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IN THE SUPREME COURT OF MISSISSIPPI

UNITED SERVICES AUTOMOBILE ASSOCIATION **APPELLANT**

v. **CASE NO. 2023-CA-00049**

ESTATE OF SYLVIA F. MINOR,
By and through Co-Executors
KATHRYN MINOR and
STEPHEN MINOR **APPELLEE/CROSS-APPELLANT**

Appeal from the Circuit Court of Jackson County, Mississippi
Civil Action No. 30CI1:08-cv-00204
Honorable Forrest A. Johnson, Jr., Special Judge

BRIEF OF *AMICUS CURIAE* COMMISSIONER OF INSURANCE MIKE CHANEY IN SUPPORT OF APPELLANT/CROSS-APPELLEE'S MOTION FOR REHEARING

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons and entities may have an interest in the outcome of this case. These representations are made so that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Paul S. Minor, plaintiff/appellee;

2. Sylvia F. Minor, deceased, former plaintiff;

3. The Estate of Sylvia F. Minor, plaintiff/appellee;

4. David W. Baria and the law firm of Cosmich Simmons & Brown, PLLC, attorneys for plaintiffs/appellees;

5. James R. Reeves, Jr. and the law firm of Reeves & Mestayer, attorneys for plaintiffs/appellees;

6. Francis Gerald Maples, former counsel for Paul and Sylvia Minor;

7. Oliver Diaz, former counsel for Paul and Sylvia Minor;

8. Chuck McRae, former counsel for Paul and Sylvia Minor;

9. Carl Dwight Campbell, III, former counsel for Paul and Sylvia Minor;

10. United Services Automobile Association ("USAA"), defendant/appellant

11. Michael Bentley, Stephen Fritz, and the law firm of Bradley Arant Boult Cummings LLP, counsel for USAA;

12. Greg Copeland, Rebecca Blunden, Tim Sterling, and the law firm of Copeland Cook Taylor & Bush, counsel for USAA; and

13. The Honorable Forrest A. Johnson, Retired Circuit Court Judge and specially appointed trial judge.

/s/ *Charles E. Ross*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

https://jmsma.scholasticahq.com/article/73400-relecting-on-tort-reform-the-nights-the-lights-went-out-in-mississippi..... 7

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Louis Masi, The National Flood Insurance Program: Why Government-Backed Flood Insurance Is Drowning in Debt, 33 Vill. Envtl. J.J. 63 (2022) 13

Linda McMullen, The Impact of Tort Reform, Journal of the Mississippi State Medical Association (March 14, 2023), https://jmsma.sholasticahq.com/article/73398 6

MWUA Reinsurance and Exposure, Mississippi Windstorm Underwriting Association, https://msplans.com/mwua/reinsurance-and-exposure 13

Cecil Pearce, High Stakes for Mississippi Tort Reform, Insurance Journal (June 21, 2004) https://wwww.insurancejournal.com/magazines/mag-partingshots/2004/06/21/43442.html 7

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Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 20 (1997) 5

STATEMENT OF INTEREST

Commissioner Mike Chaney, the statewide elected official who is the "chief officer" of the Mississippi Department of Insurance, is charged with "the execution of all laws (except as otherwise specifically provided by statute) now in force, or which may hereafter be enacted, relative to all insurance and all insurance companies …" Miss. Code Ann. §§ 83-1-1 and 83-1-3. Commissioner Chaney was first elected to the position of Commissioner in 2007. He was reelected in 2011, 2015, 2019, and 2023. Before being elected Commissioner, Commissioner Chaney served eight years in the Mississippi House of Representatives from 1993-1999, and then in the Mississippi Senate from 1999-2007.

The position of Commissioner and the Mississippi Insurance Department were created by the Legislature in 1902.[1] The duties and authority of the Commissioner are broad, including the licensing of insurance companies and agents,[2] the approval (or disapproval) of insurance rates,[3] ensuring that insurance companies do not engage in deceptive or unfair trade practices,[4] and examining insurance companies to ensure they are financially solvent.[5]

A priority of the Commissioner is protecting consumers by maintaining a competitive marketplace with as many insurance companies as possible to ensure insurance products are available and affordable to Mississippi citizens. *About the Mississippi Insurance Department*,

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[1] *History*, Mississippi Insurance Department, https://www.mid.ms.gov/mississippi-insurance-department/about-the-mississippi-insurance-department/history/.

[2] Miss. Code Ann. § 83-17-51.

[3] Miss. Code Ann. § 83-2-3; Miss. Code Ann. § 83-2-11.

[4] Miss. Code Ann. § 83-5-33; Miss. Code Ann. § 83-5-37.

[5] Miss. Code Ann. § 83-1-29; Miss. Code Ann. § 83-1-51.

Mississippi Insurance Department, https://www.mid.ms.gov/mississippi-insurance-department/about-the-mississippi-insurance-department/. This includes ensuring insurance rates (which the Commissioner must approve) are reasonable but sufficient to maintain a competitive insurance market in Mississippi. *See* Miss. Code Ann. § 82-2-3, § 83-2-5. The Commissioner, by law, must ensure insurance rates are not "excessive" by "produc[ing] a profit that is unreasonably high;" and are not "inadequate" by "threaten[ing] the solvency of the insurance company" or tending "to create a monopoly." Miss. Code Ann. § 83-2-3(1)(b). In performing this balancing act, the Commissioner must consider "past and prospective loss and expense experience" (which would include punitive awards); and "a reasonable provision for profits and contingencies." Miss. Code. Ann. § 83-2-3(2)(a). This has been especially important on the Mississippi Gulf Coast since Hurricane Katrina devastated that part of the state.

The Commissioner serves on, appoints members to, or is responsible for the administration of numerous government boards relating to insurance in Mississippi, namely: Health Insurance Management Board;[6] Mississippi Automobile Insurance Plan;[7] Mississippi Comprehensive Health Insurance Risk Pool Association;[8] Mississippi Fire Personnel Minimum Standards and Certification Board;[9] Mississippi Fire Prevention Code Board of Adjustments and Appeals;[10] Mississippi Insurance Guaranty Association (Property and Casualty);[11] Mississippi Life Health

[6] Miss. Code Ann. § 41-86-1 et seq.

[7] Miss. Code Ann. § 63-15-65 et seq.

[8] Miss. Code Ann. § 83-9-211 et seq.

[9] Miss. Code Ann. § 45-11-251 et seq.

[10] Miss. Code Ann. § 45-11-103 et seq.

[11] Miss. Code Ann. § 83-23-101 et seq.

Insurance Guaranty Association;[12] Mississippi Tort Claims Board;[13] Mississippi Rural Risk Underwriting Association;[14] Mississippi Windstorm Underwriting Association;[15] Mississippi Workers Compensation Assigned Risk Plan / Mississippi Workers Compensation Assigned Risk Pool;[16] Rural Fire Truck Acquisition Assistance Review Committee;[17] State Employees Health Insurance Board Advisory Council;[18] and State Liquefied Compressed Gas Board.[19]

Decisions affecting the legal standards applicable to insurance companies in handling claims directly impact insurance loss and exposure, which the Commissioner is, by law, obligated to consider in his approval or disapproval of rates. *See* Miss. Code Ann. § 82-2-3(2)(a) ("Due consideration shall be given to past and prospective loss and expense …."). This analysis necessarily includes the availability (or lack thereof) of punitive damages in claims by insureds, including homeowners. The Commissioner regularly testifies before legislative committees on issues pertaining to homeowner insurance, including the Windpool (discussed further below).[20]

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[12] Miss. Code Ann. § 83-23-201 et seq.

[13] Miss. Code Ann. § 11-46-18 et seq.

[14] Miss. Code Ann. § 83-38-1 et seq.

[15] Miss. Code Ann. § 83-34-1 et seq.

[16] Miss. Code Ann. § 71-3-111 et seq.

[17] Miss. Code Ann. § 17-23-1 et seq.

[18] Miss. Code Ann. § 25-15-9 et seq.

[19] Miss. Code Ann. § 75-57-1 et seq.

[20] *See* pp. 12-14, *infra*, for an explanation of the Windpool.

The Commissioner files this *amicus curiae* brief in support of USAA's Motion for Rehearing on the issue of interpretation of Mississippi's punitive damage statute, Miss. Code Ann. § 11-1-65(1)(a).

ARGUMENT

I. MISS. CODE ANN. § 11-1-65(1)(a) (REV. 2019) IS CLEAR AND UNAMBIGUOUS, AND IT SHOULD BE APPLIED AS WRITTEN.

The Mississippi Legislature could not have been clearer as to the standard for punitive damages. Miss. Code Ann. § 11-1-65(1)(a) states that punitive damages are only allowed if the insurance company "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." (Emphasis added.) Here, "malice" and "actual fraud" are not at issue. Brief of Appellant United Services Automobile Association, *United Services Automobile Association v. Estate of Sylvia F. Minor,* 2023 WL 11872563, at *40. Thus, the sole issue is whether USAA committed "gross negligence" in disregard "for the safety of others."

It is undisputed that the "safety" of the Minors (or anyone else) was not at risk by virtue of USAA's handling of the Minors' homeowner claim. *Id.* at *41. Because the "safety of others" language in Miss. Code Ann. § 11-1-65(1)(a) is clear and unambiguous, it must be applied as written. *See Lawson v. Honeywell Int'l, Inc.*, 75 So.3d 1024, 1027 (Miss. 2011) ("If the words of a statute are clear and unambiguous, the Court applies the plain meaning of the statute and refrains from using principles of statutory construction."); *Jefferson Co. Sch. Dist. v. Covington Co. Sch. Dist.*, 352 So.3d 1123, 1132 (Miss. 2022) ; *Bailey v. Al–Mefty*, 807 So.2d 1203, 1206 (Miss. 2001) ("Where the statute is plain and unambiguous there is no room for construction.") (internal quotation and citation omitted); *Dupree v. Carroll*, 967 So.2d 27, 30 (Miss. 2007) (same); *Laurel Yamaha, Inc. v. Freeman*, 956 So.2d 897, 904 (Miss. 2007) (same). Section 11-1-65(a) in no way

refers generally to the "rights of others" as advocated by appellees. *See Lawson*, 75 So.3d at 1027 (Miss. 2011)) ("This Court 'cannot ... add to the plain meaning of the statute or presume that the legislature failed to state something other than what was plainly stated.'") (alteration in original); *Am. Tower Asset Sub, LLC v. Marshall Cnty.*, 324 So.3d 300, 302 (Miss. 2021) (same); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 20 (1997) ("Congress can enact foolish statutes as well as wise ones, and it is not for courts to decide which is which and rewrite the former."). Appellant USAA (and other *amici*) elaborate on this point, so the Commissioner will not repeat their arguments, but instead simply states his full concurrence.

Section 11-1-65(1)(a) is unambiguous so the Court should apply it as written.

II. THE LEGISLATIVE HISTORY REINFORCES THE NEED TO HONOR THE CLEAR AND UNAMBIGUOUS LANGUAGE OF SECTION 11-1-65(1)(a).

The Mississippi Legislature first codified the punitive damages statute in 1993. *See* 1993 Miss. Laws Ch. 302, § 2 (H.B. 1270). In enacting Section 11-1-65(1)(a), the Legislature, as is its prerogative,[21] modified the common law standard with regard to punitive damages, but it specifically exempted the field of contract law.[22] Commissioner Chaney was a member of the House of Representatives at the time. The punitive damage standard enacted by the Mississippi Legislature in 1993 with regard to punitive damages for non-exempted fields was "gross negligence which evidences a willful, wanton or reckless disregard for the safety of others." Miss.

[21] "The provisions of the common law…are subject to modification by the Legislature." *Pickering v. Langston Law Firm, P.A.*, 88 So.3d 1269, 1278 (Miss. 2012).

[22] *See* 1993 Miss. Laws Ch. 302, § 2 (H.B. 1270) (exempting contracts from punitive damages statute). "Section 11–1–65(2)(a) states that the provisions of this section shall not apply to contracts. The issue of punitive damages in suits for tortious breach of contract is instead governed by common law." *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 447 (Miss. 1999) (citing the 1993 version of the statute), *abrogated by Cmty. Care Ctr. of Aberdeen v. Barrentine*, 160 So.3d 216 (Miss. 2015).

Code Ann. § 11-1-65(1)(a). To the extent the common law standard for non-contract causes of action was different prior to 1993, the Legislature replaced that standard with "disregard for the safety of others."[23] *Id.*

The Legislature again addressed the punitive damages standard in 2004 as part of a comprehensive legal reform. *See* 2004 Miss. Laws 1st Ex. Sess. Ch. 1, § 4 (H.B. 13). Commissioner Chaney was by then a member of the Mississippi Senate. The 2004 legislation was the culmination of several years of heated debate and legislative effort on the issue of legal reform.[24] Business and consumer groups labeled Mississippi as a "judicial hell-hole" and a "jackpot justice" forum. Linda McMullen, *The Impact of Tort Reform*, Journal of the Mississippi State Medical Association (March 14, 2023), https://jmsma.scholasticahq.com/article/73398; Pender. In 2002, the Legislature passed significant legal reform, but many felt it was insufficient.[25] *See* 2002 Miss. Laws 3rd Ex. Sess. Ch. 4, § 6 (H.B. 19); *See* Pender. The 2003 gubernatorial election focused on legal reform, with the Republican candidate, Haley Barbour, advocating that

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[23] The previous common law standard for punitive damages often varied. Some cases had required a showing that the defendant had "acted with (1) malice, or (2) gross negligence or reckless disregard *for the rights of others*." *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 293 (Miss. 1992) (emphasis added): *Hurst v. SW Mississippi Legal Servs. Corp.,* 708 So.2d 1347 (Miss. 1998); *Am. Funeral Home Assoc. Co. v. Hobbs,* 700 So.2d 283 (Miss. 1987). Other cases, however, used safety of others. *See Memphis & C. R. R. Co. v. Whitfield*, 44 Miss. 466 (1871); *Belk v. Rosamond*, 213 Miss. 633, 57 So.2d 461 (1952). *Beta Beta Chapter of Beta Theta Pi Fraternity v. May*, 611 So.2d 889 (Miss. 1992) (last case by this Court prior to the adoption of the "safety of others" Miss. Code Ann. § 11-1-65(1)(a) standard in 1993 session). Regardless, the Legislature explicitly clarified the standard in Section 11-1-65(1)(a), namely: "safety of others."

[24] Geoff Pender, *Mississippi tort reform at 10 years*, The Clarion-Ledger (May 5, 2014, 10:10 PM) ("Pender"), https://www.clarionledger.com/story/news/2014/05/05/mississippi-tort-reform-years/8750203/.

[25] In fact, the 2002 legislation was only passed in a marathon 83-day special session. *See* Frank Corder, *Jackpot Justice +20: Taggart, Nash look back at impact of the longest special session in state history*, Magnolia Tribune (Sept. 6, 2022) ("Corder"), https://magnoliatribune.com/2022/09/06/jackpot-justice-20-taggart-nash-look-back/.

the Legislature must complete the job of legal reform, and with the Democratic candidate, Ronnie Musgrove, arguing that enough had been done and Mississippi should wait to see if the 2002 legislation accomplished its goal. *See* Pender.

After Haley Barbour won the 2003 gubernatorial election, the Legislature again immediately took up legal reform in the 2004 Regular Legislative Session.[26] But when the Legislature was unable to complete legal reform in the 2004 Regular Session, Governor Barbour immediately called a Special Session.[27] *See* Cecil Pearce, *High Stakes for Mississippi Tort Reform*, Insurance Journal (June 21, 2004), https://www.insurancejournal.com/magazines/mag-partingshots/2004/06/21/43442.html. The culmination was House Bill 13, which Governor Barbour signed into law on June 16, 2004. 2004 Miss. Laws 1st Ex. Session Ch. 1, § 4 (H.B. 13). Randy Easterling, MD, *Reflecting on Tort Reform: The Nights the Lights Went Out in Mississippi*, Journal of Mississippi State Medical Association (March 14, 2023), https://jmsma.scholasticahq.com/article/73400-reflecting-on-tort-reform-the-nights-the-lights-went-out-in-mississippi. House Bill 13 amended the punitive damages statute to eliminate the contract exemption, while retaining the "safety of others" standard. *See* H.B. 13.[28] This was a

[26] *See, e.g.*, H.B. 90; H.B. 91; H.B. 555; H.B. 556; H.B. 1579; S.B. 2763, 2004 Regular Session.

[27] *See Barbour Calls Special Session for Tort Reform, Voter ID*, Jackson Free Press (May 13, 2004), https://m.jacksonfreepress.com/news/2004/may/13/barbour-calls-special-session-for-tort-reform/ ("I would have preferred for comprehensive tort reform to have been achieved during the Regular Session. … Since it was not, this Special Session became necessary.").

[28] H.B. 13 also included many other reforms, including the elimination of innocent seller liability in the products liability context; substantial venue reform; the elimination of joint and several liability in most contexts; and caps on noneconomic and punitive damages.

departure from the common law "disregard for the rights of others" that had had been used in some contract cases before this 2004 modification.[29]

This legal reform effort in the early 2000's was a balancing act to accommodate and reconcile many competing interests between varied groups such as the trial bar, the business community, the health care community, and consumer advocates. *See Price v. Clark*, 21 So.3d 509, 541 (Miss. 2009) (Randolph, C.J., concurring in part and dissenting in part) (The 2004 legal reform laws "were enacted after considerable and heated debate in the public realm and within the Legislature. The appropriate constitutional body, the Legislature, determined their adoption was in the best interests of the citizens of this State.") *See* Pender ("Medical, insurance, business and political forces joined to push for lawsuit reform."). An overarching issue was whether Mississippi's liability laws should consider what is best for Mississippi in general as opposed to only considering the interests of the particular litigants. *Id*.; *see also* Charlie Ross, *Winning the Tort War in Mississippi: Keys for Success in other States*, American Tort Reform Association 4-22 (2004). The Legislature, not the courts, was, and is, the governmental branch best able to weigh such competing interests. *City of Starkville v. 4-Cnty. Elec. Power Ass'n*, 819 So.2d 1216, 1221 (Miss. 2002) ("The Legislature is the foremost expositor of public policy.").

To nullify judicially one aspect of the 2004 legislative enactment by changing the standard for punitive damages ignores not only the Legislature's authority but also its unique ability to balance competing interests in forming public policy. *Id.*

[29] *See* FN 23, *supra.*

III. THE LEGISLATURE DID NOT RATIFY ANY RULING OF THIS COURT APPLYING SECTION 11-1-65(1)(a) TO CONTRACTS.

In 2004, the Legislature was writing on a blank sheet of paper when it removed the contract exemption from § 11-1-65(1)(a). Since the 1993 legislation exempted contracts, there were no punitive damages decisions properly applying Section 11-1-65(1)(a) to a cause of action based on contract, for the simple reason that the 1993 version of the punitive damages statute explicitly excluded contract actions. *See Paracelsus Health Care Corp.*, 754 So.2d at 447 (citing the 1993 version of the statute). Thus, the 2004 change to Section 11-1-65(1)(a) was not a situation where the pertinent language, i.e., "disregard for the safety of others," could have been properly construed by the courts in the contractual context.

The majority opinion and the concurrence in this case cited five decisions of this Court discussing the availability of punitive damages in a contract case. *See, e.g., Thornhill v. Walker-Hill Envt'l & Zur. Am. Ins. Co. of Ill.*, 345 So.3d 1197 (Miss. 2022); *Miss. Farm Bur. Cas. Ins. Co. v. Hardin*, 323 So.3d 1034 (Miss. 2021); *McCord v. Healthcare Recoveries, Inc.*, 960 So.2d 399 (Miss. 2007); *Caldwell v. Alfa Ins. Co.*, 686 So.2d 1092 (Miss. 1996); *T.C.B. Const. Co. v. W.C. Fore Trucking, Inc.*, 134 So.3d 701 (Miss. 2013). None of those cases, however, cited Section 11-1-65(1)(a). This Court has said that cases that "hav[e] been decided without reference to, or consideration of [a statute] are not such precedents within the rule of stare decisis as to require that they be followed unless and until overruled." *Aetna Ins. Co. v. Commander*, 169 Miss. 847, 153 So. 877, 879 (1934). None of these cases, then, had binding force with regard to Section 11-1-65(1)(a), and, where, as here, this Court was silent on a statutory issue prior to the 2004 legislation, there is no reason to regard the Legislature's silence (i.e., failure to change the language thereafter) as having any meaning. In *Caves v. Yarborough*, 991 So.2d 142, 153 (Miss. 2008), this Court declared that "we do not agree that the Legislature's mere silence is enough." A prior judicial

construction of the statute may be applied only "upon finding the Legislature amended or reenacted the statute without correcting the prior interpretation." *Id. See also Estate of Eubanks v. Eubanks*, 197 So.3d 861, 870 (Miss. 2015); *WC Baker Co. v. Stockton*, 274 So.3d 948, 950-51 (Miss. App. 2018) (citing *Rankin Cty. Bd. of Supervisors v. Lakeland Income Properties LLC*, 241 So.3d 1279, 1283 (Miss. 2018)).

Based on his own fifteen years as a legislator, the Commissioner acknowledges each legislator has innumerable responsibilities, but analyzing decisions that do not construe a statute is not one of them. When an existing statute comes up for readoption or revision, a conscientious legislator does make an effort to understand its prior application by the courts. But Section 11-1-65(1)(a) had not been construed in the contract context before 2004, so legislative ratification was not then an issue, and the Legislature's inaction since 2004 did not (and could not) approve any subsequent decisions. It is the Court's job to construe statutory language, *King v. Miss. Military Dep't,* 245 So.3d 404, 407-08 (Miss. 2018), not to speculate on the reason for legislative silence. For these reasons, Section 11-1-65(1)(a) must be construed as written.

IV. PREDICTABILITY AND THE RULE OF LAW ARE CRITICAL FOR MISSISSIPPI'S INSURANCE MARKET.

Commissioner Chaney, exercising his statutory authority to approve or disapprove rates, must protect the citizens of Mississippi by ensuring that rates are fair and equitable, Miss. Code Ann. § 83-2-3(1)(a) and (b), while at the same time ensuring that insurance companies can make sufficient profit so they will stay in the Mississippi market. *Id.* at subsection (1)(c). Because Mississippi is such a small percentage of the national insurance market (i.e., 1%),[30] this is a

[30] *See 2023 Market Share Reports For Property/Casualty Groups and Companies by State and Countrywide*, National Association of Insurance Commissioners, https://content.naic.org/sites/default/files/publication-msr-pb-property-casualty.pdf.

difficult and delicate balance, since insurance companies can easily choose to abandon the Mississippi market, given Mississippi's small market share. Judicial decisions modifying clear statutory language affecting the risk faced by insurance companies will upset this balance. *Id.* at subsection (2)(a) ("past and prospective loss experiences" are to be considered by the Commissioner in approving or disapproving rates.). Common sense dictates that the availability of large, eight figure punitive awards (like the $10,000,000.00 here) based on the more liberal judicially created "rights of others" standard, while ignoring the legislatively mandated "safety of others" standard, will cause rates to increase.

Predictability in the law, which leads to more predictability in evaluating the amount of exposure, is crucial to protecting consumers, insurance companies, and a competitive insurance market. When a statute is clear and unambiguous, as is Section 11-1-65(1)(a) regarding the punitive damages standard, it is imperative for courts to apply the statute as written. *See Lawson*, 75 So.3d at 1027. Should the law need to be changed, the Legislature can do so. *City of Starkville*, 819 So.2d at 1221. It is not the role of courts to ignore or modify clear and unambiguous statutory language to achieve a particular outcome. Nor is the Court equipped to do so. As with the legal reform effort in the early 2000's, modification of the "safety of others" standard would implicate the interest of various Mississippians, notably consumers, insurance companies, health care providers, businesses, and attorneys. Balancing these interests can only be properly achieved by the Legislature, which is equipped to consider these varying interests, not via a judicial decision that involves only the litigants.

V. THE INSURANCE MARKET IS COMPLEX AND MULTIFACETED, SO CHANGES TO THE GOVERNING LAW MUST CONSIDER THIS COMPLEXITY, WHICH ONLY THE LEGISLATURE CAN DO.

Private insurance is just one part of the mosaic that constitutes the homeowners' insurance market in Mississippi. The private insurance market for wind coverage, as noted, must be

competitive (i.e., numerous providers). But Mississippi realized long ago that an insurer of last resort was also needed on the Mississippi Gulf Coast, and thus the Legislature, in 1987, established the Mississippi Windstorm Underwriting Association (MWUA) ("Windpool") "to provide insurance coverage against wind and hail to residents of the Mississippi Gulf Coast." *See* 1987 Miss. Laws, Ch. 459, § 2 (H.B. 274); *Fonte v. Audubon Ins. Co.*, 8 So.3d 161, 163 n.1 (Miss. 2009), *as modified on denial of reh'g* (May 14, 2009).[31] Then in 2007, the Legislature expanded the Windpool into a separate and independent entity in response to Hurricane Katrina. *See* 2007 Miss. Laws Ch. 425, § 6 (H.B. 1500).

The Windpool is funded by a combination of premiums collected and by fees on non-admitted insurance companies that write insurance in Mississippi. *See* Miss. Code Ann. § 83-34-4. These fees, per Department of Insurance data, were $196,062,223 for the years 2007-2023. Further, if the Windpool suffers a loss of a certain level of its surplus and reinsurance, admitted insurance companies are assessed to cover losses above this amount. Miss. Code Ann. § 83-34-10. And if the loss is still not covered, then the Commissioner must implement a statewide surcharge on homeowner policies pursuant to Miss. Code Ann. § 83-34-33(1).[32] Given the foregoing, there is a direct connection between the availability of a strong private insurance market (which is partly a function of possible exposure) and the funding of the Windpool.

As of April 1, 2024, the Windpool's total loss exposure is $3,347,075,709.00. *MWUA Reinsurance and Exposure*, Mississippi Windstorm Underwriting Association,

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[31] *See* also Miss. Code Ann. § 83-34-1(f) (stating that the Mississippi Gulf Coast, for purposes of the Windpool, includes Hancock, Harrison, Jackson, Pearl River, Stone, and George Counties).

[32] Further, from 2006-2011, after Hurricane Katrina, per Department of Insurance data, the Windpool received $179,981,381 in federal block grants and state appropriations in order to stay afloat.

https://msplans.com/mwua/reinsurance-and-exposure. Significantly, the Windpool incurred this exposure even though Windpool coverage does not allow for punitive damages, *see* Miss. Code Ann. § 83-34-23, which begs the policy question: why liberalize the punitive standard in Section 11-1-65(1)(a) for privately placed homeowners' coverage when the same coverage via a Windpool policy does not allow punitive damages? The answer to this question, regardless of what the answer may be, is for the Legislature to decide, not the courts.

Beyond this, homeowners can access the National Flood Insurance Program ("NFIP") pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4129, which was passed "in order to make flood insurance available on reasonable terms and conditions to those in need of such protection." *Battle v. Seibels Bruce Ins. Co.,* 288 F.3d 596, 598-600 (4th Cir. 2002) (discussing the history and organization of the NFIP). In addition, consumers can purchase flood insurance from private companies if they feel like they need flood insurance in excess of that provided by NFIP. Louis Masi, *The National Flood Insurance Program: Why Government-Backed Flood Insurance Is Drowning in Debt*, 33 VILL. ENVTL. L.J. 63, 77 (2022). As with the Windpool, punitive damages are not allowed in the NFIP. *See Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F. Supp. 2d 606 (S.D. Miss. 2001); *Eddins v. Omega Ins. Co.*, 825 F. Supp. 752, 753 (N.D. Miss. 1993) ("There is no authorization within the [federal] statutes or the regulations of the National Flood Insurance Act which allow the recovery of punitive damages."). Thus, both the Mississippi Legislature and Congress have recognized that punitive damages may adversely affect the market.

Given this mosaic (private homeowner policies, the Windpool, and flood insurance), any modification of the laws governing remedies available to consumers with regard to homeowners' insurance policies must not be taken in isolation. A seemingly isolated change in the law governing insurance claims in the homeowners' insurance context will likely have ripple effects and likely may result in unintended consequences on other aspects of the homeowners' insurance mosaic,

especially on the Gulf Coast where the Windpool is applicable. Again, this points out the necessity of honoring and implementing the clear and unambiguous "safety of others" language in Section 11-1-65(1)(a). To the extent the standard for punitive damages should be changed or modified, only the Legislature can undertake such change with a view of the entire homeowners' insurance mosaic. *City of Starkville*, 819 So.2d at 1221.

CONCLUSION

For the reasons set forth above, the Commissioner strongly urges the Court to grant USAA's Motion for Rehearing.

Respectfully submitted, January 23, 2025.

COMMISSIONER MIKE CHANEY
DEPARTMENT OF INSURANCE

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CERTIFICATE OF SERVICE

I, the undersigned attorney of record, do hereby certify that on January 23, 2025, I caused the foregoing brief to be filed with the Clerk of the Court using the MEC system, which will deliver copies to all counsel of record and that I have this day caused a true and correct copy of the foregoing to be delivered to the following by United States Mail, first-class postage prepaid:

The Honorable Forrest A. Johnson, Jr.
Retired Circuit Court Judge
211 S. Commerce Street
Natchez, Mississippi 39120

COMMISSIONER MIKE CHANEY
DEPARTMENT OF INSURANCE

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E-Filed Document Jan 23 2025 16:12:09 2023-CA-00049-SCT Pages: 4

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

UNITED SERVICES AUTOMOBILE ASSOCIATION **APPELLANT**

v. **CASE NO. 2023-CA-00049**

ESTATE OF SYLVIA F. MINOR,
By and through Co-Executors
KATHRYN MINOR and
STEPHEN MINOR **APPELLEE/CROSS-APPELLANT**

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* BY THE MISSISSIPPI COMMISSIONER OF INSURANCE, MIKE CHANEY

Pursuant to Miss. R. App. P. 29(b), Mississippi Commissioner of Insurance Mike Chaney (the "Commissioner") respectfully submits this Memorandum Brief in Support of the Commissioner's Motion for Leave to File Brief of *Amicus Curiae*.

The Commissioner's amicus brief meets the requirements of Miss. R. App. P. 29(a), which states:

> (1) A motion for leave shall demonstrate that amicus has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court's attention; or (4) the amicus has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.

Both (3) and (4) are present here.

Commissioner Chaney is the statewide elected official who is the "chief officer" of the Mississippi Department of Insurance, which is charged with "the execution of all laws (except as otherwise specifically provided by statute) now in force, or which may hereafter be enacted, relative to all insurance and all insurance companies … ." Miss. Code Ann. §§ 83-1-1 and 83-1-

3. A major portion of USAA's Motion for Rehearing focuses on whether this Court erred in its interpretation of the standard for punitive damages set forth in Mississippi punitive damages statute, Miss. Code Ann. § 11-1-65(1)(a), and more specifically, on the issue of the correct interpretation and application of the statutory phrase "disregard for the safety of others." The Commissioner's proposed *amicus* addresses this issue.

Decisions as to the legal standards applicable to insurance companies in handling claims directly impact insurance loss and expense, which the Commissioner is, by law, obligated to consider in his approval or disapproval of rates. *See* Miss. Code Ann. § 82-2-3(2)(a) ("Due consideration shall be given to past and prospective loss and expense … ." This necessarily includes the availability (or lack thereof) of punitive damages under Miss. Code Ann. 11-1-65(1)(a) in claims by homeowners or other insureds.

Miss. Code Ann. § 11-1-65(1)(a) unambiguously states that punitive damages are only allowed if the insurance company "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard <u>for the safety of others</u>, or committed actual fraud." (Emphasis added.) Even so, the Mississippi Supreme Court in this case applied a defunct common law standard ("disregard for the <u>rights</u> of others") instead of the operative Section 11-1-65(1)(a) statutory standard ("disregard for the <u>safety</u> of others") when deciding whether to permit punitive damages in this insurance contract case. This ruling, in departing from the clear and unambiguous text of the punitive damages statute, will likely have adverse consequences on the rates Mississippians pay for insurance, ignores the Legislature's unique role in balancing the interests of various affected interested persons, and ignores the complex mosaic of homeowners' insurance (private, Windpool, and flood insurance). Since one of the Commissioner's major responsibilities is protecting consumers by maintaining a competitive marketplace with as many insurance

companies as possible for the sale of insurance products and services to ensure insurance products are available and affordable to Mississippi citizens in the context of this mosaic, the Commissioner has "substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case." Miss. R. App. P. 29(a)(4). Further, given the Commissioner's unique position as the state regulator of insurance in Mississippi, there "are matters of fact and law that may otherwise escape the court's attention." *Id.* at (a)(3).

The Commissioner's proposed *amicus* brief (Exhibit A to the Commissioner's motion) demonstrates the foregoing in detail.

For these reasons and the reasons shown in the Commissioner's proposed *amicus* brief, the Commissioner respectfully moves for leave to file his *amicus* brief.

Respectfully submitted, February 13, 2025.

COMMISSIONER OF INSURANCE MIKE CHANEY

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