

**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**

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**MOTION FOR NEW TRIAL**

**(PRESENTED IN THE ALTERNATIVE TO USAA'S  
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT)**

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As explained in USAA's Motion for Judgment Notwithstanding the Verdict (MEC 443), the Estate did not satisfy the legal elements to satisfy the verdicts against USAA (MEC 428, 429) and corresponding judgment entered on October 3, 2022 (MEC 432). This Court should set those verdicts aside and enter judgment for USAA.

Alternatively, for those same reasons and also because of erroneous evidentiary and legal rulings, in accordance with Rule 59 of the Mississippi Rules of Civil Procedure, this Court should set aside the verdict of the jury and the judgment entered on October 3, 2022 as to Plaintiff and grant USAA a new trial on all issues.

**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 early 2009, the Estate of Sylvia Minor substituted Mrs. Minor.

3. In mid-2013, the Plaintiffs' extra-contractual claims for emotional distress were dismissed.
4. On August 9, 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.<sup>1</sup> The jury did not award the Estate the loss of use damages they sought; the jury also did not award replacement cost value because the Minors and/or 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 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 cash value but reversed the

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<sup>1</sup> There was a total of \$1,956,967.06 in limits remaining on the Minors' policy at the time of the trial.

grant of summary judgment. After reviewing two factual disputes, the Court of Appeals concluded 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. Although the Court ruled 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.<sup>2</sup>

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 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

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<sup>2</sup> 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).

and closing arguments were made by counsel, the jury retired to deliberate. On Friday, after approximately eight (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.

**II.  
ARGUMENT**

13. USAA is entitled to a new trial because (1) the trial court's pretrial decisions prejudiced USAA; (2) the trial court's errors during trial prejudiced USAA; (3) the verdict is the against the great weight of the evidence, (4) the verdict is the result of passion, prejudice, and bias; and (5) for any other reason for which a new trial may be granted.

**A.  
STANDARD**

14. "[T]he trial court has the power and duty to set aside a verdict and order a new trial whenever, in its sound judgment, such action is required." *Motorola Commc'ns & Elecs., Inc. v. Wilkerson*, 555 So. 2d 713, 723 (Miss. 1989).

[T]he trial court may grant a new trial based upon a prejudicial error by the court in the admission or exclusion of evidence, an error in the jury instructions, prejudicial comments by the judge or attorneys, a finding that the verdict is against the great weight of the evidence, a finding that the jury's verdict is the result of passion, prejudice or bias, or any grounds upon which new trials were granted in actions at law prior to the adoption of" the Mississippi Rules of Civil Procedure.

Miss. R. Civ. P. 59 cmt.

**B.**  
**ERROR IN PRETRIAL PROCEEDINGS**

The following prejudicial errors occurred in the pretrial proceedings:

15. The trial court incorrectly allowed the Estate to take depositions.
16. The trial court incorrectly denied USAA the opportunity to take depositions, while, as described above, allowed the Estate to take depositions.
17. The trial court incorrectly granted the Estate's Motion in Limine disallowing USAA to mention or refer to Paul Minor's arrest and conviction. Minor's conviction was for judicial bribery and is relevant to the veracity of his positions and statements that were introduced during the trial. The conviction and subsequent incarceration also put context in USAA's position that the Minors did not cooperate in the adjustment despite requests by USAA.
18. The trial court incorrectly granted the Estate's Motion in Limine disallowing USAA to mention or refer to the fact that the Minors did not have flood coverage as such was relevant to the motivation of the Minors during the entire claim process.
19. The trial court incorrectly prohibited USAA from taking depositions relating to the Estate's claim of delay and an email exchange wherein the Plaintiffs only reserved a pre-litigation "delay" claim and waived a post-litigation "delay" claim. The Court of Appeals held there were material facts in dispute "as to whether USAA had an arguable and legitimate basis to deny *or delay* payment to the Minors." *Estate of Minor*, 247 So. 3d at 1273 (emphasis added). Because delay was an issue of fact identified by the Court of Appeals, the trial court erred when it prohibited USAA from taking depositions on that issue, including USAA's arguable basis for believing there was no delay claim during litigation, while allowing the Estate to take depositions on all issues.

20. The trial court incorrectly prohibited USAA from taking Paul Minor's deposition. Mr. Minor reported the claim and was the contact person for USAA for most of the claim and its related information. The Minors had obligations under their USAA policy and Mississippi law, including a duty to cooperate with USAA in its investigation. Mr. Minor did not cooperate in the claim investigation, telling USAA that the Minors would not accept any payment less than the policy limits and promising information that the Minors were slow to provide and/or never provided. "Both parties to a contract are required to exercise good faith." *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992) (cleaned up and quotations omitted). This error is even more egregious seeing that the trial court allowed the Estate to conduct and reconduct depositions.
21. The trial court incorrectly denied USAA's Motion in Limine seeking to prohibit any mention of attorneys' fees. Such were not produced in discovery or after remand. Indeed, no admissible evidence was produced during the trial.

**C.**  
**ERROR IN TRIAL PROCEEDINGS**

The following prejudicial errors occurred in the trial proceedings:

22. The trial court erred when it allowed the Estate to argue that USAA improperly charged the deductible twice. The Estate did not present any evidence in support of the claim that USAA improperly charged two deductibles. Conversely, USAA presented un rebutted evidence explaining why USAA charged what it did.
23. The trial court erred when, over objections from USAA, it failed to stop the Estate from complaining about delay during the handling of the claim. As the trial court had prevented USAA from taking depositions on the issue of delay and, in doing so, ruled that delay was not an issue in this case, it was error to allow the Estate to refer to,

mention, or argue about delay.

24. The trial court erred when, over objections from USAA, it failed to stop the Estate from complaining about delay after suit was filed. As the trial court had prevented USAA from taking depositions on the issue of delay during litigation and prevented USAA from introducing evidence explaining “delay” during litigation, including an email exchange wherein the Estate explained to USAA that it would not argue that USAA delayed payments during litigation and reserved only its claim for pre-suit delay. Further, it was error to allow argument of delay during litigation as this Court ruled that such delay was not an issue in this case, it was error to allow the Estate to refer to, mention, or argue about delay.
25. The trial court erred when it allowed the Estate to mention other USAA claims.
26. The trial court erred when it did not allow USAA’s stipulation of facts into evidence. It further erred by introducing its own stipulation of facts.
27. The trial court erred when it allowed the Estate to argue, infer, suggest, lie, or imply that USAA had been held liable for bad faith in any other Hurricane Katrina case. It had not, and USAA was prejudiced every time the Estate implied otherwise.
28. The trial court erred when it allowed the Estate’s lawyers to refer to bad acts by other insurance companies.
29. The trial court erred when it allowed the Estate to argue that USAA had some obligation to make changes to its claims handling practices based on the compensatory-phase jury’s verdict. While the jury did not agree with USAA’s conclusion on what caused the damage to the Minors’ house, there was no rejection of USAA’s claims handling practices and any implication that a change was made (or should have been made) was

prejudicial to USAA.

30. The trial court erred when it allowed the Estate to argue that USAA could have or should have adjusted the Minors' claims solely based on 11- and 5-year-old underwriting information found in USAA's storage.
31. The trial court erred when it allowed the Estate to argue that USAA hid and/or misrepresented engineering opinions when the evidence established:
  - a. USAA, namely Ms. Bergstrom, shared the engineer's contact information with the Minors, giving them a direct line of communication with the engineer.
  - b. 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.
  - c. USAA shared the information again when Ms. Bergstrom sent a copy of the engineer's report to the Minors.
  - d. While there was an email labeled "CONFIDENTIAL" relating to the engineering opinions that were undisputedly shared with the Minors, the label was not attached because of the substance of the email, but rather the fact that the member's name and member number were in the email.

And the Estate failed to establish:

- a. The Minors received the June 18, 2006, letter from USAA's adjuster, Rob Brooks, or read the substance of the letter; no one testified that happened.
- b. The Minors relied on the representation found in the letter.
- c. The Minors reasonably relied upon the representation.
- d. The Minors were damaged by the representation.



Moreover, 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;<sup>3</sup> such an interpretation makes sense considering the full first report (not just cherry-picked language), the evidence introduced relating to the second/clarification report and the engineer's testimony about his actual opinions.

32. The trial court erred when it allowed the Estate to argue that the compensatory verdict had any meaning or impact on the extracontractual or punitive issues. The fact that the compensatory-phase jury determined that there was additional covered wind damage to the Minors' insured property does not, by itself, render USAA's claim handling decisions improper, without justification, or in bad faith. *United States Fid. & Guar. Co. v. Martin*, 998 So. 2d 956, 970-71 (Miss. 2008) ("This Court has also stated that punitive damages should not be imposed simply because a mistake was made regarding coverage."). *See also Soblely 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).
33. The trial court erred when it allowed the Estate to present testimony and argument suggesting that the engineer retained by USAA opined that all windows were damaged by wind.
34. The trial court erred when it allowed the Estate to present testimony and argument suggesting that USAA should have retrieved the old underwriting information to adjust

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<sup>3</sup> 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.

the Minors' claims as some sort of standard duty owed by insurers.

35. The trial court erred when it allowed testimony and argument relating to industry standards and/or internal procedures.
36. The trial court erred when it introduced a factual finding into evidence relating to the Estate's attorneys' fees. The Estate did not disclose any information relating to attorneys' fees before trial. The documents presented at trial were not sponsored, unsworn, not authenticated and hearsay. The trial court erred by not requiring discovery or a sponsoring witness to testify and be cross-examined about the improper evidence. Nevertheless, the trial court introduced a factual finding which was completely improper and misleading and confusing for a jury.
37. The trial court erred when it allowed the Estate's attorneys to solicit testimony from non-expert witnesses to provide opinion testimony that (1) was not supported by the facts; (2) was not supported by the witnesses' purported expertise; (3) was on improper issues; and (4) was not disclosed during discovery. Rule 701 of the Mississippi Rules of Evidence restricts the presentation of lay opinion testimony to those situations in which the witness possesses an opinion that is based on his rational perception and is "helpful to clearly understanding the witness's testimony or to determining a fact in issue." Miss. R. Evid. 701. A lay opinion can only be admitted when the witnesses has "first-hand knowledge or observation" as the basis for that opinion. *Id.*, cmt. Furthermore, these lay opinions should not be based on hypothetical questions and instead should be formed from the witness's own perceptions. *White v. Walker*, 950 F.2d 972, 979 (5th Cir. 1991) (finding hypothetical questions to lay witness improper as they did not call for responses rationally based on witness's perception of events). If a witness is to

provide opinion testimony at trial that requires “some experience or expertise beyond that of the average, randomly selected adult, it is a M.R.E. 702 opinion and not a 701 opinion.” *Langston v. Kidder*, 670 So. 2d 1, 4 (Miss. 1995). In *Langston*, the Mississippi Supreme Court held that the witness’s testimony as to trucking industry customs was derived from specialized knowledge and was therefore an expert opinion. *Id.* The opinions elicited by the Estate from lay witnesses during trial were indeed opinions that required more than the experience of a randomly selected adult. None of this testimony should have been allowed, and USAA was prejudiced by this testimony to such a degree that a new trial is warranted.

38. The trial court incorrectly denied USAA’s motion for a directed verdict.
39. The trial court incorrectly denied USAA’s preemptory instructions.
40. The trial court incorrectly granted the jury instructions offered by the Estate over USAA’s objections.
41. The trial court incorrectly denied USAA’s offered jury instructions.
42. The trial court incorrectly denied each of USAA’s objections as to the Estate’s counsels’ arguments, evidence and proceedings.
43. The trial court incorrectly sustained each of the Estate’s objections as to the evidence and proceedings.
44. To the extent that any single error is not, in and of itself, sufficient to deny USAA a fair trial, the cumulative effect of all the errors committed by the trial court denied USAA a fair trial and constitutes cumulative reversible error.
45. The trial court incorrectly denied USAA’s motion for a mistrial.

***The Estate failed to show that nothing supported USAA's decisions.***

46. Before bad faith damages can be awarded, the trial court must determine whether the insurance company acted arbitrarily or with caprice; if there is no proof of such arbitrary or capricious actions, there is no basis for bad faith damages. *Blue Cross & Blue Shield, Inc. v. Campbell*, 466 So. 2d 833, 840 (Miss. 1984). Bad faith claims are, as a result, few and far between. It is only when the denial is “sufficiently egregious” that a bad faith claim can stand. *Life Ins. Co. v. Allen*, 518 So. 2d 1189, 1193 (Miss. 1987).
47. A claim for extracontractual damages (such as the attorneys’ fees awarded by this jury) requires 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). This is a heavy burden that requires that the Estate prove that “a proper investigation by [USAA] would easily adduce evidence showing its defenses to be without merit.” *Id.* (quotation and citation omitted).
48. A successful claim for punitive damages based on bad faith required the Estate to prove (1) that USAA lacked an arguable basis and (2) that USAA “acted with malice or gross and reckless disregard for the rights of the insured.” *Martin*, 998 So. 2d at 960. If there is an arguable basis to delay or deny benefits, there can be no extracontractual or punitive damages. *See, e.g., Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 480 (Miss. 2002) and *Pioneer Life Ins. Co. v. Moss*, 513 So. 2d 927, 930 (Miss. 1987) (“if an insurance company has a legitimate or arguable reason for denying a claim, then such will utterly *preclude* the submission of the issue of punitive damages to the jury.”) (emphasis in original).
49. The trial court erred when it allowed this case to proceed to the jury. Extracontractual

damages are only possible “if **nothing legal or factual** would have arguably justified” the insurance company’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 there to be no bad faith because “[t]he existence of a viable dispute means that both sides had arguable reasons...”).

50. USAA need only have “some credible evidence” to support its claims decisions. *Rsrv. Life Ins. Co. v. McGee*, 444 So. 2d 803, 817 (Miss. 1983). An arguable reason exists even when there is contradictory evidence. *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). In *Hoover v. United Servs. Auto. Ass’n*, the insureds gave USAA a weather report and an engineering report that said their house’s Hurricane Katrina damage was caused by wind. *Hoover v. United Servs. Auto. Ass’n*, 125 So. 3d 636, 643 (Miss. 2013). USAA had a contradictory report from SEA Ltd., an engineering firm, that concluded some of the damage to the house was caused by flooding. *Id.* The Mississippi Supreme Court affirmed the trial court’s decision to dismiss the Hoovers’ bad faith claim against USAA because the SEA report provided USAA with an arguable basis. *Id.* *See also 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).
51. The trial court erred when it allowed this case to proceed to the jury, because the Estate

failed to present evidence that undermined USAA's legal and factual evidence, all of which arguably justified its positions regarding its payment of the Minors' claim.

52. For the sake of brevity, USAA also incorporates by reference its factual presentation and arguments made in its JNOV Motion.

***The Estate did not present clear and convincing evidence that USAA committed a willful or malicious wrong or acted with gross or reckless disregard for the Minors' rights.***

53. "The 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.* The trial court erred when it did not undertake this analysis before allowing the case to proceed to the jury.
54. The trial court erred when it allowed this case to proceed to the jury on the issue of punitive damages because the Estate failed to present any evidence that USAA committed a willful or malicious wrong or acted with gross or reckless disregard for the Minors' rights.
55. The trial court erred when it allowed the Estate to argue—and the jury to consider—whether USAA had been grossly negligent. The Estate admitted that USAA did not commit a willful or malicious wrong, arguing only that USAA was "grossly negligent." But that is not the standard; the "gross negligence" required for bad faith punitive damages must be "indicative of a wanton and willful disregard of the rights of others."

*Blue Cross & Blue Shield, Inc. v. Maas*, 516 So. 2d 495, 498 (Miss. 1987). This tracks the language of § 11-1-65, which requires the Estate to “prove 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.

56. The trial court erred when it allowed this case to proceed to the jury. The Estate did not satisfy the clear and convincing burden required for punitive damages.
57. Again, USAA incorporates by reference its factual presentation and arguments made in its JNOV Motion.
58. The trial court erred when it incorrectly ascertained that the Estate could proceed on claims for punitive damages and subsequently incorrectly ascertained that the punitive damages awarded to the Estate are proper under § 11-1-65 of the Mississippi Code.
59. The trial court failed to properly instruct the jury. The trial court’s errors include, but are not limited to, granting the following instructions:
  - a. The trial court erred in granting Jury Instruction No. 2 because it was abstract and not a full statement of the law.
  - b. The trial court erred in granting Jury Instruction No. 3 because it was abstract and not a full statement of the law.
  - c. The trial court erred in granting Jury Instruction No. 4 because it allowed the jury to consider whether USAA “delayed” the Minors’ claim and whether “such...delay was without arguable and legitimate basis to do so....” MEC 424, p. 6. The trial court had prohibited USAA from developing its defense on the issue of delay, while allowing the Estate to fully develop its case; the Estate had waived

the issue of delay; and the trial court assured USAA that delay would not be an issue at trial. Despite this, the jury was instructed that “delay,” with no restrictions, was one of two bases upon which punitive damages could be awarded.

The trial court further erred in granting Jury Instruction No. 4 because it allowed the jury to award punitive damages based on whether USAA “denied...the Minors’ claim,” which implied that no payment had been made. MEC 424, p. 6. Before the compensatory-phase trial, USAA paid the Minors for what it believed to be the extent of the damage covered under their policy. The Minors’ claim was not denied, and trial court’s instruction that the claim was denied is not based on the evidence. It was error to give it. *Canadian Nat’l/Ill. Cent. R.R. v. Hall*, 953 So. 2d 1084, 1102 (Miss. 2007) (“Our case law is clear that jury instruction must be supported by the evidence.”)

The trial court further erred in granting Jury Instruction No. 4 because it failed to state the appropriate standard under § 11-1-65, allowing for punitive damages when the “denial and delay was without an arguable and legitimate basis..., amounting to malice or gross negligence in reckless disregard of the Minors’ rights....” MEC 424, p. 6. Section 11-1-65 only permits punitive damages when there is clear and convincing evidence of “actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or...actual fraud.” Miss. Code Ann. § 11-1-65.

- d. The trial court erred in granting Jury Instruction No. 6 (P-2), which charges USAA “with knowledge of the entire contents of [its underwriting department



files documents and photographs with regard to 1995 and 2001 onsite inspections of the Minor home by USAA] and all other files in its possession.” MEC 424, p. 8. This is not the law and should not be the law. Such a rule imposes an impossible burden onto persons and entities, alike.

Furthermore, this instruction improperly shifted the burden of proof for the Minors’ personal property claim from the Minors to USAA and improperly relieved the Minors of their obligation under the policy to “prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss,” which the Minors did not do, and improperly relieved the Minors of their obligation to cooperate with the investigation of their claim.

- e. The trial court erred in granting Jury Instruction No. 10 (P-4) because it failed to define what a legitimate or arguable basis was. MEC 424, p. 12.

The trial court erred in granting Jury Instruction No. 10 (P-4) because it instructed the jury to “consider whether USAA conducted a prompt and adequate investigation in the plaintiffs’ insurance claim obtaining all relevant information.” MEC 424, p. 12. This instruction, especially when considered in conjunction with Jury Instruction No. 6, improperly relieved the Minors of their obligations under the policy to provide USAA with the information it requests and suggests that USAA can be held liable for extracontractual damages even if the Minors fail to provide USAA with the requested information.

- f. The trial court erred in granting Jury Instruction No. 14 (P-5) because it was abstract and confusing when read in conjunction with other instructions.
- g. The trial court erred in granting Jury Instruction No. 16 (P-6a) because it was

- abstract and confusing and an improper statement of the law.
- h. The trial court erred in refusing to grant D-7. The instruction was an accurate statement of the law.
  - i. The trial court erred in refusing to grant D-10. The instruction was an accurate statement of the law.
  - j. The trial court erred in refusing to grant D-12. The instruction was an accurate statement of the law.
  - k. The trial court erred in refusing to grant D-14. The instruction was an accurate statement of the law.
60. The trial court erred in refusing to grant USAA's peremptory instructions (D-1, D-2 and D-3).
61. The trial court erred in allowing instruction and argument that contemplated, allowed, or encouraged punitive damages based on any alleged gross negligence which evidences a willful, wanton or reckless disregard for the rights of others. Section 11-1-65 allows for punitive damages only if there is clear and convincing evidence of "actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or...actual fraud." Miss. Code Ann. § 11-1-65. Instructing and allowing argument that punitive damages are allowed when it is someone's "rights" and not "safety" that has been recklessly disregarded is an improper statement of the law. Changing the wording of the statute, after the allegedly egregious conduct occurred, violated USAA's due process rights as guaranteed by the United States and Mississippi Constitutions and is tantamount to the application of an ex post facto law in violation of the federal and state constitutions. While the deviation is only one word, the change from "safety" to

“rights” is substantial. It must be assumed that the jury followed the instructions and applied the word chosen by the trial court, which is contrary to § 11-1-65. Given the substantial punishment applied by the jury to USAA for alleged violations of the Minors’ rights and the absence of any proof that the “safety” of anyone was disregarded, the trial court’s error is prejudicial to USAA’s rights to a fair trial under the law as written by the Mississippi legislature.

62. Mississippi’s punitive damages scheme, including § 11-1-65 of the Mississippi Code, is unconstitutional because it does not impose a sufficiently defined and meaningful constraint on the discretion of fact finders who award punitive damages in causes of action based upon contract disputes. Furthermore, Mississippi lacks well-defined, substantive procedural safeguards for review of punitive damages in all cases and particularly in causes of action based upon contracts. Section 11-1-65 is vague and ambiguous to the extent it means “rights” when it states “safety.”
63. The punitive damages award in this case is the product of unbridled jury discretion and is violative of USAA’s federal and state due process rights.
64. The verdicts of the jury are contrary to the overwhelming weight of the evidence and reflect the jury’s bias, passion, and prejudice and are an unconscionable injustice.
65. The amount of the punitive damages award is excessive and evidences bias, passion, and prejudice on the part of the jury and is an unconscionable injustice. The amount of the award is not rationally related to the alleged wrongful conduct. Since the facts and circumstances involving USAA and the Minors are unique, there is no reasonable necessity to deter any future conduct by USAA. The punitive damages award results from unbridled jury discretion with inadequate precise objective standards. Under the

circumstances of this case, the punitive damages verdict constitutes an excessive fine and unfair taking without due process of law. All of these errors violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Section 14 and Section 28 of the Mississippi Constitution.

66. The trial court incorrectly failed to require a unanimous verdict and/or a finding beyond a reasonable doubt as the punitive damages portion of the trial was solely for the purpose of punishing USAA and taking property from them. This failure violates due process, including the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Section 14 and Section 28 of the Mississippi Constitution.
67. The trial court improperly permitted punitive damages to be considered for breach of an implied duty.
68. The trial court erred by allowing the imposition of punitive damages in violation of the United States and Mississippi Constitutions. Due process prohibits the state from imposing “grossly excess” punishment on a tortfeasor. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996).
69. The trial court erred by allowing the imposition of punitive damages when there was no evidence of reprehensible conduct by USAA. “[P]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *Cook*, 832 So. 2d at 485 (quoting *Gore*, 517 U.S. at 575). Viewed as a whole, USAA conduct is not reprehensible; it is, at most, a difference of opinion with the insured as to what was damaged by the wind before the uncovered storm surge caused the vast majority of the damages.
70. The trial court erred by allowing the imposition of punitive damages after the Estate

argued that the jury was to send a message for all other policyholders who had to settle. A jury can only consider the harm to the party to the case. *Philip Morris USA v. Williams*, 549 U.S. 346, 349, 127 S. Ct. 1057, 1060 (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.”) Because the jury was told to consider the harm to insureds other than the Minors, a new trial is warranted.

71. The trial court erred in (1) denying USAA’s motion for direct verdict; (2) denying USAA’s preemptory instructions; (3) granting the jury instructions offered by the Estate over USAA’s objections; (4) denying USAA’s offered jury instructions; (5) denying each of USAA’s objections as to the evidence and proceedings; and (6) sustaining each of the Estate’s objections as to the evidence and proceedings. To the extent that any single error is not, in and of itself, sufficient to deny USAA a fair trial, the cumulative effect of all the errors committed by the trial court denied USAA a fair trial and constitutes cumulative reversible error.

**WHEREFORE, PREMISES CONSIDERED**, USAA respectfully moves that the verdicts and judgments against USAA in favor of the Estate be set aside and this alternative Motion for New Trial be granted.

Respectfully submitted, this the 13<sup>th</sup> day of October, 2022.

**UNITED SERVICES AUTOMOBILE  
ASSOCIATION, Defendant**

By: /s/ Timothy J. Sterling  
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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 13<sup>th</sup> day of October, 2022.

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