IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

ESTATE OF SYLVIA MINOR **PLAINTIFF**

vs. **CIVIL ACTION NO. 30CI1:08-cv-00204**

UNITED SERVICES AUTOMOBILE ASS'N **DEFENDANT**

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The Estate did not satisfy the legal elements or burden of proof to sustain the verdicts against USAA (MEC 428, 429) and corresponding judgment entered on October 3, 2022 (MEC 432). Therefore, pursuant to Rule 50(b) of the Mississippi Rules of Civil Procedure, USAA respectfully moves this Court to set aside those verdicts and the judgment and to render judgment in favor of USAA.

I.

PROCEDURAL BACKGROUND OF THE LITIGATION

1. On August 14, 2008, Paul and Sylvia Minor sued USAA, alleging that USAA had refused to pay the Minors for all the damages they suffered caused by Hurricane Katrina. Complaint, ¶ 11. The Minors asserted claims of breach of contract as well as breach of the duty of good faith and fair dealing; they sought compensatory, extracontractual, and punitive damages. *Id.*, ¶¶ 16-17.
2. In 2009, the Estate of Sylvia Minor substituted Mrs. Minor.
3. In 2013, the Plaintiffs' extra-contractual claims for emotional distress were dismissed.
4. Later, in 2013, USAA filed its Motion for Partial Summary Judgment, seeking dismissal of the Plaintiffs' claims for breach of the duty of good faith and fair dealing and for

extracontractual and punitive damages. On September 10, 2013, the trial court granted USAA's motion, concluding that "USAA had an arguable or reasonable basis for its claims decisions." *Estate of Minor v. United Servs. Auto. Ass'n*, 247 So. 3d 1266, 1271 (Miss. Ct. App. 2017).

5. The trial began on September 11, 2013; closing arguments were held on September 20th. That same day, the jury returned its verdict in favor of the Estate, finding that Hurricane Katrina had caused additional covered wind damage to the Minors' insured property and awarding a total of $1,547,293.37 for the actual cash value of the additional covered wind damage.[1] The jury did not award any damages for the Minors' claimed loss of use (also known as ALE). The jury also did not award replacement cost value because the Estate had neither repaired nor replaced their property.

6. USAA immediately paid the judgment. The Estate, however, appealed, advancing two arguments. First, that they were entitled to replacement cost value, not actual cash value, and second, that the trial court had erred when it granted USAA's Motion for Partial Summary Judgment.

7. After extensive briefing and oral argument, the Mississippi Court of Appeals rejected the Estate's argument that it was entitled to replacement cost value but reversed the grant of summary judgment. After reviewing two factual disputes, the Court of Appeals ruled that the evidence presented at summary judgment "was sufficient to conclude that there was a genuine issue of a material fact in dispute as to whether USAA had an arguable and legitimate basis to deny or delay payment to the Minors." *Id.* at 1273.

[1] There was a total of $1,956,967.06 in limits remaining on the Minors' policy at the time of the trial.

Although the Court held that summary judgment should not have been granted, it explained, "To be clear, this Court does not find that the Minors are entitled to present their claims for punitive or extracontractual damages to a jury." *Id*. at 1274.[2]

8. USAA's rehearing and certiorari motions were denied, and on August 10, 2018, the case was remanded back to the Jackson County Circuit Court. The judges for Jackson County's Circuit Court recused themselves, and the Honorable William A. Gown Jr. was appointed special judge. MEC 346-348. The Honorable Forrest A. Johnson, Jr. was then appointed special judge on February 4, 2020. MEC 363.
9. The Estate and USAA engaged in motion practice. Among other requests, both Parties sought Orders allowing them to take depositions.
10. This court held that the Estate was allowed to take depositions; however, it held that USAA could not.
11. On September 19, 2022, the "bad faith" trial began. The Estate rested on Thursday, September 22, 2022. Then, USAA moved for a directed verdict. This court denied that motion, and USAA began presenting evidence on Thursday, resting that same day.
12. On the same day, a brief jury instruction conference was held. After the jury was instructed and closing arguments were made by counsel, the jury retired to deliberate. On Friday, after approximately 8 hours of deliberation, the jury returned its verdict, awarding the Estate $457,858.89 in extracontractual damages and $10,000,000.00 in punitive damages. MEC 432.

[2] This clarification comports with Mississippi Supreme Court precedent; in the "vast majority of so-called 'bad faith'" cases against an insurance company, the Mississippi Supreme Court has decided the issue of bad faith was **not** "a fact for the determination of the jury...." *Res. Life Ins. Co. v. McGee*, 444 So. 2d 803, 809 (Miss. 1983).

II.

ARGUMENT

13. The jury's verdicts against USAA should be set aside for two reasons.

    a. **Extra-contractual Damages:** Claims for extra-contractual damages (such as the attorneys' fees awarded by this jury) demand that the Estate prove that USAA did not have an arguable basis when it made its determination regarding the insured's claim. *United Servs. Auto. Ass'n v. Lisanby*, 47 So. 3d 1172, 1178 (Miss. 2010); *Pioneer Life Ins. Co. v. Moss*, 513 So. 2d 927, 930 (Miss. 1987). The Estate failed to show by a preponderance of evidence that USAA did not have arguable reasons to support its decisions regarding the Minors' claim. Additionally, the Estate failed to introduce any admissible evidence of extra-contractual damages; instead, it utilized an improper and confusing for the jury factual finding as to the Estate's attorneys' fees.

    b. **Punitive Damages:** The Estate did not show by clear and convincing evidence that USAA "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." Miss. Code Ann. § 11-1-65(1)(a). Absent that, "[p]unitive damages may not be awarded." *Id.*

A.

STANDARD

14. The purpose of this JNOV motion is to "test the legal sufficiency of" the Estate's case by comparing the evidence the Estate presented with the legal elements of its claims. *White v. Stewman*, 932 So. 2d 27, 31-32 (Miss. 2006). The Estate's evidence, when applied to

the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt. of Miss. v. Jackson Ramelli Waste LLC*, 301 So. 3d 635, 640 (Miss. 2020) (reversing trial court for denying JNOV motion and rendering judgment) (quotations omitted). Thus, the verdicts against USAA should be set aside and judgment entered in favor of USAA.

B.

THE ESTATE FAILED TO SHOW THAT USAA HAD NO SUPPORT FOR ITS DECISIONS

15. Extracontractual damages are only possible if the Estate established that "***nothing legal or factual*** would have arguably justified" USAA's position regarding the payment of a claim. *Essinger v. Liberty Mut. Fire Ins. Co.*, 529 F.3d 264, 272 (5th Cir. 2008) (emphasis added). *See also Se. Real Estate Holdings, LLC v. Companion Prop. & Cas. Ins. Co.*, No. 2:15cv62, 2016 U.S. Dist. LEXIS 25215, at *12 (S.D. Miss. Mar. 1, 2016) (finding no bad faith because "[t]he existence of a viable dispute means that both sides had arguable reasons…."). The Estate's "burden in proving a claim for bad faith refusal goes beyond proving mere negligence in performing the investigation. The level of negligence in conducting the investigation must be such that a proper investigation by the insurer would easily adduce evidence showing its defenses to be without merit." *United Servs. Auto. Ass'n v. Lisanby*, 47 So. 3d 1173, 1178 (Miss. 2010) (reversing extracontractual award and rendering in favor of USAA).

16. USAA was not required to disprove all possible allegations made by the Estate. It was simply required to perform a prompt and adequate investigation and make a reasonable, good faith decision based on that investigation. *Liberty Mut. Ins. Co. v. McKneely*, 862 So. 2d 530, 536 (Miss. 2003).

17. The verdicts can only stand if the Estate proved that USAA had no credible evidence supporting its claims decisions.. *Rsrv. Life Ins. Co. v. McGee*, 444 So. 2d 803, 817 (Miss. 1983). This credible evidence need not be uncontradicted, so, for example, the fact that the Minors believed the property had been destroyed by wind is not conclusive of this issue. Indeed, "[t]he existence of a viable dispute means that both sides had arguable reasons...." *Se. Real Estate Holdings, LLC v. Companion Prop. & Cas. Ins. Co.*, No. 2:15cv62, 2016 U.S. Dist. LEXIS 25215, at *12 (S.D. Miss. Mar. 1, 2016).

18. So long as USAA's evidence is credible, there is an arguable reason. *Hood v. Sears Roebuck & Co.*, 532 F. Supp. 2d 795, 803 (S.D. Miss. 2005) (finding there to be credible evidence even though the insured and insurer took opposite sides in an he-said/she-said dispute) and *Tipton v. Nationwide Mut. Fire Ins. Co.*, 381 F. Supp. 2d 572, 574-76 (S.D. Miss. 2004) (dismissing the bad faith claims because the tenant's statements contradicting the insured's statements provided credible evidence to support Nationwide's denial). Credibility does not exist when an insurer makes an "***arbitrary refusal***" to pay. *Blue Cross & Blue Shield of Miss. v. Campbell*, 466 So. 2d 833, 842 (Miss. 1984) (emphasis added).

19. Mississippi courts regularly conclude that an insurance company has an arguable reason when the insurer, like USAA here, had some credible evidence to support its claims decisions.

    a. In another Hurricane Katrina case, even though the insureds gave USAA a weather report and an engineering report that said their house's damage was caused by wind, USAA had credible evidence to pay only a portion of the claim because USAA had a contradictory engineering report that concluded some of

the damage to the house was caused by flooding. *Hoover v. United Servs. Auto. Ass'n*, 125 So. 3d 636, 643 (Miss. 2013). This engineering report, although it was contradicted by the insureds, provided USAA with an arguable basis for its claim decisions. *Id.* In contrast to *Hoover*, the Estate did not introduce any evidence establishing that the Minors provided USAA with *any* proof that their house had sustained wind damage in excess of what USAA found other than the Minors' opinion and a 2013 jury verdict; USAA introduced credible evidence in the form of photographs, adjuster's investigations, and engineering reports supporting its payments.

b. In a motorcycle accident case, Progressive was faced with damage that appeared to be from two different times—one that would be covered and one that would not. *King v. Progressive Gulf Ins. Co.*, 913 So. 2d 1065, 1066 (Miss. 2005). At trial, the judge denied King's request for a punitive damage instruction. *Id.* Affirming, the Mississippi Supreme Court held that Progressive had an arguable reason for refusing to pay the claim because it "made reasonable efforts to investigate the cause of the damage," which included sending investigators, gathering information from the insured, making a partial payment while waiting for additional information from the insured (who never provided it). *Id.* at 1068-69. As in *King*, here USAA made reasonable efforts to investigate the cause of the damage; indeed, USAA took the exact same steps that Progressive did.

20. In contrast to the above cases and the evidence in this case, no arguable reason exists *only* when the insurer had no credible evidence.

a. There was no arguable reason to deny a claim when a life insurance company decided its insured had a history of congestive heart failure in the three years prior to his application even though his medical records did not include a diagnosis of (or even mention) congestive heart failure and, when asked by the insurer, the insured's treating physicians denied treatment for such a condition. *United Am. Ins. Co. v. Merrill*, 978 So. 2d 613, 622 (Miss. 2007). Because "[e]very medical document for the three-year period preceding application contradict[ed]" the insurer's position that the insured was being treated for congestive heart failure, there was no credible evidence to support the denial.

b. While United American had *no* evidence to support its denial, *State Farm Mut. Auto. Ins. Co. v. Grimes* illustrates what *no credible evidence* looks like. In *Grimes*, State Farm denied Grimes's claim that his car had been stolen because it believed Grimes was lying. *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So. 2d 637, 639 (Miss. 1998). A jury awarded compensatory and punitive damages. *Id.* In affirming the punitive damages, the Mississippi Supreme Court concluded that while State Farm was right to investigate the claim, it needed "some direct evidence" of the insured's fraud other than "word on the street" and State Farm's opinion that the theft was unusual. *Id.* at 642. In addition, in *Grimes*, there were claim notes showing that State Farm had prejudged the claim, having "reached an early conclusion that 'this claim stinks.'" *Id.* at 639. In contrast, in *Lisanby*, the Mississippi Supreme Court noted, "Nothing in the record indicates that [USAA] had prejudged the claim." *Lisanby*, 47 So. 3d at 1179.

21. Unlike *Merrill* and *Grimes* (and like *Lisanby* and *King*), here there is direct evidence from an outside engineering expert that supported the claim decisions made by USAA. The engineer's opinion that the vast majority of the damage to the Minors' house was caused by the storm surge was supported by the photos, taken both by the engineer and by USAA's adjusters, during their on-site inspections, showing the still-standing bedroom addition and carport with no roof damage but a water line inside.

22. At trial, **the Estate did not introduce any evidence to undermine USAA's outside engineering firm's opinions**. The Estate was like State Farm in *Grimes*; **it presented no contradicting direct evidence**. USAA, however, had scientific and photographic evidence supporting its claims decision that some damage had been caused by wind and some caused by the storm surge. And, as in *Lisanby* (and unlike *Grimes*), the Estate presented no evidence that USAA prejudged this claim.

23. The Estate failed to show that USAA's claim decisions were arbitrary. USAA presented the credible evidence that supported its claim decisions.

    a. After the Minors reported their claim - nearly five months after Hurricane Katrina struck - USAA immediately assigned adjusters, who inspected the property.

    b. The adjuster observed and photographed water lines on the walls as well as siding and shingles still intact on the exterior of the dwelling and detached garage.

    c. USAA hired an engineering firm to determine what caused the damage to the Minors' insured property. The engineering firm inspected the property and then prepared a report. The engineering firm later clarified the opinions found in the

report. And at the 2022 trial, USAA introduced the engineer's opinions through his trial testimony. The opinion was that the vast majority of damage was caused by surge.

The Estate's evidence and lack thereof, combined with USAA's extensive, direct evidence, all of which is more fully discussed below, demonstrates that the Estate did not prove the elements necessary to support their bad faith claim.

The Dwelling Claim

24. At trial, the Estate did not put into evidence:

a. The subject insurance policy;

b. The named insured's, Paul Minor, testimony;

c. USAA's engineer's clarification/supplemental report;

d. The Estate's engineer's report or testimony;

e. The Estate's meteorologist's report or testimony;

f. Testimony by the USAA adjuster, Rob Brooks, who wrote the first estimate and made the first dwelling payment;

g. Testimony by the USAA team leader, Gary Taylor, who assisted with the dwelling estimate and payment;

h. USAA's estimates of the dwelling damage; or

i. USAA's estimates of the other structures' damage.

This begs the question: what did the Estate present at trial to prove its claims and meet its burden of proof? For each of the items presented, the evidence does not satisfy the elements of the Estate's claims.

The Opinions Found in the First Engineer's Report and USAA's Responsive Actions

25. The Estate presented the first report from the engineer retained by USAA, an email exchange between two USAA adjusters relating to the engineer's opinion, and limited testimony regarding the opinion and email. What the Estate seemingly tried to establish was rebutted at every turn.

    a. ***CLAIM:*** The engineer retained by USAA opined that all windows were damaged by wind before the surge.

    Except that is not what the evidence shows. The engineer retained by USAA did not opine that all windows were damaged by wind before the surge. USAA put into evidence the unrebutted testimony of the engineer. The engineer testified that he separately considered two components of the dwelling – the original structure and the attached bedroom addition. He testified that he inspected and photographed both areas.

    Regarding the bedroom addition, the engineer testified, consistent with his photographs, which were also admitted into evidence, that the bedroom addition was still largely intact, though it had been pushed off its piers by surge. He testified that there was very few missing shingles on this half of the dwelling. He testified that his expert opinion was that surge caused the damage to bedroom addition.[3]

    Regarding the original structure, the engineer testified, consistent with his photographs, which again were admitted into evidence, that his opinion was

[3] Nowhere did the engineer opine that wind or windborne debris would have or could have damaged the bedroom addition's windows. This testimony is 100% consistent with his first report, which was put into evidence by the Estate. The testimony is also completely consistent with the limited information that the Estate introduced relating to the second/clarification report.

that wind would not have destroyed the original structure. He opined that the original structure would have experienced wind damage similar to the wind damage to the bedroom addition and the still-standing garage. He opined that there would have been some missing shingles. He opined that, before the surge, some siding may have been damaged by wind prior to the surge, but he "couldn't say." He opined that window coverings "would have deflected any wind-borne debris."[4]

b. ***CLAIM:*** USAA's first dwelling adjuster, Teri Bergstrom, believed that the engineer opined that all windows were damaged by wind before the surge.

Except that is not what the evidence shows. Ms. Bergstrom did not believe that the engineer opined that all windows were damaged by wind before the surge; she believed the windows in issue were the windows on the original structure and not the bedroom addition.

Ms. Bergstrom testified at trial that, after she reviewed the report, she spoke to the engineer on the phone. She testified that she, then, spoke to Mr. Minor, she went over the engineer's opinions, and she sent a copy of the report to Mr. Minor. She testified that she told Mr. Minor that, based on the engineer's opinions, USAA "would be only paying for a fraction of his loss."

[4] This testimony is also 100% consistent with the first report and the second/clarification report. The engineer opined that wind or windborne damage to the original structure would have been similar to the damage that he observed on the bedroom addition. He, then, explained that, because the original structure was completely gone, he could not be certain that wind or windborne debris did not damage the original structure's windows before the surge. USAA – Ms. Bergstrom in March 2006, Brooks in June 2006, and Taylor/Carraway in Early 2007 - read this possibility and found it would be appropriate to pay for some windows and opened up the claim for some interior damage.

She testified that the windows to which she was referring in her email were only the windows on the original structure, not the windows on the addition; indeed, this is exactly what the email says.

She testified that she did not label the email as "CONFIDENTIAL." She testified that it was labeled confidential by the other adjuster (and there is no proof whatsoever suggesting that the other adjuster believed that she was going to receive top secret information in Ms. Bergstrom's response). She testified that there was a USAA policy requiring that all emails containing a member's name and member name be labeled "CONFIDENTIAL."

c. ***CLAIM:*** USAA hid this "all windows" opinion from the Minors in an email chain labeled "CONFIDENTIAL."

Except that is not what the evidence shows. USAA did not hide the "all windows" opinion from the Minors in an email chain labeled "CONFIDENTIAL."[5] First, as detailed above, there was no "all windows" opinion. Second, USAA, namely Ms. Bergstrom, shared the engineer's contact information with the Minors, giving them a direct line of communication with the engineer. Third, as mentioned above and undisputedly shown at trial, USAA shared the information with the Minors when Ms. Bergstrom called Mr. Minor and went over the engineer's findings shortly after she spoke to the engineer.

[5] The Mississippi Court of Appeals found, and the Estate argued in response to USAA's motion for summary judgment, that Ms. Bergstrom ended the conversation with a statement suggesting that a male manager would not be happy with the engineer's findings. The Estate did not attempt to establish that as a fact supporting a bad faith finding. No matter, USAA introduced evidence, through testimony from Ms. Bergstrom, establishing that the "he" referred to Mr. Minor.

Fourth, and again as mentioned above, USAA shared the information again when Ms. Bergstrom sent a copy of the engineer's report to the Minors.

d. ***CLAIM:*** USAA's third dwelling adjuster, Rob Brooks, (intentionally, maliciously and/or grossly negligently) misrepresented the engineer's opinions in his June 18, 2006, letter to the Minors.[6]

Except that is not what the evidence shows. There is no proof that USAA's third dwelling adjuster, Mr. Rob Brooks, (intentionally, maliciously and/or grossly negligently) misrepresented the engineer's opinions in his June 18, 2006, letter to the Minors. First, the Estate did not establish that the Minors received the letter or read the substance of the letter; no one testified that happened. Second, the Estate failed to introduce any evidence proving the Minors relied on the representation. Third, the Estate failed to introduce any evidence showing that they reasonably relied upon the representation. Fourth, the Estate failed to introduce any evidence showing that they were damaged by the representation. Fifth, the Estate's only evidence relating to Mr. Brooks' mindset when he penned the letter came from the IMS documentation, which showed that Mr. Brooks was trying to pay what he viewed as "possible," not probable;[7] such an interpretation makes sense considering the full first report (not just the Estate's cherry-picked language found in the report), the evidence

[6] The Estate argued and the Mississippi Court of Appeals held that these four items (a.-e.), when viewed under the summary judgment standard, constituted genuine issues of material fact warranting a trial on those issues. As detailed above, the Defendant properly addressed these issues and established that those items could not support a "bad faith" verdict or judgment.

[7] This court allowed the Estate the opportunity to depose USAA employees (while holding that USAA could not depose anyone). The Estate chose not to depose Mr. Brooks.

introduced relating to the second/clarification report and the engineer's testimony about his actual opinions.

Not only did the Estate not introduce sufficient evidence of bad faith by USAA through Mr. Brooks, but the Defendant introduced undisputed evidence establishing that (i) USAA had already given the Minors full access to the engineer, (ii) USAA conveyed the opinions of the engineer via phone and through a copy of the report, (iii) the Minors were disputing the engineer's findings and had even retained their own experts, (iv) the corresponding payment and estimate by Mr. Brooks was not ever intended to be, nor was it actually, a final adjustment of the claim, and (v) the supplemental adjustment and payment, which was offered a few months later, was not made in reaction to any specific complaint by the Minors relating to Mr. Brooks' letter, estimate or payment.[8]

e. ***CLAIM:*** The Minors were harmed because USAA did not pay for "all window" damage.

Except that is not what the evidence shows. The Minors were not harmed because USAA did not pay for all window damage. The Estate did not introduce any evidence of harm. The Estate did not establish how much more money would have been offered (and obviously rejected seeing that the Minors rejected all

[8] The Estate did not attempt to establish at trial that USAA's supplemental estimate and payment ($194,322.85 check for Actual Cash Value) were made without an arguable basis and/or made while acting with "actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." Its meritless argument and presentation of "proof" were that the $194,322.82 was improperly delayed because USAA did not utilize the old underwriting information. That argument is refuted below.

money offered by USAA and even rejected the 2013 jury's findings).

On the contrary, the evidence introduced at trial demonstrated: (i) the Minors did not cash any check (dwelling or otherwise); (ii) the Minors were living elsewhere and not trying to rebuild or replace the dwelling; (iii) by March 2006, the Minors were disputing everything; and (iv) by December 2006, the Minors were demanding policy limits plus extra-contractual damages. Some unestablished, unknown additional offer for some unestablished, unknown number of windows, which were not found to be damaged by wind by the engineer's opinions, was not going to change the course of this claim.

The Pre-Loss (1994 and 2000) Underwriting Information

26. The Estate presented 11- and 5-year-old underwriting information in an effort to show that USAA should have or could have completely adjusted the Minors' claim with this information.

    a. ***CLAIM:*** USAA should have utilized this underwriting information immediately after the claim was made (which was undisputedly January 2006, four months after Katrina struck).[9]

    Except that is not what the evidence shows. First, USAA established that this old information was not in the claims system; the information was not even in the underwriting system; the information was in storage. Second, it was not common for USAA to have companies perform the type of analysis that was done on the Minors' property back in 1994 and 2000; and this is why the USAA

[9] The Estate had no expert to offer an opinion that this type of information is standard information that should be kept and utilized when adjusting claims.

adjusters on the claim did not think to ask for the information until the Minors mentioned it. Third, USAA was undisputedly told by the Minors that they would provide pre-loss photographs and diagrams/blueprints.[10] USAA had a contractual and legal right to ask for information from the Minors and believe that the Minors, who told USAA they had the information, would provide the information in a timely manner (some of the information was finally provided in December 2006, at the same time the Minors told USAA's adjuster that there could be this old underwriting information).

b. ***CLAIM:*** USAA could have adjusted and issued checks for the dwelling damage sooner than it did had it utilized this underwriting information.

Except that is not what the evidence shows. USAA could not have adjusted and issued checks for the dwelling damage sooner than it did had it utilized this information. The Estate put the old photographs from USAA's stored underwriting department into evidence. However, undisputedly, those photographs do not capture all areas of the dwelling (outside or inside); they do not capture all 90 windows; they do not establish where the interior rooms that were captured are in relation to the outside.

The Estate did introduce two diagrams that were retrieved from USAA's storage. Those diagrams do not provide the level of detail necessary to prepare a proper estimate (for example: there are no interior details, such as wall

[10] Throughout trial, counsel for the Estate argued about how difficult it was for some people to gather this type of information. That certainly was the case for many. However, the Minors told USAA that they were able to provide this information. The Estate failed to put any evidence before the jury to demonstrate that the Minors could not cooperate.

placement).

The Estate also introduced replacement cost calculations from USAA's storage. However, those calculations were from 1994 and were not specific to particular rooms or elevations. The Estate certainly would have argued that USAA acted in bad faith had it attempted to limit recovery to the $751,256 replacement cost found in those records.

Finally, USAA's corporate representative testified that this old underwriting information was not enough to prepare a complete estimate. And as mentioned above, USAA's adjuster, Mr. Carraway, who prepared the supplemental estimate, testified that he did not simply rely on this old underwriting information; instead, he also utilized the photos and footprints of the dwelling that were provided by Mr. Minor in December 2006. The Estate did not and could not introduce any expert testimony to refute these witnesses' testimony.

c. ***CLAIM:*** The Minors were harmed because USAA did not utilize this underwriting information until Early 2007.[11]

Except that is not what the evidence shows. The evidence shows that USAA could not have simply used this information; it also needed what the Minors had promised and ultimately provided in December 2006. *See also*

[11] The Estate argued and the Mississippi Court of Appeals held that this underwriting information, when viewed under the summary judgment standard, created fact issues warranting a trial. As detailed above, the Defendant properly addressed these issues and established that the underwriting information was not what the Estate made it out to be and it was not, in isolation, sufficient to adjust and pay as USAA did in its supplemental adjustment.

supra, Paragraph 24e.

27. With consideration to the above argument, the Estate's evidence as it relates to the dwelling claim, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt.* at 640.

The Named Other Structures (the Guesthouse and Carport) Claim

28. USAA has already listed the evidence that the Estate chose not to introduce at trial. Many of those failures have equal application to the named other structures claim (the $108,000.00 in available coverage for a guesthouse and the $41,000.00 in coverage for the carport).

29. The Estate did not present any evidence to establish that USAA lacked an arguable basis and acted arbitrarily during its handling of the guesthouse and carport. While the Estate introduced USAA's first engineer's report (again, it did not introduce the second report) and limited evidence showing that USAA prepared an estimate and issued payment for these other structures, the Estate did not attempt to prove that those estimates and/or payments were inconsistent with the engineer's opinions or somehow otherwise improper.

30. Regardless of the Estate's proof or lack thereof, USAA showed photographs of the carport, which was still standing. USAA introduced testimony from its engineer, who opined that the damage to the carport was caused by surge. USAA introduced testimony from its engineer, who opined that the damage to the guesthouse would have been similar to the damage to the bedroom addition and carport. Again, USAA absolutely made payments for these other structures (the IMS documents introduced into

evidence proves this fact), and the Estate did not put forth any evidence to support their claim that USAA acted in bad faith when it adjusted the named other structures coverage.

31. With consideration to the above argument, the Estate's evidence as it relates to the named other structures claim, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt*. at 640.

The Contents Claim

32. Again, above in Paragraph 23, USAA already listed the evidence that the Estate failed to introduce at trial. Many of those failures have equal application to the contents claim, but importantly for the contents claim, the Estate also failed to introduce the contents list and contents estimate. What the Estate seemingly tried to establish was rebutted at every turn.

    a. ***CLAIM:*** The engineer retained by USAA opined and USAA's first adjuster believed the engineer opined that all windows were damaged by wind before the surge and therefore all rooms with windows were opened for the contents claim.

    Except that is not what the evidence shows. For the sake of brevity, USAA incorporates by reference its arguments made above in Paragraph 19 that dispel the notion that "all windows" were damaged by wind and all rooms with windows were ripe for a contents adjustment.

    And because the Estate completely misconstrued the evidence and chose not to introduce the contents list and/or have anyone establish what contents existed in what rooms (with windows), the Estate wholly failed to establish what

items USAA failed to consider. Put differently, the Estate failed to establish what should have been paid had USAA paid for other contents in rooms with windows.

b. ***CLAIM:*** USAA could have adjusted and issued checks for the contents damage utilizing the 1994 and 2000 underwriting information.[12]

Except that is not what the evidence shows. USAA could not and should not have adjusted and issued checks for the contents damage utilizing the 1994 and 2000 underwriting information for four reasons.

First, the idea that USAA could have and/or should have used old underwriting information impermissibly relieved the Minors' and the Estate's obligations under the policy and Mississippi law to prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Neither the Minors nor the Estate were "excused from participation and must cooperate to assist in the resolution of the claim." *Pilate v. Am. Federated Ins. Co.*, 865 So. 2d 387, 400 (Miss. Ct. App. 2004).

Second, USAA had a right, consistent with the insureds' obligations under the policy and Mississippi law, to believe that the Minors were going to provide a contents list. The undisputed facts demonstrate that the Minors told USAA, on multiple occasions, that the Minors would provide such a list.

Third, the old photographs, which were introduced at trial, were not

[12] The Estate argued and the Mississippi Court of Appeals held that the underwriting information, when viewed under the summary judgment standard, created fact issues warranting a trial. As detailed above, the Defendant properly addressed these issues and established that the underwriting information was not what the Estate, in pre-trial motion practice, made it out to be and it was not, in isolation, sufficient to adjust and pay the Minors' contents claim.

usable. Because the photos were 5 and 11 years old, they could not depict what was actually in the dwelling when Katrina struck. Likewise, the photos were limited; there were not:

- photos of all rooms (for example, there were no photos taken inside the witch's hat, which as the Estate's attorney argued but did not attempt to prove housed the most expensive contents).
- photos inside of cabinets, jewelry boxes, drawers, closets, or the like.
- photos depicting the brand, make, and model of the contents.
- photos showing the age of each of the contents.

The only reasonable interpretation of the underwriting photos the Estate introduced into evidence is that none of them were meant to capture the contents in the dwelling; not in 1994, not in 2000, and not in 2005, when Katrina struck. USAA could not be acting in bad faith when it did not adjust the contents claim based solely on these photographs.[13]

Fourth, and completely contradicting the Estate's depiction of the descriptions found in the underwriting information, the limited notes relating to contents inside the dwelling specifically showed that detailed estimates and/or appraisals were not done.

c. ***CLAIM:*** USAA only paid for "soft goods" in certain rooms.

[13] Indeed, the conclusion that USAA should have used underwriting photos to adjust a contents claim rewrites the policy and Mississippi law, which requires that (1) the Minors prove the damage to their contents was caused by a covered peril and (2) the Minors provide USAA with a personal property inventory, listing the age, make, model, description, and price of every damaged item.

Except that is not what the evidence shows. While it is true that USAA only paid for "soft goods" in certain rooms, it also undisputedly paid for all goods in certain rooms. And because the Estate completely misconstrued the evidence and chose not to introduce the contents list and/or have anyone establish what "hard goods" were improperly not adjusted, the Estate wholly failed to establish what items USAA failed to consider in bad faith. The Estate failed to establish how much was improperly withheld through this distinction.

To the extent that the Estate felt that the label "soft goods" was improper, the Estate failed to establish through expert testimony that such a label violated industry standards. Moreover, USAA's witnesses explained why the label was used and how such a distinction is appropriate.

d. ***CLAIM:*** The Minors were harmed because USAA did not issue a contents check until 2013.

Except that is not what the evidence shows. The Estate failed to introduce any evidence of harm. Neither the Minors nor the Estate ever tried to replace or repair any of the contents. Significantly and tellingly, Mr. Stephen Minor testified at trial that he did not even know a contents check had been issued and never looked at the estimate. Why? Because it did not matter. The Minors and the Estate consistently demanded limits (which even the 2013 jury did not award).

33. With consideration to the above argument, the Estate's evidence as it relates to the contents claim, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been

obviated." *Waste Mgmt*. at 640.

The $4,000 Silver/Jewelry Claim

34. The Estate argued that USAA missed the $4,000 silver/jewelry endorsement when USAA considered the Minors' contents list (which again was not introduced into evidence). USAA admits that happened. USAA also demonstrated that this was an oversight that was corrected once the issue was brought to its attention. The Estate introduced no evidence to support a finding that this was anything more than a simple mistake.

35. With consideration to the above argument, the Estate's evidence as it relates to the silver/jewelry claim, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt*. at 640.

The $500 Refrigerated Products Claim

36. The Estate argued that USAA missed the $500.00 refrigerated products endorsement when USAA considered the Minors' contents list (which again was not introduced into evidence). USAA admits that happened. USAA also demonstrated that this was an oversight. The Estate introduced no evidence to support a finding that this was anything more than a simple mistake.

37. With consideration to the above argument, the Estate's evidence as it relates to the refrigerated products claim, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt*. at 640.

The Boathouse and Shed Claim

38. The Estate did not present any evidence to establish that USAA lacked an arguable basis and acted arbitrarily during its handling of the boathouse and shed. Starting with the shed, the Estate did not attempt to prove that the shed was mishandled.

39. Ignoring the shed, the Estate concentrated on the boathouse. The Estate argued that the boathouse was mishandled because: (i) the initial entry in IMS listed a "boat pier," (ii) the old underwriting provided information about the boathouse, and (iii) because of that information, USAA should not have needed the Estate to ask about the claim when it finally raised the issue during litigation.

40. USAA admits that it did not consider the boathouse until after litigation ensued. USAA demonstrated that this was an oversight not to see the "boat pier" note and ask the Minors for details. USAA also testified that had the Minors raised the issue pre-suit, it would have adjusted the claim.

41. The evidence shows that USAA provided the Minors with its estimates and the engineering firm's report, and none of these mentioned the boathouse. Yet, the Minors never asked, "what about the boathouse?" It is undisputed that the pier and boathouse on the end of the pier were located away from the main residence and across a public road. As Mr. Carraway testified, normally the insureds are willing to meet with the adjuster and point out the loss. Not in this claim, just a continuing demand for limits and resistance to producing information.

42. Further, USAA showed the jury that the old underwriting information was not helpful. Indeed, there was a single distance photo of the boathouse in the old underwriting documentation. There was no other mention of the boathouse in the documents.

43. There were notes by the inspector describing other structures mentioned by the Minors; however, the boathouse was not mentioned by the Minors or listed by the inspector. There were diagrams of structures, but no diagram of the boathouse. There were replacement cost calculations of the dwelling, but no calculations for the boathouse.

44. Finally, and tellingly, the Estate did not introduce the policy. This is because the policy, which specifically named other large appurtenant structures, did not list the boathouse. The boathouse was deemed covered under an other structures on the residence premises additional coverage provision, and the Estate admitted that the boathouse was across a public road in the Gulf of Mexico.

45. With consideration to the above argument, the Estate's evidence as it relates to the boathouse and shed claim, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt*. at 640.

The Double Deductible Claim

46. The Estate did not present any evidence to establish that USAA lacked an arguable basis and acted arbitrarily when applying the deductible. The Estate did not present any testimony or documentation. Conversely, USAA's corporate representative testified that USAA's math showed that only one deductible was applied and USAA's adjuster's belief that only one deductible was taken was reasonable. This testimony was not rebutted or challenged by the Estate. That the 2013 jury found that two deductibles were taken does not alone mean that USAA lacked an arguable basis and acted arbitrarily when applying the deductible and/or believing its math supported its application of the deductible.

47. With consideration to the above argument, the Estate's evidence as it relates to the deductible, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt*. at 640.

The Delay Claim

48. The jury was instructed it could award extracontractual damages to the Minors based on "delay." There is no evidence, however, that supports a claim of "delay."

49. But before there is any discussion of the "delay" in paying the claim, USAA reminds this Court that the Minors expressly waived any claim of "delay" based on the time after litigation began. Alternatively, if the claim was not waived, USAA had an arguable basis – the email – to believe it was. The trial court denied USAA's efforts to place the email waiver into evidence for the jury. This happened before trial when the trial court denied USAA's request to take depositions (while allowing the Estate to take depositions) and during trial when the trial court determined the document was too confusing for the jury. Therefore, any analysis of "delay" must be limited to the time between January 16, 2006 and August 14, 2008. Once we focus on the correct time period, the Estate presented no evidence of delay during, and the verdicts should be set aside.

50. Before August 14, 2008, USAA had offered the Minors $229,568.71 for their structure damage and $2,000 for loss of use (which the original jury found was not even owed). To adjust and offer these amounts, USAA only had its own retained engineering firm's opinions to go by; the Minors told USAA that they would provide their own experts' opinions as early as March 2006, but the Minors did not follow through with that promise. Moreover, after USAA offered the supplemental $194,322.85 payment in early

2007, the Minors never responded, despite numerous follow-up letters from USAA. Instead, the Minors waited more than a year after the supplemental payment was made, and then they filed suit. Moreover, the Minors never cashed any of the checks sent to them by USAA until after the 2013 trial. These facts do not amount to an arbitrary delay.

51. Moreover, before August 14, 2008, USAA had legitimate reasons for not paying anything for contents, refrigerated products, or silver because the Minors, despite repeated requests by USAA and promises by the Minors to provide a personal property inventory, had not bothered to tell USAA what the contents of their house were on August 29, 2005. Because a USAA adjuster cannot know what an insured's personal property is, the policy and Mississippi law requires the insured—and not USAA—to create a personal property inventory. Because the Minors had not complied with this basic requirement, USAA could not have made a payment. There is simply no evidence of delay, and the verdicts should be set aside.

52. Mississippi courts have "made clear that a claimant is not excused from participation and must cooperate to assist in the investigation and resolution of a claim." *Barnes v. Stonebridge Life Ins. Co.*, 624 F. Supp. 2d 574, 581 (S.D. Miss. 2009) (citing *Pilate v. Am. Federated Ins. Co.*, 865 So. 2d 387, 400 (Miss. 2004)). The Estate put on no proof excusing the Minors' the lack of participation and failure to cooperate with USAA's investigation of this claim.

53. The Estate's "evidence" of delay, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt.* at 640.

MISTAKES AND JURY VERDICTS DO NOT PROVE BAD FAITH

54. Insurance companies can be wrong; perfection is not required. USAA made mistakes. Once oversights were pointed out, USAA addressed them. But honest mistakes and oversights such as these do not lead to "the heightened status of an 'independent tort'" required for a finding of a lack of arguable reason. *State Farm Fire & Cas. Co. v. Simpson*, 477 So. 2d 242, 250 (Miss. 1985).

55. Furthermore, that the 2013 jury disagreed with USAA's experts on causation does not mean USAA acted in bad faith. *Martin*, 998 So. 2d at 970-71 ("This Court has also stated that punitive damages should not be imposed simply because a mistake was made regarding coverage."). *See also Sobley v. S. Natural Gas Co.*, 302 F.3d 325, 341 (5th Cir. 2002) (finding that an exclusion can provide an arguable basis even if the exclusion ultimately does not apply).

56. The Estate failed to establish that USAA arbitrarily denied the Minors' claim. The Estate failed to establish that USAA had no credible evidence in support of its claim decisions. The Estate failed to show that USAA could have "easily adduce[d] evidence showing" there was no merit to the engineer's conclusion that the storm surge caused the vast majority of the damage to the Minors' house. For these reasons, as a matter of law, USAA had an arguable reason for its claim decisions, and there can be no extracontractual (or punitive damages) against USAA.

THE ESTATE FAILED TO SHOW THAT IT INCURRED EXTRA-CONTRACTUAL DAMAGES

57. The Estate did not seek damages for emotional distress suffered by the Minors or the representatives of the Estate; that claim was voluntarily dismissed long before the 2022 trial.

58. The Estate did seek damages for attorneys' fees allegedly incurred while seeking recovery of contractual damages. However, the Estate did not introduce any admissible evidence in support of its allegedly incurred fees. Likewise, the Estate never disclosed anything relating to attorneys' fees during discovery or after remand. Nevertheless, and over USAA's objections, the trial court made its own factual finding on attorneys' fees and read that finding to the jury. The jury then awarded exactly what the trial court told them was the Estate's incurred fees.

59. With consideration to the above argument, the Estate's evidence as it relates to the attorneys' fees, when applied to the elements of its extracontractual claim and its punitive damages claim, is "so deficient[] that the necessity of a trier of fact has been obviated." *Waste Mgmt*. at 640.

C.

THE ESTATE FAILED TO MEET THE REQUIREMENTS OF § 11-1-65

60. By statute, no punitive damages can be awarded unless a plaintiff proves by clear and convincing evidence that the defendant "acted with actual malice, **gross negligence *which* evidences a willful, wanton or reckless disregard for the safety of others**, or committed actual fraud." Miss. Code Ann. § 11-1-65 (emphasis added). The emphasis is added for two reasons. First, the Estate conceded that there was no proof of malice or fraud. Second, the Estate ignored the clause beginning with "which."

The Estate did not meet its clear and convincing evidence burden

61. To meet the clear and convincing standard, the Estate's evidence must be so strong that it leads to a firm belief or conclusion, without hesitation, "of the truth of the precise facts of the case." *Miss. Comm'n on Judicial Performance v. Carver*, 107 So. 3d 964,

969-70 (Miss. 2013). This means that the Estate was required to prove with "evidence so clear, direct and weighty and convincing" (1) that USAA did not have an arguable reason for its claim decision and (2) that USAA with "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud…." *Niebanck v. Block*, 35 So. 3d 1260, 1264 (Miss. Ct. App. 2010) and Miss. Code Ann. § 11-1-65.

62. The Estate provided no direct evidence that USAA did not have an arguable basis for its claim decisions. Every decision made by USAA was formed through and consistent with its investigation, both through the engineer's reports and the photographic evidence of the Minors' property (including the damage to the still-standing structures). These two facts alone, *as a matter of law*, provided the requisite credible evidence.

63. What evidence, then, did the Estate present to support its claim for punitive damages?

- An interpretation of an email concerning damage? As detailed above, USAA addressed that "interpretation."
- A claim that the same email was intentionally omitted? Even the Estate knew the evidence wasn't there for this, claiming "I don't know" to its own question of whether this was just an unfortunate coincidence. Tr. 495. And, as detailed above, USAA addressed this "claim."
- A suggestion that, in the same email, the "he" in the sentence "He still won't be happy about that" was about a USAA team leader and not Mr. Minor? Again, USAA addressed this "suggestion."
- A claim that USAA had a nefarious reason for putting CONFIDENTIAL on that email? Once again, USAA addressed this "claim," explaining it was to protect

personally identifiable information contained in the email.

- An argument that USAA wanted the engineer to change his opinion despite the undisputed fact that USAA's request for clarification was not a request for a new opinion? Not only did USAA address this, but the Estate purposefully did not introduce the report because it knew its "argument" would be shown to be what it is – a baseless argument.
- A theory that the 1994 and 2000 underwriting information would have changed the pace of these proceedings? Again, above, USAA addressed this "theory."

64. For a jury to conclude each of these elements in the Estate's favor, it had to reject unrefuted testimony and draw inferences in favor of the Estate. Except, under the clear and convincing standard, inferences in the face of direct evidence to the contrary are insufficient. *Lauderdale Cty. Dep't of Human Servs.*, 13 So. 3d 1263, 1268 (Miss. 2009) (finding circumstantial evidence insufficient to meet the clear and convincing standard).

65. Before an inference can support a clear and convincing burden of proof, the resolution requested by the Estate must be the single most reasonable inference that can be drawn based on the evidence and that inference must lead to a firm conclusion, without hesitation, as to what the truth is. *GFI, Inc. v. Franklin Corp.*, 88 F. Supp. 2d 619, 624 (N.D. Miss. 2000). Each of the items listed above require an inference or inferences, each of which were refuted by actual evidence and none were the single most reasonable inference that could have been drawn.[14]

[14] For example, the Estate asks the jury to assume that USAA adjuster Rob Brooks confined the possible wind-caused covered damage to the windows to the windward side because he was grossly negligent (again, not necessarily in a manner that evidenced a

66. Putting those inferences aside, as this court must, and in consideration of all that was and was not presented, the Estate did not satisfy its burden of proving that (1) USAA had no credible evidence to support its claim decisions and (2) USAA "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud...." Because the Estate did not meet these burdens of proof, the punitive damages verdict and judgment should be set aside with judgment entered in favor of USAA.

The Estate presented no evidence of actual malice, safety problems, or actual fraud

67. The punitive damages verdict can only stand if the Estate was able to show that USAA "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud...." Miss Code Ann. § 11-1-65.

68. There was no evidence of actual malice or actual fraud. Rather, the Estate based its entire punitive damages case on "gross negligence." But this is only part of what § 11-1-65 requires before there can be punitive damages based on "gross negligence." By statute, punitive damages based on gross negligence must "evidence[] a willful, wanton or reckless disregard for the safety of others...." ***There is no evidence that anyone's***

willful, wanton or reckless disregard for the Minors' rights as is required to be actionable). However, since his enclosure letter made it clear this was a partial payment and that additional funds would be paid, and he explained in IMS documentation that he was trying to pay what he believed was possibly damaged by wind (consistent with the actual opinions of the engineer, not the Estate's spin on the opinions) that inference is not most reasonable inference to be drawn from the undisputed evidence. Indeed, the only inference that can be drawn from USAA's initial payment is that it was paying the Minors some money for possible and probably wind damage while it continued to investigate the claim with the intent of paying additional money.

safety was disregarded.

69. For punitive damages to be allowed based on gross negligence, there must be clear and convincing evidence that a defendant acted in such a way that it unreasonably put another at risk of physical harm. There is no evidence of that here. Even if all the inferences are drawn in favor of the Estate (secret e-mails, misrepresenting the engineer's conclusions), none of those things threatened the safety of the Minors (who didn't even live in this house) or their adult children who lived in other states. Under the plain language of § 11-1-65, the punitive damages verdict must be set aside, and judgment entered for USAA.

The Estate did not prove that USAA evidenced a willful, wanton, or reckless disregard for the Minors' rights

70. In 2004, § 11-1-65 was extended to breach of contract actions; previously, such claims had been omitted. Prior to this change in 2004, Mississippi had already developed its law regarding punitive damages against an insurance company. An insured bears a "heavy burden" when seeking punitive damages. *Sentinel Indus. Contr. Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 972 (Miss. 1999). "The law of this State does not impose punitive damages in cases in which a carrier is determined to have merely reached an incorrect decision in denying a given claim." *Grimes*, 722 So. 2d at 641.

> The issue of punitive damages should not be submitted to the jury unless the trial court determines that there are jury issues with regard to whether:
>
> 1. The insurer lacked an arguable or legitimate basis for denying the claim, *and*
>
> 2. The insurer committed a wilful or malicious wrong, or acted with gross and reckless disregard for the insured's rights.

Id. (emphasis in original).

71. Unlike extracontractual damages, such as attorneys' fees or emotional distress, "[t]he fact that an insurance company lacks a legitimate or arguable reason for denying a claim *does not automatically lead to the conclusion that the issue of punitive damages should be submitted to the jury*." *Moss*, 513 So. 2d at 930 (emphasis in original). Before a jury can consider punitive damages, the trial court was required to "determine whether there is a jury issue as to the insurer's having committed a willful or malicious wrong, or acted with gross or reckless disregard for the insured's rights." *Id.*

72. Since the 2004 amendment to § 11-1-65, without discussion, courts have swapped "rights" for 11-1-65's "safety" requirement and allowed punitive damages when (1) the insurance company lacked an arguable reason and (2) the insurance company acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the rights of the insured, or committed actual fraud.

73. Even if this court were to apply that standard, the verdict for punitive damages must be set aside. As noted above, the Estate cannot show that USAA lacked an arguable reason for its claim decisions. That alone "will utterly *preclude* the submission of the issue of punitive damages to the jury." *Moss*, 513 So. 2d at 930 (emphasis in original). Therefore, there can be no judgment for punitive damages.

74. As to the second element, the Estate argued that a number of small things added up to "gross negligence"; even if we accept that those small things add up to gross negligence (and we do not), the Estate did not show that USAA had a willful, wanton, or reckless disregard for the Minors' rights as USAA insureds. Instead, the undisputed evidence is:

    - USAA accepted the Minors' claim, made nearly five months after Hurricane Katrina.

- USAA proceeded to investigate the Minors' claim, through adjusters and engineers.
- USAA obtained photographic evidence of the damage to the Minors' insured property.
- USAA offered interim payments to the Minors; all of which were rejected.
- USAA regularly and repeatedly communicated with the Minors, including advising them of the on-going status of their claim, giving them direct access to the engineers, explaining the opinions of the engineers, sending them the engineering report, giving them the estimates that formed the basis for the payments, and repeatedly asking them if there was any additional information they had for USAA to consider.
- Every time the Minors provided USAA with any information, USAA reexamined the claim and, if warranted, paid additional funds.

Nothing supports the jury's apparent conclusion that USAA acted with gross negligence which evidenced USAA willfully, wantonly, or recklessly disregarding the Minors' safety or rights as USAA insureds.

THE PUNITIVE DAMAGES VERDICT DOES NOT SATISFY DUE PROCESS

75. In addition to failing to meet Mississippi law for a punitive damage verdict, the jury's $10 million verdict in favor of the Estate violates USAA's due process rights. As such, the punitive damages verdict should be set aside.

76. "[C]ourts reviewing punitive damages [must] consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the

difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). Addressing each of these guideposts, the punitive damages verdict cannot stand and should be set aside.

a. "'[P]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 485 (Miss. 2002) (quoting *BMW of N. Am. v Gore*, 517 U.S. 559, 575 (1996)). Viewed as a whole, USAA conduct is not reprehensible; at most, there were differences of opinion with the insured as to what insured property was damaged by the wind before the storm surge came and mere mistakes that when shown were addressed.

b. The Estate showed no actual harm. As detailed above, the Minors were not harmed by the pre-suit offers; indeed, the Minors refused to accept any amount of money from USAA until the 2013 contract trial was over. And there was no proof that the dispute created any hardship for the Minors. They lived well elsewhere. They were not attempting to rebuild or replace anything lost in Katrina. Moreover, after the jury awarded compensatory damages of $1,547,293.37, the Estate did not and could not show that it was harmed because it was not paid until the 2013 jury awarded it damages. The Estate could not and did not show that it has rebuilt, it has begun to rebuild or has plans to rebuild.

77. In the absence of any evidence to support the due process guideposts, the jury's verdict for punitive damages violates USAA's due process rights and must be set aside.

78. Perhaps recognizing these issues, the Estate pivoted from its focus on USAA's conduct

with the Minors to an argument that encouraged a punitive damage verdict so the jury could send a message to all insurance companies on behalf of all the policyholders who had to settle their lawsuits. This was the primary message of the Estate's closing argument. This cannot, however, be the basis for a punitive damage award. A jury is permitted to only consider the harm to the party to the case. *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007) (holding an award that punishes "the defendant for harming persons who are not before the court ... would amount to a taking of 'property' from the defendant without due process."). USAA further incorporates all constitutional defenses included in USAA's Answer.

79. Since the punitive damage verdict violates USAA's due process rights, it should be set aside with judgment entered for USAA.

WHEREFORE, PREMISES CONSIDERED, USAA respectfully moves that the verdicts and judgments against USAA in favor of the Estate be set aside and judgment rendered for USAA on the Estate's claims.

Respectfully submitted, this the 13th day of October, 2022.

UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant

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CERTIFICATE OF SERVICE

I, Timothy J. Sterling, do hereby certify that I have this date filed the foregoing with the clerk of this Court via MEC, which sent notification to all attorneys of record.

This, the 13th day of October, 2022.

/s/ Timothy J. Sterling
TIMOTHY J. STERLING (MSB#103063)