IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

MARGARET and DR. MAGRUDER CORBAN — PLAINTIFFS

VERSUS — CAUSE NO. A2401-2006-00404

UNITED SERVICES AUTOMOBILE ASSOCIATION
a/k/a USAA INSURANCE AGENCY; and
JOHN AND JANE DOES A, B, C, D, E, F, G, and H — DEFENDANTS

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)

THIS CAUSE came on to be heard on the Plaintiffs' Motion for Partial Summary Judgment and United Services Automobile Association's Motion for Partial Summary Judgment. This cause was filed by Plaintiffs (hereinafter the Corbans) seeking recovery under their homeowners' insurance policy for damage caused by Hurricane Katrina and seeking punitive damages for the alleged bad faith of the insurer. The Corbans also make various other claims, but all are related to the insurance policy at issue, the damages suffered as a result of the hurricane and the actions of the insurer. United Services Automobile Association (hereinafter USAA) issued a policy to the Corbans known as an all risk policy which provided coverage for the Corbans' residence on the beach in Long Beach, Mississippi. Policy limits were $750,000.00 on the dwelling, $562,500.00 on the contents, and $150,000.00 for loss of use. The Corbans also had an insurance policy on this residence through the National Flood Insurance Program which policy was issued by USAA GIC. The Corbans' home, contents and other property sustained substantial damage as a result of the hurricane on August 29, 2005. The Corbans received the policy limits of the flood coverage, being $250,000.00 for the dwelling and $100,000.00 for contents.

The parties do not dispute that the homeowners' policy provides coverage for damage caused by windstorm. USAA has, in fact, paid $39,971.91 under the policy to the Corbans for wind damage to the dwelling. It has paid nothing for contents. Nor do the parties dispute that the policy excludes coverage for damage caused by certain water as defined in the policy. The two (2) issues on these motions which will be addressed in this Order are (1) whether or not "storm surge" is included in the water damage as defined in the policy and therefore excluded and (2) whether the exclusion in the policy operates to exclude damage caused by a combination of wind and water. The remaining issues raised in USAA's motion seeking partial summary judgment will be addressed in separate orders.

The Corbans seek judgment invalidating a portion of the exclusion in their policy as being against public policy and as being ambiguous. They further seek the application of the efficient proximate cause doctrine herein. The policy exclusion at issue states:

> 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.
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> c. Water Damage, meaning:
> (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;....

The Corbans' home was a two (2) story dwelling with a multi-car garage. Other structures were also located on the property. It appears from this record that the second floor of the dwelling sustained damage from the wind and perhaps rain. The first floor is alleged to have sustained damage from both wind and storm surge. Experts on behalf of the Corbans indicate that the home and other structures were destroyed by wind before the arrival of the water. The Corbans maintain that storm surge is not included in the policy exclusion and that

the policy exclusion applies only to water damage and not to any wind damage. USAA argues that storm surge is included in the policy exclusion and that the policy exclusion operates to exclude coverage for all damage caused either by water alone or damage from any combination of water and any other peril.

The starting point for consideration of a motion for summary judgment is, of course, Rule 56 of the Mississippi Rules of Civil Procedure. Rule 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In *Young v. Wendy's International, Inc.*, 840 So.2d 782 (Miss. Ct. App. 2003), the Court reiterated the familiar rule that the burden of showing that there is no genuine issue of material fact is on the movant. *Id.* at 783, ¶5, *citing Tucker v. Hinds,* 558 So.2d 869, 872 (Miss. 1990). The parties agree that the issues presented on this portion of these motions and addressed herein are questions of law. They are, therefore, appropriate for summary judgment consideration.

The exclusion in the Corbans' policy which they challenge here has been referred to as the anticoncurrent causation clause or ACC clause. This clause and similar clauses in policies issued by other insurers are and have been the topic of much dispute and litigation following Hurricane Katrina. The parties have thoroughly briefed this matter and both have reasonable and well prepared arguments. The parties agree that there are no cases yet decided by any Mississippi state appeals court addressing this or a similar ACC clause concerning the wind versus water versus combination of wind and water controversy. With regard to Mississippi state court precedent, the parties have relied for the most part on post Hurricane Camille cases and cases involving earth movement exclusions. The Corbans rely

on cases decided following Hurricane Camille which interpreted similar, but not identical language in policies. Those cases generally found that if the evidence was sufficient to support a finding that the wind first caused the damage prior to the water arriving, then coverage existed. *See, e.g. Lunday v. Lititz Mutual Insurance Company,* 276 So.2d 696 (Miss. 1973); *Grace v. Lititz Mutual Insurance Company,* 257 So.2d 217 (Miss. 1972); *Lititz Mutual Insurance Company v. Boatner,* 254 So.2d 765 (Miss. 1971); and *Commercial Union Insurance Company v. Byrne,* 248 So. 2d 777 (Miss. 1971). None of those cases discussed the insurance policy provisions which existed in those cases in any detail.

USAA relies in part on *Boteler v. State Farm Casualty Insurance Company,* 876 So.2d 1067 (Miss. Ct. App. 2004) for the proposition that our state courts have approved ACC clauses, at least in the context of earth movement cases. That decision did find that the exclusion of the policy applied to the facts in that case. That exclusionary provision, however, contained different language from that used in the Corbans' policy. In Boteler's case, the insurer's expert determined that the damage was caused by the "unpredictable shrinking and swelling of the clay lying under the home." *Id.* at 1069, ¶6. Boteler argued that there could be other causes including a leaking pipe. The *Boteler* opinion found that the language of that policy excluded damage caused from the shifting of the earth regardless of the cause of the shifting. *Id.* In other words, whether the shifting was caused by the leaking water pipe or by the clay under the home, the cause of the **damage** was the shifting of the earth, an excluded peril. This is different from the allegations made by the Corbans in this matter. They claim that the cause of the **damage** for which they seek to recover was the wind, which is a covered peril.

The post-Camille cases and the earth movement cases are somewhat helpful in that they remind that our courts will look first to the language of the policy and then apply that language to the specific facts of each case. Following the long established rules, if the policy is not ambiguous, the provisions will be applied as written to the facts existing in each case. If ambiguous, the terms will be construed in the light most favorable to the insured. *See, e.g., Franklin County Memorial Hospital v. Mississippi Farm Bureau Mutual Insurance,* 2008 Miss. LEXIS 122, ¶19 (02/28/08); *South Carolina Insurance Co. v. Keymon,* 2008 Miss. LEXIS 67, ¶12 (01/31/08); and *Pate v. Conseco Life Insurance Co.,* 971 So.2d 593, ¶4 (Miss. 2008) and authorities cited in each of those cases.

In looking to the language at issue in the Corbans' policy, the exclusionary provision of the policy appears to this Court to be unambiguous. Certainly this Court is aware of the differing interpretations of this language made by the parties to this and other litigation as well as the differing interpretations given by the federal courts. This does not, however, render the language ambiguous. *See, e.g. Wooten v. Mississippi Farm Bureau Insurance Co.,* 924 So.2d 519, 520-21 (Miss. 2006); *Delta Pride Catfish, Inc. v. Home Insurance Co.,* 697 So.2d 400, 404 (Miss. 1997). The majority of policyholders are not lawyers. A plain common sense reading of the policy, without resort to legal jargon or theories, would seem to be the proper means to interpret provisions in an insurance policy that average citizens are expected to read and understand.

> However, this Court has followed the plain meaning and common sense approach when interpreting insurance clauses. *Noxubee County School Dist. v. United Nat. Ins. Co.,* 883 So.2d 1159 (Miss. 2004); *Blackledge v. Omega Ins. Co.,* 740 So.2d 295 (Miss. 1999); *Allstate Ins. Co. v. Chicago Ins. Co.,* 676 So.2d 271 (Miss. 1996). ***
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> Furthermore, this Court traditionally applies the ordinary and plain meaning of words and concludes that the disputed phrase must be construed as written.

Wooten, supra, at 522-23, ¶¶11, 13. *See also South Carolina Insurance Co., supra,* at ¶12 quoting *Naifeh v. Valley Forge Life Ins. Co.*, 204 S. W.3d 758, 768 (Tenn. 2006). 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.

This Court is well aware of the fact that this interpretation is closer to that made by the federal district court than that of the Fifth Circuit. The Corbans urge this Court not to follow the decisions of the Fifth Circuit. Mississippi state courts are indeed not bound by the decisions or interpretations of the federal courts. Our appeals courts, though, very often find those decisions persuasive and well reasoned and have adopted many of those decisions in many different areas of the law. This Court is acutely aware of the fact that the Fifth Circuit's opinions are at this time the only appeals court precedent directly dealing with ACC clauses such as that in the Corbans' policy as applied to hurricane cases and which address or consider the application of Mississippi law.

In *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419 (5th Cir. 2007), the applicable ACC clause read:

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

The Fifth Circuit stated that this clause "denies coverage whenever an excluded peril and a covered peril combine to damage a dwelling or personal property." *Id.* at 425. The Fifth Circuit reviewed the Camille cases, the doctrine of efficient proximate cause, public policy, and statutory law (all argued here by the Corbans) as well as the earth movement cases and acceptance of ACC clauses in general (argued here by USAA). That Court held:

> Nationwide's ACC clause is not ambiguous, nor does Mississippi law preempt the causation regime the clause applies to hurricane claims.
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> 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." *Leonard,* 438 F.Supp.2d at 693. Moreover, in the past we have not deemed similar policy language ambiguous. *See, e.g. Arjen Motor Hotel Corp. v. Gen. Accident Fire & Life Assurance Corp.*, 379 F.2d 265, 268 (5th Cir. 1967). *** The clause is not ambiguous.
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> 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.

Id. at 430. That Court then proceeded to "make an educated '*Erie* guess'" as to the Mississippi Supreme Court's resolution of whether recovery under an insurance policy may be precluded for such concurrent damages. *Id.* at 431. The Fifth Circuit determined:

> For all these reasons, we conclude that use of an ACC clause to supplant the default causation regime is not forbidden by Mississippi caselaw (including the Camille cases which antedate such clauses), statutory law, or public policy. Because the ACC clause is unambiguous and not otherwise voidable under state law, it must stand.

Id. at 436.

Just over two (2) months after the *Leonard, supra,* decision, three (3) different judges of the Fifth Circuit rendered their opinion in *Tuepker v. State Farm Fire & Casualty Company,* 507 F.3d 346 (5th Cir. 2007). The policy language in the Tuepkers' policy was somewhat different from that in the *Leonard* case. The Fifth Circuit found the difference to be insignificant and again upheld the ACC clause, finding:

> Thus, *Leonard* governs this case, and compels the conclusion that the ACC Clause in State Farm's policy is not ambiguous, and should be enforced under Mississippi law. As the *Leonard* opinion directs, any damage caused *exclusively* by a nonexcluded peril or event such as wind, not concurrently or sequentially with water damage, is covered by the policy, while all damage caused by water or by wind acting concurrently or sequentially with water is excluded.

Id. at 354.

The briefs of the parties, the documentation submitted, the arguments and the cases cited by both parties have been reviewed repeatedly and at length by this Court. The decisions of the United States District Court for the Southern Division of Mississippi and those of the United States Fifth Circuit Court of Appeals in the Hurricane Katrina cases have also been reviewed. This Court's interpretation of the ACC clause language in the Corbans' policy may or may not be correct.[1] 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

[1] In the final analysis, 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.

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.

USAA seeks a determination that "storm surge" is within the terms of the definitions of water damage and, therefore, an excluded peril. The Corbans argue that USAA could have easily included the term "storm surge" in the exclusion had it meant to include it as an excluded peril. Many definitions of the term "storm surge" have been reviewed, including those listed in *Leonard, supra,* and *Tuepker, supra.* The internet provides many sources for the average citizen to locate such a definition. All of the sources reviewed by this Court refer to storm surge as ocean or lake water being pushed by or affected by wind causing the water to rise and move toward or onto shore. Many of these sources refer to this surge as combining with the normal tides or as causing a rising of sea level. Certainly by these definitions, storm surge could be considered surface water, waves, tidal water, or even overflow of a body of water. Storm surge is included in the policy terminology delineating the meaning of "water damage" by virtue of its definition. *Leonard, supra,* and *Tuepker, supra,* and cases cited therein also found that "storm surge" is included in such a definition. The lack of the words "storm surge" do not either render the provision ambiguous or provide coverage for storm surge.

It is, therefore,

ORDERED that United Services Automobile Association's Motion for Partial Summary Judgment be and it is hereby granted as to "storm surge" and "storm surge" is

found to be included in the water damage definition of the subject policy and is, therefore, an excluded peril. It is further,

ORDERED that the Plaintiffs' Motion for Partial Summary Judgment be and it is hereby denied and the anticoncurrent causation clause will be applied herein as interpreted by the United States Fifth Circuit Court of Appeals, thereby barring coverage under the homeowner's policy for any damage caused by water as defined in the policy or caused concurrently or sequentially by wind and water in combination.

ORDERED this the 27th day of March, 2008.

Lisa P. Dodson
CIRCUIT COURT JUDGE