IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

DANIEL B. O'KEEFE,
CELESTE A. FOSTER O'KEEFE,
AND THE DANCEL GROUP, INC. **PLAINTIFFS**

VS. **CAUSE NO. 1:08cv600-HSO-LRA**

STATE FARM FIRE & CASUALTY
COMPANY and MARSHALL J. ELEUTERIUS and
JOHN AND JANE DOES A, B, C, D, E, F, G and H **DEFENDANTS**

PLAINTIFFS' MOTION TO ALTER OR AMEND THE FINDINGS AND/OR JUDGMENT OF THE COURT; FOR A NEW TRIAL ON; AND/OR SEEKING RELIEF FROM THE COURT'S [214] ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO AMEND AND DENYING AS MOOT PLAINTIFFS' MOTION TO EXPEDITE

COME NOW THE PLAINTIFFS, by and through Counsel, and pursuant to Federal Rules of Civil Procedure Rules 52(b), 59(e), and 60, and respectfully requests this Court to alter or amend its findings and/or judgment set forth in the Court's [214] Order Granting in Part Plaintiffs' Motion to Amend . . .; as follows:

I. REQUEST FOR HEARING AND ORAL ARGUMENT

1. Pursuant to Rule 7.2(F)(1) of the Uniform District Court Rules, Plaintiffs respectfully request the Court conduct a Hearing, and consider and allow oral argument on the relief requested by the Plaintiffs herein. Plaintiffs ask the Court to please set this matter for Hearing as soon as Counsel may be heard.

II. INTRODUCTION

2. Plaintiffs are seeking reconsideration and/or amendment of this Honorable Court's Order to prevent a miscarriage of justice in this cause. Plaintiffs respectfully submit that, in light of the facts placed before the Court in support of Plaintiffs' motion for leave to amend to add State

Farm Mutual as a party Defendant, denying the Plaintiffs the right to do so is akin to allowing a puppet to stand trial for alleged heinous misdeeds while ignoring the puppeteer at the other end of the strings.

III. STANDARD

3. Properly used, motions for reconsideration serve to ensure judicial accuracy. *Willy v. Coastal Corp.*, 503 U.S. 131, 112 S.Ct. 1076, 1081, 117 L.Ed.2d 280 (1992) ("Courts do make mistakes . . . ."). "Judges are not omniscient, and 'in any given opinion, [a court] can misapprehend the facts. . . .or even overlook important facts or controlling law.'" *In re Sulfuric Acid Antitrust Litig.*, 2006 WL 2501473 (N.D. Ill. 2006), quoting, *Olympia Equipment v. Western Union*, 802 F.2d 217, 219 (7th Cir. 1986).

4. This Court holds that a Motion to Reconsider is generally reviewed, however,

> under either Rule 59(e), as [a] motion to 'to alter or amend judgment', or Rule 60(b), [a] motion for 'relief from judgment'. . . . [Where] the Motion [is] served within ten days of the Court's Order, as prescribed by Federal Rules of Civil Procedure 59(e) and 6(a)(2), the Court reviews it pursuant to Rule 59(e).

Fowler vs. State Farm Fire & Cas. Co., 2008 WL 3540180 (S.D. Miss. 2008) (citations omitted). Plaintiff brings the subject Motion to alter or amend the Court's Judgment pursuant to Rule 52, 59; and/or to seek relief pursuant to Rule 60. Plaintiff's Motion is being filed within ten (10) days of the Court's *Memorandum Opinion* as calculated by the referenced Rules. Federal Courts in Mississippi have enumerated four (4) grounds that support a Rule 59(e) Motion:

> The permissible grounds for granting a request to alter or amend a judgment under Rule 59(e) are as follows: (1) to correct manifest errors of law or fact upon which judgment is based; (2) the availability of new evidence; (3) the need to prevent manifest injustice; and (4) an intervening change in controlling law.

Shelter Ins. Co. vs. Mercedes Benz, USA, 2006 WL 160 1770 (N.D. Miss. 2006) (citations omitted). This Court has alternatively condensed grounds that support a Rule 59(e) Motion into three (3) considerations:

> . . . (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice.

Atkins v. Marathon LeTourneau Co., 130 F.R.D. 625, 626 (S.D. Miss. 1990).

5. This Court "has considerable discretion in deciding whether to reopen a case under Rule 59(e)," and may do so for a variety of reasons in order "to render just decisions on the basis of all the facts." *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993) (emphasis added). A motion for reconsideration is appropriate "where, . . ., the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented. . . ., or has made an error not of reasoning but of apprehension." *Above The Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

6. As discussed below, it appears the Court may have inadvertently overlooked critical evidence demonstrating why State Farm Mutual should be added as a party Defendant to this cause. Plaintiff respectfully contends the present Motion should be granted in order to allow the Court to address critical, material issues of fact that are not addressed in the current *Order*; to correct errors of law resulting from the fact the *Order* does not address the totality of circumstances; to prevent manifest injustice; and to ensure that the Court's ruling is a just resolution based upon "all the facts".

7. Should the Court elect to consider Plaintiff's Motion pursuant to Fed.R.Civ.P. 60, Plaintiff respectfully submits the relief they are requesting is appropriate under sub-parts (b)(1)

and/or (b)(2), for the same reasons set forth above and below. Additionally, and in the alternative, the relief requested by the Plaintiffs is appropriate pursuant to Fed.R.Civ.P. 60(b)(6):

> Rule 60(b)(6) 'is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses. The broad language of clause (6) gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice. . . . The discretion under 60(b)(6) is said to be especially broad because relief may be granted under it 'when appropriate to accomplish justice.'

Harrell vs. DCS Equipment Leasing Corp., 951 F.2d 1453, 1458 (5th Cir. 1992).

8. Plaintiffs' are also seeking relief under Fed. R. Civ. P. 52(b). Specifically, the Plaintiff is asking the Court to amend its Order to address what Plaintiff contends are critical facts in the Record not addressed in the initial *Memorandum Opinion*, and to make findings and rulings of law thereon as set forth herein below.

IV. ARGUMENT

9. The Court's *Order* does not address or discuss proposed claims against State Farm Mutual in Plaintiffs' proposed Amended Complaint that are unique to this Court's consideration of prior efforts to add State Farm Mutual as a party in Katrina Litigation. Specifically, the Court's *Order* does not address Plaintiffs' claims that State Farm Mutual was the "co-principal" of State Farm Fire with regard to the adjustment, handling and claims decisions made on the subject claims.

10. In *Fonte vs. Audubon Ins. Co.*, 8 So.3d 161, (Miss. 2009)[1], the Mississippi Supreme Court confirmed the viability of claims in the context of a dispute over the handling of an insurance claim against a Defendant **that is not a party to the insurance contract** – even where that Defendant's conduct may not rise to the level of gross negligence – if the insured alleges that the Defendant acted as the co-principal of the Insurer. Plaintiffs have made just such claims

[1] Opinion attached as "Exhibit 1".

against State Farm Mutual in their proposed Amended Complaint. As the Mississippi Supreme Court confirmed in *Fonte*, such claims are valid under controlling Mississippi law, and present questions of fact that must be resolved by a Jury:

> The Fontes assert that Audubon was a co-principal with MWUA, and therefore, Audubon can be held liable under a negligence standard. Audubon was acting as the servicing insurer for MWUA at the time of Hurricane Katrina. As a servicing insurer, Audubon provided service on MWUA policies by issuing policies on behalf of MWUA, adjusting claims, and providing full claim supervision. MWUA owned the files, records, and data obtained or created by Audubon in performance of its duties for MWUA. However, the contract between Audubon and MWUA, the "Servicing Insurer Agreement," does not provide MWUA with surmountable control over Audubon's operations and obligations under the contract.
>
> This Court has adopted a non-exclusive list of factors for determining whether an agency relationship exists:
> Whether the principal master has the power to terminate the contract at will; whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment; whether he furnishes the means and appliances for the work; whether he has control of the premises; whether he furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output; whether he has the right to prescribe and furnish the details of the kind and character of work to be done; whether he has the right to supervise and inspect the work during the course of employment; whether he has the right to direct the details of the manner in which the work is to be done; whether he has the right to employ and discharge the subemployees and to fix their compensation; and whether he is obliged to pay the wages of said employees.
>
> (citations omitted) "Control and the rights to control are key to determining whether an agency relationship exists." (citations omitted). Although the contract between MWUA and Audubon gives MWUA ownership of "all files, records, and data obtained or created" by Audubon, it does not give MWUA the explicit authority to supervise Audubon's work under the contract. Thus, Audubon is given a great deal of autonomy in performing its duties. As such, a genuine issue of material fact exists as to whether MWUA had the necessary control over Audubon required for a principal-agent relationship to exist.
>
> Ultimately, this is an issue for a jury to decide. "The determination of whether an agency relationship exists is a question of fact for the jury," and not a question of law. (citations omitted) Therefore, as to this issue, we must remand this case to the trial court for determination by a jury.

Fonte, at ¶ 9-10.

11. Plaintiffs' "co-principal" claims against State Farm Mutual are not based upon conjecture, but upon facts and evidence that were incorporated into Plaintiffs' Motion for Leave to File Amended Complaint. Plaintiffs attached the "Master Services Agreement" between State Farm Fire and State Farm Mutual as "Exhibit 4" to their Motion, and demonstrated that this agreement is very similar to the agreement that bound Audubon to potential liability (subject to the Jury's conclusions) in *Fonte*. Though that agreement, **State Farm Mutual assumed multiple duties related to the** sale, administration and ***claims handling* under the policies of insurance that are the subject of this litigation** – yet State Farm Fire did not retain meaningful control over State Farm Mutual's execution of those duties. Rather, State Farm Mutual was granted considerable autonomy with regard to the manner in which it devised claims procedures and directed and handled the adjustment (and denial) of Plaintiffs' claims. Paired with the other facts discovered through similar litigation by Counsel for Plaintiffs (which were incorporated and supported by un-refuted evidence attached to Plaintiffs' Motion), this Master Services Agreement demonstrates State Farm Mutual is the co-principal with State Farm Fire with regard to the handling of Plaintiffs' Katrina claims under the subject policies of insurance. Plaintiffs respectfully submit that the Court's Order, which does not acknowledge the existence of Plaintiffs' "co-principal" claims despite setting forth a number of claims Plaintiffs are attempting to make against State Farm Mutual, should be reconsidered so this claim can be addressed; and that Plaintiffs' should be allowed to add State Farm Mutual as Defendant in this cause to pursue such claim(s).

12. Additionally, the Court's Order does not address the evidence set forth in Plaintiffs' motion in support of Plaintiffs argument that, even if State Farm Mutual were found not be the

"co-principal" of State Farm Fire, it could be found individually liable for gross negligence in that State Farm Mutual controlled the adjustment (and ultimate denial) of Plaintiffs' claims. Under controlling Mississippi law, it is clear that an insurance "adjuster, agent or other similar entity" can incur individual liability when its "conduct constitutes gross negligence, malice or reckless disregard for the rights of the insured." *Gallagher Basset Services, Inc. vs. Jeffcoat*, 887 So.2d 777, ¶ 25 (Miss. 2004). Plaintiffs presented the Court with **un-refuted evidence**, in support of their timely motion to add State Farm Mutual as a party Defendant, that (1) State Farm Mutual Automobile Insurance Company, through its agents, representatives, and/or employees was responsible for drafting and implementing the policies and procedures, including but not limited to, the contract altering claims instructions set forth in the Wind / Water Protocol, written by State Farm Mutual and used on ALL Katrina claims in Mississippi, including on the Plaintiffs' claims; (2) Many of the individuals who made or participated in the ultimate denial of Plaintiffs' claims were agents, representatives, and/or employees of State Farm Mutual Automobile Insurance Company; and (3) State Farm Mutual Automobile Insurance Company has been in charge of post-litigation decisions involving this case, and similarly situated cases.

13. It is this **evidence** that sets Plaintiffs' effort to add State Farm Mutual as a party Defendant in this case apart from the "consistently rejected" efforts of other Plaintiffs referenced by the Court – and which makes Plaintiffs' claims in this case more akin to the claims in *Guice vs. State Farm, et al.*, Civil Action No. 1:06-cv-1-LTS-RHW and *Marion vs. State Farm*, Civil Action No. 1:06-cv-969-LTS-RHW, where this Court ***did grant Motions to Amend to add State Farm Mutual as a party***.

V. CONCLUSION

14. Plaintiffs respectfully submit that reconsideration of the Court's [214] Order is necessary to correct manifest errors of law and fact (premised on overlooking critical claims and facts set forth in Plaintiffs' Motion and proposed Amended Complaint), and to prevent manifest injustice, for the reasons set forth above. Specifically, Plaintiffs request this Court enter a new Order GRANTING Plaintiffs' Motion for Leave to File Amended Complaint in full.

15. Because of the complete and concise argument contained herein above, the Plaintiffs respectfully request they be excused from the filing of a supporting memorandum.

Respectfully submitted, this the 4th day of September, 2009.

DANIEL B. O'KEEFE,
CELESTE A. FOSTER O'KEEFE, and
DANCEL GROUP, INC., PLAINTIFFS

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CERTIFICATE OF SERVICE

I, undersigned counsel of record, hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the EFC system which sent notification of such filing to the following:

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This the 4th day of September, 2009.

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8 So.3d 161
(Cite as: 8 So.3d 161)

H

Supreme Court of Mississippi.
Raul **FONTE** and Helen Flammer
v.
AUDUBON INSURANCE COMPANY.
No. 2008-CA-00222-SCT.

Feb. 26, 2009.
As Modified on Denial of Rehearing May 14, 2009.

Background: Insureds, who lost their home due to Hurricane Katrina, filed suit against servicing insurer for the Mississippi Windstorm Underwriting Association (MWUA), which had issued wind and hail policy to them, alleging negligent and arbitrary adjusting tactics. Defendant filed motion for summary judgment. The Circuit Court, Harrison County, Stephen B. Simpson, J., granted motion. Plaintiffs appealed.

Holdings: The Supreme Court, Carlson, P.J., held that:
(1) genuine fact issues precluded summary judgment, and
(2) liability dispute, rather than "pocketbook dispute" existed between the parties.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
In reviewing a trial court's grant or denial of summary judgment, the standard of review is de novo.

[2] Judgment 228 ⚿181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of Issue of Fact. Most Cited Cases
A summary judgment motion is only properly granted when no genuine issue of material fact exists. Rules Civ.Proc., Rule 56(c).

[3] Judgment 228 ⚿185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
On a motion for summary judgment, the evidence must be viewed in the light most favorable to the party against whom the motion has been made. Rules Civ.Proc., Rule 56(c).

[4] Judgment 228 ⚿185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact. Rules Civ.Proc., Rule 56(c).

[5] Judgment 228 ⚿181(23)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(23) k. Insurance Cases. Most Cited Cases
Genuine issue of material fact existed as to whether Mississippi Windstorm Underwriting Association (MWUA) had the necessary control over servicing insurer with which it had contracted, as required for a principal-agent relationship to exist, thus precluding summary judgment to servicing insurer in insureds' suit against it asserting negligent and arbitrary adjusting tactics.

[6] Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases
Control and the rights to control are key to determining whether an agency relationship exists.

[7] Principal and Agent 308 ⚿24

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k24 k. Questions for Jury. Most Cited Cases
The determination of whether an agency relationship exists is a question of fact for the jury, and not a question of law.

[8] Insurance 217 ⚿3234

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)4 Adjusters
217k3231 Claims Administration by
217k3234 k. Adjustment or Settlement. Most Cited Cases

Insurance 217 ⚿3242

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)4 Adjusters
217k3242 k. Liability. Most Cited Cases
An insurance adjuster has a duty to investigate all relevant information and must make a realistic evaluation of a claim; if an agent does not adhere to this duty, the agent will incur individual liability where the agent's conduct rises to the level of gross negligence.

[9] Judgment 228 ⚿181(23)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(23) k. Insurance Cases. Most Cited Cases
Genuine issue of material fact existed as to whether an arguable or legitimate basis for denial of insureds' claim under wind and hail policy for loss of their home following Hurricane Katrina by servicing insurer for Mississippi Windstorm Underwriting Association (MWUA) existed for servicing insurer's decision not to pay the policy limits, thus precluding summary judgment to servicing insurer in insureds' suit against it asserting negligent and arbitrary adjusting tactics.

[10] Insurance 217 ⚿3242

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)4 Adjusters
217k3242 k. Liability. Most Cited Cases
Liability dispute, rather than "pocketbook dispute" existed between insureds, who lost their home due

to Hurricane Katrina, and servicing insurer for Mississippi Windstorm Underwriting Association (MWUA), which issued wind and hail policy to insureds, as a "pocketbook dispute" existed when parties were in agreement as to the extent of damage but disagreed on value to be assigned to the damage, but insureds and servicing insurer did not agree on extent of damage subject to the policy.
***163** John A. Scialdone, Ryan Andrew Hahn, Gulfport, attorneys for appellants.

Walker (Bill) Jones, III, Jason Richard Bush, Bradley Clayton Moody, Jackson, attorneys for appellee.

EN BANC.

CARLSON, Presiding Justice, for the Court.

¶ 1. Raul **Fonte** and Helen Flammer filed this action against **Audubon** Insurance Company and other parties in the Circuit Court for the First Judicial District of Harrison County to recover insurance proceeds for the loss of their home following Hurricane Katrina. **Audubon** filed its Motion for Summary Judgment, which the circuit court granted. Aggrieved, **Fonte** and Flammer appeal to us. Finding error, we reverse and remand this case to the circuit court for further proceedings consistent with this opinion.

FACTS AND PROCEEDINGS IN THE TRIAL COURT

¶ 2. On August 29, 2005, the newly constructed home of Raul **Fonte** and Helen Flammer (the **Fontes**) was reduced to a slab as a result of Hurricane Katrina. This house was located on East Beach Boulevard in Pass Christian. The **Fontes** maintained three separate insurance policies on their home at the time Katrina struck: (1) a wind-and-hail policy through the Mississippi Windstorm Underwriting Association (MWUA); [FN1] (2) a federal flood policy; and (3) a homeowner's policy written by State Farm Insurance Company. At the time the **Fontes'** home was destroyed, **Audubon** Insurance Company (**Audubon**) was handling claims for MWUA.

> FN1. The Mississippi Windstorm Underwriting Association (MWUA) was established by the Mississippi Legislature in 1987 to provide insurance coverage against wind and hail to residents of the Mississippi Gulf Coast. Miss.Code Ann. § 83-34-1 to 83-34-39 (Supp.2008). MWUA is responsible for the issuance of policies; however, once MWUA determines a policy should issue, a member company acts as a servicing insurer and provides service on the policy. **Audubon** was the servicing insurer in this case.

¶ 3. **Audubon** entered into a Servicing Insurer Agreement with MWUA effective March 2005 and signed an extension of the agreement through 2007. Under the Servicing Insurer Agreement, **Audubon** agreed to provide service on MWUA polices such as issuing policies on behalf of MWUA, adjusting claims, and providing full-claim supervision. **Audubon** contracted with independent adjusting firms, in this case FARA Catastrophe Services (FARA), to assist in the adjusting process.

¶ 4. John Jay and Deanie Diamond [FN2] were the FARA adjusters who investigated and adjusted the **Fontes'** claim under their wind-and-hail policy. On February 4, 2006, Jay prepared his final report, which concluded that only the second-story ***164** portion of the **Fontes'** home was damaged by wind; and that the first floor of the property was destroyed by storm surge and thus was not covered under the **Fontes'** wind-and-hail policy with MWUA. Shortly thereafter, AIG Claims Service, acting on **Audubon's** behalf, sent a letter to the **Fontes** stating "payment is being made in the amount of $201,402.21, which is the damage determined to be

caused by the peril of windstorm ([t]he only peril covered by your policy)." On or about February 16, 2006, payment was sent to the **Fontes** in the amount of $171,402.21 for windstorm damage to their home and carport and $30,000 for windstorm damage to the contents.

> FN2. John Jay was the adjuster primarily responsible for the **Fontes'** claim, and Deanie Diamond, another adjuster for FARA, assisted Jay.

¶ 5. The **Fontes'** wind-and-hail policy had a coverage limit for the dwelling of $400,000 and $30,000 for personal property. The **Fontes** received the policy limit of $140,000 under their federal flood policy. The **Fontes** filed suit against State Farm Fire and Casualty Company, MWUA, **Audubon**, and Steve Saucier, who was the **Fontes'** State Farm Insurance agent, alleging, *inter alia,* that Saucier did not increase their policy limits as requested when their home went from a construction project to a completed dwelling. The **Fontes** further alleged that State Farm's denial of coverage under the **Fontes'** homeowners' policy was arbitrary. After the **Fontes** filed suit, MWUA tendered the remaining limits of the **Fontes'** policy, and the **Fontes** dismissed all claims against MWUA and **Audubon** for the recovery of policy limits. However, the **Fontes** maintained their claim against **Audubon** for negligent and arbitrary adjusting tactics, thus reserving their claims for litigation costs, attorney fees, and punitive damages.

¶ 6. **Audubon** filed a motion for summary judgment denying any liability for its handling of the **Fontes'** wind claim, alleging that: (1) it was an agent for a disclosed principal and was therefore immune from any causes of action arising from negligent claims handling or breach of contract; and (2) its adjustment of the **Fontes'** claim did not rise to the level of an independent tort. In response, the **Fontes** argued that: (1) **Audubon's** contractual assumption of MWUA obligations and the equity rights **Audubon** held in wind-and-hail policy premiums rendered it a co-principal with MWUA, therefore subjecting **Audubon** to claims for simple negligence; and (2) the absolute control **Audubon** asserted over the scope and methodology of adjuster John Jay's investigation, as well as the method actually employed by Jay, were grossly negligent and designed to produce arbitrary results. The **Fontes** maintained that Jay was given a mandate not to pay one hundred percent of any claims along U.S. Highway 90 in the Gulfport, Pascagoula, and Bay St. Louis area. The corporate representative of **Audubon** stated during deposition testimony that if such a mandate was given, then it may have been arbitrary. Following a hearing, the trial court entered an order granting summary judgment in favor of **Audubon**. From this order, the **Fontes** appeal to us.

DISCUSSION

¶ 7. Today's appeal raises six issues: (1) whether the trial court erred in granting summary judgment in favor of **Audubon** and dismissing the **Fontes'** claims against **Audubon** with prejudice; (2) whether the trial court erred in the standard it applied in granting summary judgment in favor of **Audubon** and whether it erred in the presumptions or factual issues in favor of the **Fontes** in granting summary judgment in favor of **Audubon**; (3) whether the trial court erred in finding that the parties had stipulated that the **Fontes'** claim was based solely on the gross negligence of **Audubon** as an agent for a disclosed principal; (4) whether the trial court erred in ***165** finding **Audubon** to be an agent for a disclosed principal versus a co-principal with MWUA; (5) whether the trial court erred in finding **Audubon** exhibited no conduct which would allow the jury to determine that **Audubon** had committed arbitrary acts or gross negligence amounting to an independent tort, and further, whether the trial court erred in taking this issue from the jury when there was direct testimony from **Audubon's** corporate

representative to the contrary; and (6) whether the trial court erred in finding that the **Fontes'** claim was nothing more than a "pocketbook dispute." FN3 Issues three through six all concern the ultimate issue of whether summary judgment was properly granted; therefore, issues one and two will not be independently discussed. Also, because the relevance of issue three turns on our disposition of issue four, only issue four will be discussed. As to the issues we deem appropriate to discuss, we restate these issues for the sake of clarity.

> FN3. By order entered on August 5, 2008, this Court granted MWUA's motion for leave to file an amicus brief, and MWUA's Brief of *Amicus Curiae* was filed the same day. In arriving at our decision today, we have likewise considered this amicus brief.

I. WHETHER THE TRIAL COURT ERRED IN FINDING AUDUBON TO BE AN AGENT FOR A DISCLOSED PRINCIPAL VERSUS A CO-PRINCIPAL WITH MWUA.

[1][2][3][4] ¶ 8. In reviewing a trial court's grant or denial of summary judgment, the well-established standard of review is *de novo. One South, Inc. v. Hollowell,* 963 So.2d 1156, 1160 (Miss.2007) (*citing Hubbard v. Wansley,* 954 So.2d 951, 956 (Miss.2007)). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). "A summary judgment motion is only properly granted when no genuine issue of material fact exists." *Jackson Clinic for Women, P.A. v. Henley,* 965 So.2d 643, 649 (Miss.2007) (*citing PPG Architectural Finishes, Inc. v. Lowery,* 909 So.2d 47, 49 (Miss.2005); *Miller v. Meeks,* 762 So.2d 302, 304 (Miss.2000)). "[T]he evidence must be viewed in the light most favorable to the party against whom the motion has been made." *One South,* 963 So.2d at 1160; *Green v. Allendale Planting Co.,* 954 So.2d 1032, 1037 (Miss.2007) (*quoting Price v. Purdue Pharma Co.,* 920 So.2d 479, 483 (Miss.2006)). "The moving party has the burden of demonstrating that no genuine issue of material fact(s) exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Id.* (*quoting Howard v. City of Biloxi,* 943 So.2d 751, 754 (Miss.Ct.App.2006)).

[5][6] ¶ 9. The **Fontes** assert that **Audubon** was a co-principal FN4 with MWUA, and therefore, **Audubon** can be held liable under a negligence standard. FN5 **Audubon** was acting as the servicing insurer for MWUA at the time of Hurricane Katrina. As a servicing insurer, **Audubon** provided service on MWUA policies by issuing policies on behalf of MWUA, adjusting claims, and providing full claim supervision. MWUA owned the files, records, and data ***166** obtained or created by **Audubon** in performance of its duties for MWUA. However, the contract between **Audubon** and MWUA, the "Servicing Insurer Agreement," does not provide MWUA with surmountable control over **Audubon's** operations and obligations under the contract.

> FN4. This Court uses the term "co-principal" only with respect to the duties and obligations of adjusting claims, and in no way does this Court deem "coprincipal" to be a "coinsurer."
>
> FN5. Although references are made to a negligent standard, based on the Complaint in this case, the **Fontes'** claim is one of tortious breach of contract.

This Court has adopted a non-exclusive list of factors for determining whether an agency relationship exists:

Whether the principal master has the power to ter-

> minate the contract at will; whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment; whether he furnishes the means and appliances for the work; whether he has control of the premises; whether he furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output; whether he has the right to prescribe and furnish the details of the kind and character of work to be done; whether he has the right to supervise and inspect the work during the course of employment; whether he has the right to direct the details of the manner in which the work is to be done; whether he has the right to employ and discharge the subemployees and to fix their compensation; and whether he is obliged to pay the wages of said employees.

Miller v. R.B. Wall Oil Co., 970 So.2d 127, 131 (Miss.2007) (*quoting Kisner v. Jackson*, 159 Miss. 424, 132 So. 90, 91 (1931)). "Control and the rights to control are key to determining whether an agency relationship exists." *Id.* at 132 (*citing Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss.1988)). Although the contract between MWUA and **Audubon** gives MWUA ownership of "all files, records, and data obtained or created" by **Audubon**, it does not give MWUA the explicit authority to supervise **Audubon's** work under the contract. Thus, **Audubon** is given a great deal of autonomy in performing its duties. As such, a genuine issue of material fact exists as to whether MWUA had the necessary control over **Audubon** required for a principal-agent relationship to exist.

[7] ¶ 10. Ultimately, this is an issue for a jury to decide. "The determination of whether an agency relationship exists is a question of fact for the jury," and not a question of law. *Id.* (*citing Kight v. Sheppard Bldg. Supply, Inc.*, 537 So.2d 1355, 1358 (Miss.1989)); *Elder v. Sears, Roebuck & Co.*, 516 So.2d 231, 236 (Miss.1987). Therefore, as to this issue, we must remand this case to the trial court for determination by a jury.

II. WHETHER THE TRIAL COURT ERRED IN FINDING AUDUBON EXHIBITED NO CONDUCT WHICH WOULD ALLOW THE JURY TO DETERMINE THAT AUDUBON COMMITTED ARBITRARY ACTS OR GROSS NEGLIGENCE AMOUNTING TO AN INDEPENDENT TORT, AND FURTHER WHETHER THE TRIAL COURT ERRED IN TAKING THIS ISSUE FROM THE JURY WHEN THERE WAS DIRECT TESTIMONY FROM AUDUBON'S CORPORATE REPRESENTATIVE TO THE CONTRARY.

[8] ¶ 11. The **Fontes** argue that the conduct exhibited by **Audubon** rises to the level of an independent tort and that there was enough evidence to send their claim of gross negligence to a jury. "An adjuster has a duty to investigate all relevant information and must make a realistic evaluation of a claim." *Bass*, 581 So.2d at 1090. If an agent does not adhere to this duty, the agent will incur individual liability ***167** where the agent's conduct rises to the level of gross negligence. *Conyers v. Life Ins. Co. of Georgia*, 269 F.Supp.2d 735, 738 (N.D.Miss.2003).

[9] ¶ 12. In today's case, the record reveals that **Audubon**, through FARA, assigned adjuster John Jay to the **Fontes'** claim. Jay stated that he was given the mandate "not to pay one hundred percent of any of the claims along U.S. 90 in the Gulfport/Biloxi/Pass Christian area because of the fact that it was assumed and believed that storm surge, or flood, created a significant part of the total damage." **Audubon's** own corporate representative agreed that doing a loss adjustment under the presumption that in no event could the loss be a hundred percent of the policy's limits "may be arbitrary." Further, Jay had no training in meteorology, structural engineering, civil engineering, or other

expertise for differentiating between wind and water damage. **Audubon** also failed to provide Jay with standard meteorological data, a consulting meteorologist, or any other consulting expert in adjusting the **Fontes'** claim.

¶ 13. In *State Farm Mutual Automobile Insurance Company v. Grimes,* 722 So.2d 637 (Miss.1998), this Court addressed the issue of punitive damages for denial of an insurance claim, determining that:

> [t]he 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. at 641 (emphasis in original). *See also Jenkins v. Ohio Cas. Ins. Co.,* 794 So.2d 228, 232-33 (Miss.2001).

¶ 14. The **Fontes'** adjuster, John Jay, made an arbitrary determination that he was "going to adjust this claim based on the top half of the home being damaged by wind," and he thinks it would be correct to say "that this estimate did not take into account possible damage to the lower portions of the home that would have been caused by the loss of the roof or breaking of the windows on the upper portion of the home from the ingress of rainwater or wind-driven water." Jay's determination was made with limited expertise, without meteorological data, without a consulting expert, and based on the instruction not to pay one hundred percent of the **Fontes'** policy limits. Whether an arguable or legitimate basis for denying the **Fontes'** claim existed for **Audubon's** decision not to pay the policy limits must be examined by a jury to determine if there existed a gross and reckless disregard for the **Fontes'** rights.

¶ 15. The trial court erred in finding that **Audubon** exhibited no conduct which would allow the fact finder to determine that **Audubon** had committed acts of gross negligence amounting to an independent tort. Thus, summary judgment was improperly granted on this issue. Finding that this issue has merit, we must remand this case to the trial court for determination by a jury.

III. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE FONTES' CLAIM WAS NOTHING MORE THAN A "POCKETBOOK DISPUTE."

[10] ¶ 16. The trial court's order granting **Audubon's** Motion for Summary Judgment states that "the uncontradicted facts in this case are that this was a 'pocketbook dispute' regarding the losses covered by the MWUA (wind) policy." In *Cossitt v. Alfa Insurance Corporation,* the insured and the underwriter agreed that ***168** the insured's claim for benefits was covered. *Cossitt v. Alfa Ins. Corp.,* 726 So.2d 132, 137 (Miss.1998). A "legitimate pocketbook dispute existed between the parties as to the amount of med-pay benefits available" under the policy. *Id.* Thus, a "pocketbook dispute" exists when parties are in agreement as to the extent of damage but disagree on the value to be assigned to the damage. This is simply not the issue in our case today, because the parties do not agree on the extent of the damage subject to the **Fontes'** policy. The **Fontes** maintain that the first floor of their home incurred substantial damage from wind, while **Audubon** attributes all the first-floor damage to storm surge. This clearly is a liability dispute.

CONCLUSION

¶ 17. The trial court erred in granting summary judgment where a genuine issue of material fact exists as to whether **Audubon** was an agent for a disclosed principal, MWUA. The trial court further erred in granting summary judgment by finding that

Audubon exhibited no conduct which would allow the jury to determine that **Audubon** had committed gross negligence. Likewise, this case is not a "pocketbook dispute" but a liability dispute. Thus, for the reasons stated, the Harrison County Circuit Court's final judgment is reversed, and this case is remanded to the Circuit Court for the First Judicial District of Harrison County for further proceedings consistent with this opinion.

¶ 18. **REVERSED AND REMANDED.**

WALLER, C.J., GRAVES, P.J., DICKINSON, RANDOLPH, LAMAR, KITCHENS, CHANDLER AND PIERCE, JJ., CONCUR.
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