well demonstrates what has happened to Mississippi policyholders whose homes were destroyed by Hurricane Katrina. Those who, like the Corbans, lost their roof from the winds of the hurricane were paid only for the roof. USAA refused to pay for all the damage done to the interior of the home, claiming that despite the loss of the roof which allowed substantial wind and rain waters to invade and destroy the home, all other damage is not covered because storm surge impacted the home at some point prior to the end of the hurricane.²³ Despite Mississippi law, the insurers maintain they do not have to prove the exposed interior was not destroyed until the surge arrived.

3. USAA Has Not and Cannot Meet Its Burden

The insurer’s burden of proving an exclusion bars coverage cannot be met by simply showing that at some point storm surge may have affected whatever part of the house may have still existed by the time the surge arrived. In other words, as even the Fifth Circuit acknowledges, there is no “shifting” burden of proof as advocated by the insurance industry. *See, Broussard, supra*, at 626-28, citing *Boatner, Grace* and *Byrne*.

²³Here, they did not even pay the Corbans for cleaning the carpet.

Nor can USAA satisfy its burden of proving any part of the loss is excluded from coverage by the mere fact that the insured was paid benefits under a separate flood insurance policy. The Mississippi Collateral Source Rule states:

[c]ompensation or indemnity for the loss received by plaintiff from a collateral source, wholly independent of the wrongdoer, as from insurance, cannot be set up by the latter in mitigation or reduction of damages

Brandon HMA, Inc. v. Bradshaw, 809 So.2d 611, 618 (Miss. 2001), citing *Coker v. Five-Two Taxi Serv., Inc.*, 211 Miss. 820, 826, 52 So.2d 356, 357 (1951). As with any collateral source, USAA should not be permitted to mitigate its own liability by using proceeds paid under an entirely different policy backed by the United States government. See, *Thornton v. Sanders*, 756 So.2d 15, 18 (Miss. App. 1999), and cases cited therein.

The Corbans were not required to sign any proof of loss or other statement in order to receive flood proceeds from the United States government.²⁴ Indeed, they were not required to acknowledge or attribute any of the damage in question to flood. Moreover, the Corbans were not provided with any prior notice that USAA would attempt to use the acceptance of proceeds under a separate policy of flood insurance, limited as they were, in mitigation of contract benefits owed under the USAA insurance policy or as an “admission” that any portion of their

²⁴The U.S. Government apparently recognized the difficult, if not impossible task of separating “wind” loss from “water” loss in Hurricane Katrina claims like the Corbans, and issued W-05040, a “Waiver of the Proof of Loss Requirement in the Standard Flood Insurance Policy (SFIP)” by correspondence and Bulletin dated August 31, 2005, at <http://bsa.nfipstat.com/wyobull/w-05040.pdf>. (R.E. 139 - 141)

loss was caused by flood. Thus, no election of remedies or judicial admission or estoppel applies in this case. See, e.g., *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d 626 (2nd Cir. 1999) (Jones Act seaman's acceptance of voluntary interim payments from the New York Workers Compensation Board did not waive entitlement to damages under the Jones Act where seaman never received a formal workers' compensation award settling the matter of his injury and never advanced an intention to waive redress under the Jones Act).

This Court's decision in *Harrison Co. v. Norton*, 146 So.2d 327 (Miss. 1962), discussed in detail the analogous situation of whether a workers' compensation claimant could recover benefits in one state and subsequently claim benefits under the Mississippi act. Concluding that receipt of benefits under another state's workers' compensation act would not bar entitlement under the Mississippi act, the Court held that where the statute does not make receipt of benefits exclusive, then, subject only to the double recovery rule, successive awards in different states would be permitted. See also, *Genesis Ins. Co. v. Wausau Ins. Co.*, 343 F.3d 733 (5th Cir. 2003) (discussing Mississippi's "volunteer doctrine" whereby acceptance of payments voluntarily made may not affect entitlement to other benefits). *Thomas v. Bailey*, 375 So.2d 1049, 1053 (Miss. 1979) (holding "judicial estoppel" only applies when a party "with full knowledge of the facts" asserts a position that is "inconsistent with a position asserted in prior judicial proceedings.")

There is no evidence to support any claim by USAA that the Corbans' acceptance of flood insurance proceeds was intended by them as an election of remedies or admission of cause of loss. Indeed, the proof is uncontradicted that the Corbans were vigorously pursuing their claims under the USAA insurance policy and maintaining that their losses are covered under that policy.²⁵ The lower court erred in its ruling that "the Corbans have, by acceptance of those flood proceeds, admitted that they sustained flood damage." (R.E. 63)

USAA is contractually obligated to pay for the entirety of the Corban direct physical loss unless and until it can prove that any particular part of the loss was caused by excluded water damage. It cannot meet its burden by merely showing that at some point storm surge would have come onto the property because there is no way to determine if the loss had already been caused by covered wind. 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

As previously discussed, *Leonard v. Nationwide, supra*, represents the Fifth Circuit's first consideration of the effect of an ACC on causation issues in

²⁵The payment of flood insurance benefits is not probative of the extent to which wind caused damage to the home. Indeed, the federal government has admitted that procedures used for the payment of flood claims during Hurricane Katrina do not permit a determination of how much a particular damage was caused by wind and how much by water. There is not even any proof that any portion of the Corbans' residence structure was in fact destroyed by storm surge flooding. Whether some credit should be given for NFIP payments to avoid "double recovery" is a question that should strictly be limited to a post-verdict determination by the court.

hurricane claims decided under Mississippi law. An extensive discussion of the case's factual and procedural background is necessary.

Leonard, the first Hurricane Katrina case to be tried in Mississippi, began as a non-jury trial before Senior District Court Judge L.T. Senter of the United States District Court for the Southern District of Mississippi. See, *Leonard v. Nationwide Mut. Ins. Co.*, 438 F.Supp.2d 684 (S.D. Miss. 2006). Sitting as the trier of fact, Judge Senter found that storm surge "inundated the Leonard residence to a depth of approximately five feet," that the "second floor of the Leonards' property was not damaged," that "the water-tight integrity of the roof was not breached," and that the "only wind damage on the ground floor of the Leonards' residence was a hole in one window." 438 F.Supp.2d at 689.

Judge Senter construed the Nationwide ACC clause, substantially similar to that contained in the Corban policy, after quoting the language, as follows:

[“]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 peril or event contributed concurrently or in any sequence to cause the loss.[”] The “loss,” “such a loss,” and “the loss” referred to in this paragraph, is, in this instance, damage caused by rising water during Hurricane Katrina. These three terms refer to this particular excluded loss, i.e. damage caused by rising water, but this paragraph does not affect the coverage for other losses (covered losses), i.e. damage caused by wind, that occur at or near the same time. Thus, this language does not exclude coverage for different damage, the damage caused by wind, a covered peril, even if the wind damage occurred concurrently or in sequence with the excluded water damage. The wind damage is covered; the water damage is not.

Id. at 693. (Bracketed quotation marks supplied to indicate quoted policy language). With regard to the burden of proof issue, Judge Senter contradicted himself without explanation in the following passage:

The Leonards have the burden of proving that the insured property was damaged or destroyed by a cause within the insuring language of the policy during the time the policy was in force. For their structure, this requires the Leonards to prove that there was a direct accidental physical loss to the property. . . .

Nationwide has the burden of proving what portion of the total loss was attributable to water damage and was thus within the water damage exclusion. *Commercial Union Insurance Co. v. Byrne*, 248 So.2d 777 (Miss. 1971).

Under applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), **the insured may recover that portion of the loss which he can prove to have been caused by wind.** *Grace v. Lititz Mutual Insurance Co.*, 257 So.2d 217 (Miss. 1972). Nationwide is not responsible for that portion of the damage it can prove was caused by water. To the extent property is damaged by wind, and is thereafter also damaged by water, the insured can recover that portion of the loss which he can prove to have been caused by wind, but the insurer is not responsible for any additional loss it can prove to have been later caused by water. *Lititz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss. 1971).

Id. at 694 (emphasis added).

Considering Judge Senter's opinion in the context of Mississippi law, it is apparent that while his construction of the ACC as not excluding wind damage was correct, even if the wind damage occurred concurrently or in sequence with the excluded water damage, his conflicting applications of the burden of proof cause confusion. Initially, he got it right by stating that once the Leonards proved a direct accidental physical loss to the property, then Nationwide had the burden

of proving what portion of that loss was attributable to water damage. Immediately following this correct pronouncement, however, Judge Senter, citing post-Camille “named perils” decisions, erroneously stated that “the insured may recover that portion of the loss which he can prove to have been caused by wind.” *Id.* at 695.²⁶ In the context of the *Leonard* case, this fine tuning of legal conclusions would not have changed the ultimate result since Judge Senter, the finder of fact in this non-jury trial, found Nationwide met its burden of proving that the bulk of the damage was caused by water. Unfortunately, however, the less than precise language used in this first, all important decision on the merits in the context of Hurricane Katrina litigation has haunted policyholders and its errors have been compounded by the Fifth Circuit.

As discussed in more detail, *supra*, the Fifth Circuit’s opinion in *Leonard*, 499 F.3d at 430-31, significantly misstated Mississippi law by holding that if a portion of plaintiffs’ “property damage was caused by the concurrent or sequential action of water - - or any number of other enumerated water-borne perils - - the policy clearly disallows recovery.” The *Leonard* court also erred in its interpretation of the ACC by stating a loss is excluded if damage is caused by wind

²⁶It should be emphasized that the subject policy does not provide coverage for “wind.” It is an “all risk” policy under which the Corbans are covered for all the “direct physical loss” caused by Hurricane Katrina, excepting only those specific portions of loss USAA can prove were caused by an excluded peril. Obviously, something cannot be “destroyed” more than once, and once the Corbans’ property sustained an “accidental direct physical loss,” it is covered regardless of whether subsequent storm surge may reasonably have been expected to cause the same loss in the absence of the preceding effects of the hurricane.

and “storm-surge flooding - - an excluded peril - - then inundates the *same* area that the rain damaged.” *Id.* at 431.

The Fifth Circuit likewise erred in the later decision of *Tuepker, supra*, 507 F.3d 346, where it misconstrued Mississippi law by holding that “the ACC Clause in combination with the Water Damage Exclusion clearly provides that indivisible damage caused by both excluded perils and covered perils or other causes is not covered.” *Tuepker, supra*, at 354. This conclusion is directly contrary to Mississippi law which holds that if the insurer of property covered by an all risk policy cannot determine which particular portion of a loss was caused by an excluded peril, then the insurer owes for the entire loss.²⁷

Under Mississippi law, if the winds of a hurricane cause damage and water later impacts the covered property, resulting in “an indivisible” loss, i.e., one in which it cannot be determined whether a particular part of the loss was caused by wind or water, then the insurer owes for the entire loss, as it has failed to meet its burden of proof.

This Honorable Court has previously decided the issue of the insurer’s responsibility for payment of a loss caused in part by a covered event and in part by an excluded one, and that decision was in favor of the insured. In *Glens Falls Ins. Co. v. Linwood Elevator*, 130 So.2d 262 (Miss. 1961), the insured filed a claim for loss of soybeans allegedly destroyed by fire in the insured’s grain elevator. The

²⁷See also, MID Bulletin 2005-6, *supra*, directing that “where there is any doubt [about the cause of loss], that doubt will be resolved in favor of finding coverage on behalf of the insured.”

insurance company denied the claim, maintaining that it was caused in part by internal deterioration and combustion, known as “bin burn”, an excluded peril. One of the issues on appeal was couched as follows: “can appellant be held liable if the soybeans were destroyed partly by fire and partly by internal deterioration and combustion, known as ‘Bin Burn?’” *Id.* at 265. The insurer argued on appeal that the insured could recover nominal damages at best, because it failed to distinguish between the amount of damage caused by the covered peril and the amount caused by the excluded peril. *Id.* at 269. This Honorable Court rejected that argument and found that because the efficient proximate cause of the totality of the loss was covered fire, the insurance company owed it all.

The Court’s holding in *Glens Falls* was based on several decisions from other jurisdictions, including *Lummel v. National Fire Ins. Co. of Hartford, Conn.*, 210 N.W. 739 (S.D. 1926). *Lummel* was described by this Honorable Court as holding that “where only one concurring cause of loss is insured against, and damage by peril can be distinguished, each party must bear its proportion, but where each cause cannot be distinguished, the party responsible for dominating efficient cause is liable for the loss; and where an efficient cause nearest the loss is a peril expressly insured against, the insurer is not relieved from responsibility by showing that property was brought within such peril by a cause not mentioned in the insurance policy.” *Glens Falls* at 270. *See also, Varano v. Home Mut. Fire Ins. Co.*, 63 A.2d 97, 99 (Pa. 1949) (“[t]he damage caused by the explosion was an incident of the fire and was caused by it, and under the circumstances therefore

the entire loss must be regarded as a loss by fire regardless of an exception in the policies against loss from explosion.”), cited in *Glen Falls*, 130 So. 2d at 270.

The Fifth Circuit opinions in *Leonard* and *Tuepker* fail to properly apply Mississippi law. The concept that “indivisible loss” is excluded is inconsistent with controlling law requiring insurers in “all risk” policies to prove direct physical loss was caused by an excluded peril in order to avoid coverage. Clearly, “indivisible damage” constitutes no less a “direct physical loss” than “divisible” damage. The rulings of the federal courts have caused and will continue to cause harm to Mississippi policyholders already victimized by the devastating losses of Hurricane Katrina. This Honorable Court now has the opportunity to rectify these erroneous rulings by holding that indivisible damage, i.e., damage to which causation cannot be determined, is covered under an all risk policy.

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

As noted *supra*, Mississippi law is clear that an insured may recover under his homeowners policy if the covered peril was the “dominant and efficient cause” of the loss, notwithstanding the fact that an excluded cause contributed to the loss. Indeed, even the Fifth Circuit panel in *Leonard* acknowledged that Mississippi law provided “in the context of a homeowner’s policy that covers wind damage but excludes damage by water, ‘it is sufficient to show that wind [i.e., the covered peril] was the proximate or efficient cause of the loss . . . notwithstanding other factors [i.e., excluded perils like water] contributed’” *Leonard, supra*,

499 F.3d at 432, quoting *Boatner*, *supra*, 254 So.2d at 767. (Brackets in *Leonard*). Nonetheless, however, the Fifth Circuit found that the efficient proximate cause doctrine could be and was in fact “contracted out” by use of the ACC. This holding is erroneous.

It bears repeating that the exclusion in question begins by noting: “we do not insure for loss **caused**” The efficient proximate cause doctrine as adopted by Mississippi goes to the issue of whether any particular loss was “caused” by the excluded event or not. Under Mississippi law, when a loss is “caused” by a covered event which sets in motion other events, then said loss is not “caused” by the excluded peril. This is the clear conclusion reached by the Hurricane Camille cases that previously reached this Court and which were found to have resulted in covered damages notwithstanding the fact that water later impacted the property. *See, Buckley*, 261 So.2d at 495; *Grace*, 257 So.2d at 224; *Boatner*, 254 So.2d at 766; *Schulte*, 200 So.2d at 442-443.

It is undisputed, indeed indisputable, that the efficient proximate cause of all Hurricane Katrina losses is wind, as it is the wind that sets in motion not only destruction that occurs as a direct result of wind but, in addition, any loss that may occur as a result of the subsequent storm surge, which is by definition a part of any hurricane. Since wind was the efficient proximate “cause” of all damage to the Corban home, the loss was not “caused” by excluded water damage and USAA owes for all such damage.

Thus, even if the Court determines that the ACC should not be stricken as void given its hopeless ambiguity, and even if the Court determines the ACC should not be stricken as conflicting with Mississippi public policy, Appellants submit that the water damage exclusion does not apply where wind is the efficient proximate cause of the loss.

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

For all of the above reasons, 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 were excluded from coverage. While any one of these arguments requires reversal, this Honorable Court can greatly advance the rights of Mississippi citizens by addressing each argument so that continued federal court errors in state law do not further impede Mississippi's recovery from the most disastrous catastrophe we have ever faced. The basis for the errors, discussed in detail in this brief, are as follows:

(1) The ACC has resulted in multiple and varied interpretations by the courts and parties for the three years since Hurricane Katrina wreaked havoc on the Gulf Coast. The inability of the courts and parties to determine the meaning of the clause demonstrates its ambiguity. Accordingly, the ACC should be stricken and/or construed in favor of the insured as providing coverage.

(2) Mississippi law has for decades found that when the efficient proximate cause of a loss is a covered event, the loss is covered notwithstanding

the presence of other, excluded causes. Moreover, the MID has expressed its opinion that insurance policies such as that issued by USAA cover all wind damage and all damage for which there is a doubt about the cause of loss. The Mississippi legislature has found coverage for hurricanes to be “essential.” Accordingly, if the lower court’s interpretation (and that of the Fifth Circuit) of the ACC is correct, then that clause violates Mississippi’s public policy and must be stricken.

(3) In an all risk homeowners policy containing an ACC as part of the exclusion the insurance company, and not the insured, has the burden of proving causation of that part of the loss that is to be excluded. In other words, it is not the policyholder’s duty to negate or separate out how much damage was caused by wind or how much damage was caused by water. All direct physical loss must be paid unless and only to the extent the insurer can prove which, if any, specific part of the loss was caused by an excluded event.

(4) The Fifth Circuit in *Leonard* and *Tuepker* held that under Mississippi contract law “indivisible damage” caused by both wind and water in a hurricane is excluded under the contract terms of the policy at issue. This is an incorrect interpretation of Mississippi law, which holds just the opposite, namely that if the damage from two causes, one excluded and one covered, is “indivisible”, then the insurance company must pay the entire loss.

(5) Notwithstanding the presence of an ACC, the policy at issue contains an exclusion only for losses “caused” by water damage. In determining what is

“caused” by an excluded event, the Court must look to the efficient proximate cause of the loss. Where, as here, the efficient proximate cause of the loss is wind, then it cannot be said to be “caused” by water damage.

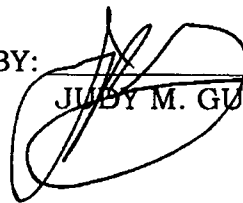
V. CONCLUSION

The trial court’s order declaring that Hurricane Katrina losses caused by a combination of wind and water are not covered should be reversed and this action remanded for further proceedings.

Respectfully submitted this the 18th day of November, 2008.

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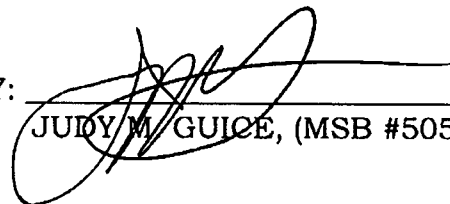
**CERTIFICATE OF FILING
THE BRIEF OF THE APPELLANTS AND
RECORD EXCERPTS FILED WITH BRIEF OF THE APPELLANTS**

Comes now, the undersigned attorney of record for the Appellants, Margaret and Dr. Magruder S. Corban, and certifies to this Honorable Court, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, that on this, the 18th day of November, 2008, she has delivered to the Clerk for filing in the above referenced cause, by mailing same via first class U.S. Mail, postage prepaid, the original and three (3) copies of the *Brief of the Appellants*, and four (4) copies of the *Record Excerpts Filed With Brief of The Appellants*, to the Clerk. Upon this certification, pursuant to the aforementioned Rule, the Brief of the Appellants and Record Excerpts Filed With Brief of the Appellants are timely filed this day, November 18, 2008.

So Certified, this, the 18th day of November, 2008.

MARGARET AND DR. MAGRUDER S. CORBAN

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CERTIFICATE OF SERVICE

I certify that I have this day forwarded by U.S. Mail, postage pre-paid, a true and correct copy of the foregoing Brief of the Appellants and Record Excerpts Filed with Brief of the Appellants, to the following:

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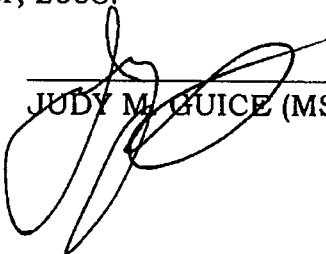
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