IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

W.R.BERKLEY CORPORATION,
UNION STANDARD INSURANCE COMPANY,
UNION STANDARD INSURANCE GROUP, AND
GREAT RIVER INSURANCE COMPANY **APPELLANTS/CROSS-APPELLEES**

V. **NO.2009-CA-01223**

REA'S COUNTRY LANE CONSTRUCTION, INC. **APPELLEE/CROSS-APPELLANT**

COA1

BRIEF OF APPELLANTS/CROSS-APPELLEES

ORAL ARGUMENT REQUESTED

Robert P. Thompson, MSB [redacted]
Caryn Milner, MSB No[redacted]
Copeland, Cook, Taylor & Bush, P.A.
1076 Highland Colony Parkway, Suite 100
P.O. Box 6020
Ridgeland, Mississippi 39158
Telephone (601) 856-7200
Facsimile (601) 856-7626

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

W.R.BERKLEY CORPORATION,
UNION STANDARD INSURANCE COMPANY,
UNION STANDARD INSURANCE GROUP, AND
GREAT RIVER INSURANCE COMPANY **APPELLANTS/CROSS APPELLEES**

V. **NO.2009-CA-01223**

REA'S COUNTRY LANE CONSTRUCTION, INC. **APPELLEE/CROSS-APPELLANT**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

COUNSEL FOR APPELLEE

Hon. Clyde Gunn
Hon. Christopher Van Cleave
Corban & Gunn
Post Office Drawer 1916
Biloxi, MS 39533-1916

APPELLEE

Rea's Country Lane Construction, Inc.
(Owner, Wayne Rea)

COUNSEL FOR APPELLANTS

Hon. Robert P. Thompson
Hon. Caryn Anlage Milner
Post Office Box 6020
Ridgeland, Mississippi 39158

Hon. Thomas T. Buchanan
Tucker Buchanan, P.A.
Post Office Box 4326
Laurel, Mississippi 39441-4326

APPELLANTS

W.R.Berkley Corporation
Union Standard Insurance Company
Union Standard Insurance Group
Great River Insurance Company

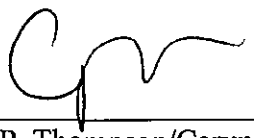
TRIAL JUDGE

Hon. Larry Buffington
Chancery Court Judge

SPECIAL JUDGE (Appointed by Order of this Court dated January 27, 2011)

Hon. Edward C. Prisock

This the 9th day of April, 2012.



Robert P. Thompson/Caryn Anlage Milner
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF CASES, STATUES AND OTHER AUTHORITIES CITED

FEDERAL CASES **PAGE(S)**

STATE CASES

Mississippi

Other Jurisdictions

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

W.R.BERKLEY CORPORATION,
UNION STANDARD INSURANCE COMPANY,
UNION STANDARD INSURANCE GROUP, AND
GREAT RIVER INSURANCE COMPANY **APPELLANTS/CROSS-APPELLEES**

V. **NO.2009-CA-01223**

REA'S COUNTRY LANE CONSTRUCTION, INC. **APPELLEE/CROSS-APPELLANT**

BRIEF OF APPELLANTS/CROSS-APPELLEES

PARTIES

Appellant is Great River Insurance Company (hereinafter "Great River") which, at times relevant hereto, issued a policy of insurance to Rea's County Lane Construction (hereinafter "Rea's").

Appellee is Rea's County Lane Construction, Inc. (hereafter "Rea's) which, at times relevant hereto, was an insured under a policy of insurance issued by Great River.

Appellants, W.R. Berkley Corporation, "Union Standard Insurance Group" and Union Standard Insurance Company, are entities with no relation to Rea's claim. In the underlying lawsuit, Rea's alleged that these entities are the "alter egos" of Great River Insurance Company. The lower court made no finding as to this allegation. "Union Standard Insurance Group" is not a legal entity.

STATEMENT OF THE ISSUES

1. The Trial Court Erred in Denying Great River Insurance Company's Motion for Summary Judgment on Coverage and Bad Faith;

2. The Trial Court Erred in Denying Appellants' Request for a Directed Verdict/Involuntary Dismissal; and,

3. The Trial Court Erred in Awarding Rea's a Final Judgment on its Claims Against Appellants.

ORAL ARGUMENT IS REQUESTED

Appellants request oral argument pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure. The appeal record is voluminous as the underlying lawsuit approaches its ten year anniversary. Oral argument will assist the Court with the facts relevant to this appeal. Of significance, the "dispute" between the parties concerns the law, not the facts. Rea's contends there is a "split of authorities" regarding the "occurrence" provision. There is not. Oral argument will facilitate a thorough discussion of the law applicable to the "occurrence" provision.

STATEMENT OF THE CASE

A. Nature of the Case

This is an insurance coverage dispute. In the underlying case, Margaret Broom ("Broom") sued Rea's County Lane Construction, Inc. ("Rea's")(and other defendants), for their alleged "wrongful" and "willful" breach of contract and "grossly careless, indifferent and reckless" actions. Broom asserted causes of action including conversion, intentional misrepresentation and fraud, fraud, gross negligence, negligence and other causes of action, arising from the underlying defendants' "reckless" and "wrongful" conduct.

Following Broom's suit, Rea's sought coverage for Broom's claims under Rea's insurance policy issued by Great River Insurance Company ("Great River"). Great River denied coverage for the claim due to, *inter alia*, a lack of an "occurrence," lack of "property damage" and certain policy exclusions.

B. Course of Proceedings

On January 26, 2001, Margaret Broom sued several defendants, including Rea's, alleging a wilful breach of contract. [R.E.1, R.35].

On October 3, 2002, Rea's filed a Third Party Complaint against Great River Insurance Company, W.R.Berkley Corporation, "Union Standard Insurance Group" and Union Standard Insurance Company, alleging that Great River's insurance policy issued to Rea's provided coverage for Broom's lawsuit, and that Great River's denial of benefits to Rea's was in "bad faith." [R.E.2, R.1432].[1] The underlying Defendants timely filed their Answers and Defenses. [R.1453, 1465, 1474]. Great River likewise filed a Counterclaim for Declaratory Relief. [R.1453]. The parties

[1] Rea's sued W.R.Berkley Corporation, Union Standard Insurance Group and Union Standard Insurance Company, alleging that these "entities" should also be held liable because they are the "alter egos" of Great River.

conducted both oral and written discovery.

On July 13, 2004, Great River filed its Motion for Summary Judgment on Coverage and Third Party Plaintiff's Claim for Bad Faith, seeking summary judgment, as a matter of law, on all of Rea's claims because Great River's policy did not provide coverage for the claims asserted against Rea's in the underlying lawsuit. [R.2250]. Rea's responded, arguing there was a split of authorities concerning the interpretation and application of the "occurrence" provision. [R.2520]. Rea's argument in opposition to the summary judgment was based on a disagreement in the law. *Id.* It was not based on the presence of any disputed fact(s). *Id.*

On September 29, 2004, the court held a hearing on Great River's Motion for Summary Judgment. Shortly after the hearing began, the Court halted any further argument, finding that the law firm of Upshaw Williams, Biggers, Beckham and Riddick, LLP[2] was a necessary party pursuant to Rule 19 of the Mississippi Rules of Civil Procedure. On October 11, 2004, the Court issued an Order to that effect. [R.3956]. On February 4, 2005, the court dismissed the law firm without prejudice because no parties asserted any claim against it. [R.3993].

On December 10, 2004, Great River supplemented its Motion for Summary Judgment with additional evidence. [R.3980].

On April 4, 2005, the court held a hearing on Great River's Motion for Summary Judgment on Coverage and Plaintiff's Claim for Bad Faith. [R.E.3, *Hearing Transcript*]. At the conclusion of the hearing, the Court denied the Motion. *Id.*

On April 8, 2005, the Court entered an Order, bifurcating the trial between (1) Rea's claim that coverage was afforded by Great River's policy; and, (2) Rea's claim that the denial of coverage was made in bad faith. [R.E.4, R.3997].

---

[2] Steven Cookston, Esq. with that law firm prepared the coverage opinion(s).

On April 18, 2005, the Court entered an Order, denying Great River's Motion for Summary Judgment. [R.E.5, 4001-2]. Great River filed for an Interlocutory Appeal to this Court, which was denied. [R.4333].

On May 11, 2005, the court held a bench trial. [R.E. 6, *Trial Transcript*]. At the conclusion of the trial the court found in favor of Rea's on its claim for coverage. *Id.* Thereafter, the court issued four (4) consecutive judgments. The Judgments are dated July 7, 2005 [R.E.7, R.4029], August 18, 2006 [R.E.8, R.4068], September 8, 2008 [R.E.9, R.4122] and June 17, 2009 [R.E.10, R.4188].

On July 7, 2005, the court issued its "Final Judgment," finding that "the original complaint alleged damages that occurred as a result of an 'occurrence" pursuant to the policy." [R.E.7, 4029-32]. The court advised that it would "further conduct a hearing as to punitive damages, if any, or attorney fees that will be assessed." *Id.*

On July 14, 2005, Rea's filed a Motion to Amend the Final Judgment, seeking an amendment that the Judgment should be for "$134, 844.47" plus pre- and post-judgment interest. [R.4033]. Great River timely responded to this Motion. [R.4038].

In December of 2005 and January of 2006, the parties submitted their briefs on the issue of punitive damages.[3] [R.4051, Volume 31 at R.3-13 and R.4064].

On August 18, 2006, the court issued a second "Final Judgment." [R.E.8, R.4068]. Here, the court found that punitive damages should not be awarded, but found that Rea's was entitled to the attorney fees incurred in filing its bad faith lawsuit. *Id.* In awarding those fees, the court held:

> This Court finds that in this case punitive damages should not be awarded, however, this Court does find that Rea's County Lane had to take steps to protect themselves,

[3] The parties agreed to conduct this phase by brief. Great River's brief was supplemented to the appeal record, and is located in Volume 31, at R. 3 -13.

> as well as to protect the interest of the insurance company. That after taking those steps it had to further take steps to recovery that that (sic) this Court has subsequently found was and should have been paid by the insurance company.

[R.E.8, R.4070]. The court advised it would take subsequent testimony either live or by affidavit concerning the attorney fees and expenses incurred. *Id.*

Rea's filed another Motion to Amend the Final Judgment. [R.4072]. Rea's requested the court to rule on its prior Motion to Amend and also requested that the lower court reconsider its ruling on punitive damages. *Id.* Great River timely responded to the Motion. [R.4083].

In the meantime, Rea's submitted an Affidavit regarding attorney fees and expenses, and Great River timely responded. [R.4111-4121].

On September 8, 2008, the lower Court issued its "Judgment," finding that Rea's was entitled to the attorney fees incurred in pursing its bad faith lawsuit in the amount of 40% of the damages awarded and $10,000 in expenses. [R.E.9, R.4122].

On September 18, 2008, Rea's filed its Motion to Amend, seeking a declaration by the lower court as to the amount being awarded, seeking pre- and post- judgment interest and seeking a ruling on its "motion for reconsideration" on the issue of punitive damages. [R.4124]. Great River timely responded. [R.4156]. A final Judgment was issued on June 17, 2009, discussed below.

C. Disposition in the Court Below

In its fourth and final "Judgment" dated June 17, 2009, the lower court awarded Rea's a "total" judgment of $193,684.95[4], as follows:

$63,937.79 "for incurred attorney fees in defending [the underlying case]"[5];

$60,000.00 "as payment to settle [the underlying claim];

---

[4] The correct total of these figures is $183,684.95 (using the incorrect calculation of attorney fees).

[5] The correct total of the attorney bills is $61,511.57.

(f) the right to remove the material expired and all final grading and replanting was to be completed by January 1, 2000;

(g) Kent agreed to indemnify Broom against any and all claims resulting from the work..

Id. at 37.

Kent defaulted on this contract. *Id.* Its bonding company (National Union Fire Insurance Company)("National Union") assumed Kent's obligations under the contract. National Union then hired J.B. Talley and Rea's. *Id.* at 38. The contract between National Union and Rea's is entitled "Completion and Indemnification Agreement." [*Trial Exhibit 13*, pp.326-341]. Rea's then entered into a Subcontract with L&J Construction, entitled "Subcontract." [*Trial Exhibit 13*, pp.342-346]. L&J then entered into two (2) contracts: (1) a "Pit Agreement" with Broom; and, (2) a "Subcontract" with W.C.Pitts. [*Trial Exhibit 13*, p.347 and pp.222-228, respectively].

Broom alleged that the "defendants" caused three (3) pits to be dug on her property which "were not dug in accordance with the specifications contained in the Broom Contract." *Id.* Broom contends "the slopes were not as agreed, the pits were not lined with clay, the topsoil was not stockpiled and placed back afterwards [and] [t]he roads and slopes were not graded and grassed nor was the main road graded and graveled." See *Id.* Further, W.C.Pitts dumped truckloads of waste material onto Broom's property in contravention of her demand not to do so. *Id.* at 47, page 142 of Margaret Broom's deposition.

Broom's lawsuit settled, with Rea's paying $60,000 to Broom. [Trial Exhibit 16].

2. *The Policy*

Great River's policy provides, in relevant part,

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> * * *

> This insurance only applies to bodily injury and property damage only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the coverage territory; and
>
> (2) the "bodily injury" or "property damage" occurs during the policy period.

[R.E.11, R.2361].

Under Definitions, Great River's policy defines "occurrence" as "an accident, including continuing or repeated exposure to substantially the same general harmful conditions." [R.E.11, R.2373]. "Property damage" is defined as "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." [R.E.11, R.2373-2374]. The policy excludes from coverage: "property damage" to "that particular part of real property on which [Rea's] or any contractors or subcontractors working directly or indirectly on [Rea's] behalf are performing operations, if the 'property damage' arises out of those operations." [R.E.11, R.2363-2364]. The policy further excludes "property damage" to "Rea's work" and/or "impaired property." [R.E.11, R.2364].

3. Great River's Receipt of Rea's Claim

Rea's submitted Broom's complaint it to its liability insurance carrier (Great River), requesting a defense and indemnity. [R.2556-7]. Great River reviewed the complaint, policy of insurance and referred for a coverage opinion to outside coverage counsel, Steven Cookston, Esq. (Upshaw, Williams, Biggers, Beckham and Riddick)("Cookston"). [R.2267]. Cookston reviewed the complaint, policy of insurance, accord notice and the law of Mississippi and other jurisdictions and opined that Great River's policy did not provide coverage for the claims asserted against Rea's. [R.E.12]. A denial letter was issued to Rea's. [R.E. 13]..

In the summer of 2002, Andy Kilpatrick, Esq. (Rea's counsel)("Kilpatrick") forwarded

Cookston additional materials to review and/or consider. [R.E, 15, Trial Exhibit 14]. This supplemental information was comprised of:

A. Copy of Kilpatrick June 27, 2002 letter to Jim Armstrong;

B. Transcripts of the depositions of Margaret Broom, Knox Broom and Willard Bishop;

C. April 26, 1999 Completion and Indemnification Agreement Between National Union Fire Insurance Company of Pittsburgh, PA and Rea's Country Lane Construction;

D. May 6, 1999 subcontract entered into between Rea's Country Lane Construction, Inc. and L&J Construction, Inc.;

E. May 18, 1999 Pit Agreement For Existing Pits between Margaret Broom and L&J Construction;

F. March 8, 2001 Answer and Cross Claim of Kent Excavating, Inc.;

G. March 9, 2001 Affirmative Defenses, Answer and Cross-Claim of Rea's Country Lane Construction, Inc.;

H. Itemization of Undisputed Facts Submitted By Rea's Country Lane Construction, Inc. In Support of Its Motion for Summary Judgment;

I. Memorandum Brief in Support of the Motion for Summary Judgment of Rea's Country Lane Construction, Inc.;

J. Plaintiff's Response to Motion of Summary Judgment of Rea's Country Lane Construction, Inc.;

K. Defendant's Response to Plaintiff's Response to Rea's Motion for Summary Judgment; and

L. Plaintiff's Response to Rea's Itemization of Undisputed Facts.

[R.E. 14 and 15].

On September 11, 2002, Cookston rendered his supplemental coverage opinion. [R.E.14, R.2281]. Cookston discussed the additional materials reviewed and opined that Great River's policy did not provide coverage for the allegations asserted against Rea's in Broom's lawsuit. *Id.* A denial letter was issued to Rea's. [R.E.15, Trial Exhibit 14]. The summary judgment argument and

discussion at trial was focused on the first coverage opinion. Similarly, the lower court's judgment finding there was an "occurrence" was based on the allegations of the complaint.

4. Rea's Bad Faith Lawsuit

On October 3, 2002, Rea's filed a Third Party Complaint against Great River, Union Standard Insurance Company, Union Standard Insurance Group and W.R. Berkley and John and Jane Doe Defendants A, B, C, D, and E, alleging a wrongful denial of insurance benefits. As to Union Standard Insurance Company, "Union Standard Insurance Group" and W.R. Berkley Corporation, Rea's alleged that these "entities" were the alter egos of Great River.

SUMMARY OF THE ARGUMENT

Great River's policy does not provide coverage for the claims asserted against Rea's. First, there was no "occurrence," defined as an "accident." Broom alleged intentional conduct in her Complaint. The conduct amounted to a breach of contract. Pursuant to *Womack* and its progeny (*Moulton, Omnibank* and *Architex*), such intentional conduct does not constitute an "occurrence" under the policy. *See, Womack v. Employers Mutual Liberty Company*, 101 So.2d 107 (Miss. 1958); *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 510 (Miss. 1985); *United States Fid. & Guar. Co. v. OmniBank*, 812 So. 2d 196, 200 (Miss. 2002); and *Architex Ass'n v. Scottsdale Ins. Co.*, 27 So. 3d 1148 (Miss. 2010).

Second, there was no "property damage." There was no physical injury to tangible property or loss of use of tangible property.

Third, even assuming Broom alleged "property damage" caused by an "occurrence," the policy excludes from coverage "property damage" to real property on which Rea's was working (and/or any subcontractors or contractors were working directly or indirectly on Rea's behalf).

Fourth, again assuming Broom alleged "property damage" caused by an "occurrence," the policy does not provide coverage for "property damage" to "impaired property." The "impaired property" exclusion excludes from coverage damage to property arising out of a deficiency or inadequacy in Rea's work and/or a delay or failure by Rea's (or anyone acting on its behalf) to perform a contract or agreement in accordance with its terms. Further, the policy excludes from coverage damages expected or intended by the insured, and damages arising from contractual liability.

Great River filed its Motion for Summary Judgment asserting the foregoing. Rea's responded, arguing only the law. Specifically, Rea's argued for a different (legal) interpretation of

the "occurrence" provision. Rea's presented no facts, argument or evidence to indicate any "accidental" conduct, much less a genuine issue of disputed fact. Ultimately, the parties disagreed on the law, not the facts. The lower court was wrong in denying Great River's motion for summary judgment.

At trial, Great River presented additional evidence supporting its argument, including the expert testimony of Sam Thomas, Esq. At the close of the evidence Great River moved for a directed verdict, which was denied. The lower court erred in denying Great River's request for a directed verdict (which was, in effect, a motion for involuntary dismissal pursuant to Rule 41(b), Mississippi Rules of Civil Procedure).

Following the bench trial, the lower court (ultimately) awarded Rea's a judgment in the amount of $193,684.95. The lower court was wrong in finding there was coverage under Great River's policy. Furthermore, the lower court was wrong in awarding Rea's its attorney fees for pursuing its bad faith lawsuit. There was no factual or legal basis for such an award. Finally, the lower court erred in including Union Standard Insurance Company, "Union Standard Insurance Group" and W.R. Berkley Corporation on the Final Judgment, as there is no evidence of any liability of each and/or any of these Appellants.

ARGUMENT

I. THE LOWER COURT ERRED IN DENYING GREAT RIVER INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

In *Hooker v. Greer*, 2012 Miss. LEXIS 117, 11-12 (Miss. 2012), the Court explained:

> [t]his Court reviews a trial court's grant or denial of summary judgment *de novo*. This Court also reviews grants or denials of partial summary judgment de novo. Summary judgment shall be rendered when "the pleadings, depositions, answers to interrogatories and admissions on file . . . 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." The moving party bears the burden of showing that no genuine issue of material fact exists, whereas the nonmoving party is given the benefit of the doubt as to the existence of a material fact. When considering a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party.

Id. (citing *Waggoner v. Williamson*, 8 So.3d 147 (Miss. 2009)).

B. There Is No Genuine Issue of Material Fact

There was no genuine issue of material fact to preclude summary judgment. The facts demonstrate that the alleged conduct was intentional and amounted to a breach of contract. [R.E. 1, R.35]. In opposition to Great River's Motion for Summary Judgment, Rea's never presented an issue of fact as to coverage.[6] Rather, the summary judgment "dispute" concerned the law, not the facts. Lacking any disputed fact, the court erred in denying Great River's Motion for Summary Judgment.

C. There Was No Duty to Defend And/or Indemnify

A duty to defend is determined by looking at the facts alleged in the complaint, together with the policy. *See Auto. Ins. Co. v. Lipscomb*, 75 So. 3d 557, 559 (Miss. 2011). An insurance company's duty to defend is not triggered until it has knowledge that a complaint has been filed that contains

---

[6] Rea's did, however, suggest that an issue of fact existed as to "bad faith."

allegations of conduct covered by the policy. *Id.* These allegations, and particularly the conduct alleged in the complaint, determine whether an insurer is required to defend an action. *Id.* No such duty arises when the alleged conduct falls outside the policy's coverage. *Id.* The allegations of Broom's Complaint do not fall within the terms of Great River's policy and/or are excluded from coverage. Great River had no duty to defend and/or indemnify Rea's regarding the claims asserted against it in Broom's lawsuit.

Under the Insuring Agreement of Coverage A[7] of Great River's policy, it provides, in relevant part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

[R.E.11, R.2361].

The policy further states:

> This insurance only applies to bodily injury and property damage only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the coverage territory; and
>
> (2) the "bodily injury" or "property damage" occurs during the policy period.

Id.

Therefore, Great River's policy will provide coverage for (1) "bodily injury"[8] and/or "property damage" that occurs during the policy period; (2) caused by an "occurrence." Also, (3) there must be no applicable exclusions. The claims asserted against Rea's do not constitute an "occurrence" nor do they give rise to "property damage" as those terms are defined in the policy.

---

[7] The policy also contains a Coverage B for Personal and Advertising Injury. However, there is no dispute that Coverage B does not provide coverage for the claims asserted against Rea's in the Broom litigation.

[8] There is no dispute that there is no claim for "bodily injury."

Further, were one to assume that the allegations could be interpreted as alleging "property damage" caused by an "occurrence," there are exclusions that would exclude coverage for Rea's claims. Discussing each in turn:

1. There Was No "Property Damage"

"Property damage" is defined under Great River's policy as "physical injury to tangible property, including all resulting loss of use of that property" and "loss of use of tangible property that is not physically injured." *Id.* at 13-14. Broom does not allege any physical injury to tangible property or loss of use thereof. Instead, Broom seeks to recover repair costs pursuant to the underlying defendant's alleged breach of contract, i.e. economic damages. "Economic damages," such as those requested by Broom, do not constitute "property damage." See, e.g. *Shelter Mutual Ins. Co. v. Brown, 345 F.Supp.2d 645,649 (S.D.Miss. 2004); Audubon Ins. Co. v. Stefancik, 98 F.Supp. 2d 751,756 (S.D.Miss.1999); State Farm Fire & Cas. Co. v. Brewer*, 914 F. Supp. 140, 142 (S.D. Miss. 1996); *Siciliano v. Hudson*, 1996 W.L. 407562 (N.D. Miss. 1996); *Snugg Harbor Ltd. v. Zurich Ins.*, 968 F.2d 530 (5th Cir. 1992); *Rogers v. Allstate*, 938 So.2d 871,876 (Miss. App. 2006). As Broom is merely seeking the costs to correct the underlying defendants' work, the allegations of the Complaint do not allege "property damage" as defined in the policy.

Furthermore, although not fully explored by this State, several other jurisdictions have recognized that allegations of damage to an insured's work itself do not constitute "property damage" under commercial general liability policies. *See, e.g., Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 266 F.3d 859 (8th Cir. 2001) (Under Missouri law, costs of repairing defective steel pipe welds were not covered as "property damage" under comprehensive general liability (CGL) policy, where pipes did not burst or collapse or otherwise cause injury to surrounding property as result of the defects, so that insured's assignee of insured's rights against insurer could not recover under CGL

policy for those costs of repair); *U.S. Fire Ins. Co. v. Milton Co.*, 35 F.Supp.2d 83 (D.D.C. 1998)(Under Maryland law, the cost to replace substandard materials and repair inferior workmanship is not "property damage" within the meaning of comprehensive general liability (CGL) insurance policies); *New Hampshire Ins. Co. v. Vieira*, 930 F.2d 696 (9th Cir.1991)(Under California law, damage caused by cutting holes in roofs of housing projects to install drywall, after subcontractor failed to perform such work, was not "property damage" covered under subcontractor's policy; diminution in value of projects caused by subcontractor's deficient work was not property damage, and cost of repair, which was not separate harm, could not be converted into covered damage); *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 578 P.2d 1253 (Ore. 1978). The allegations asserted against Rea's concern the work itself and do not involve claims of damage to other property.

In sum, there is no "property damage" and thus no coverage under Great River's policy.

2. There Was No "Occurrence"

Broom's claim is one for breach of contract and reckless defective workmanship. In *Architex*, this Court explained:

> Faulty workmanship, defective work, *et al.*, may be accidental, intentional, or neither. A return to basics leads this Court to conclude that the underlying facts will determine whether the complaint of "property damage" (defective or faulty workmanship) was proximately caused by breach of a recognizable duty and whether that breach was accidental or intentional; or, whether the "property damage" was caused by neither. In two of the three aforementioned scenarios, no coverage would exist. Only when "property damage" is proximately caused by an accident (an inadvertent act) does an "occurrence," as defined by the policy, trigger coverage.

Id. at 1161.

The "facts" alleged in the complaint state that the contract provisions were not satisfied as agreed, and that "topsoil was wrongfully taken from the property and no compensation was given to Mrs. Broom for said topsoil." Broom further alleged that Rea's sub-subcontractor (W.C.Pitts)

"continued to dump approximately 60 more truckloads of waste material (i.e., red clay) on Mrs. Broom's property in her absence in direct contravention of her demand not to do so." Broom described the defendants' actions as "wrongful," "willful," "grossly careless," "indifferent," "reckless," "grossly negligent," "intentional" and "negligent." These are allegations of intentional conduct. The mere inclusion of the legal term "negligent" does not alter the actual facts alleged, which are the focus of determining the duty to defend. *See Lipscomb,* 75 So. 3d at 559.

The additional materials reviewed by Cookston further support this finding. For example, on page 239 of her deposition, Broom describes how she was "threatened" by Rea's subcontractor (L&J) to sign a contract or else she would "be liable for construction delay costs." [R.3503].

Further, Broom alleged that Rea's and its subcontractors breached the terms of the subject contract. Although not addressed in Mississippi, other jurisdictions have consistently held that claims for breach of contract and the direct consequences thereof do not constitute an "occurrence."[9] See *Hopewell Enterprises, Inc. v. Trustmark Nat. Bank*, 680 So.2d 812, 817 (Miss. 1996)(Where

[9] See, e.g. *Mid-Hudson Castle, Ltd. v. P.J. Exteriors, Inc.*, 738 N.Y.S2d 96 (N.Y. 2nd App. Div. 2002)(Roofing contractor's commercial general liability policy did not afford coverage for breach of contract and negligence claims based on allegedly faulty roofing job; claims did not arise out of covered "accident"); *Twin City Fire Ins. Co. v. Colonial Life & Acc. Ins. Co.,* 124 F. Supp.2d 1243 (M.D. Ala. 2000)(Under South Carolina law, breach of contract does not qualify as an "occurrence" for liability insurance purposes); *Hawkeye-Security Ins. Co. v. Davis*, 6 S.W.3d 419 (Mo. App. 1999)(Homebuilder's breach of contract and warranties in connection with construction was not an accident and thus not an occurrence within the meaning of builders commercial general liability insurance policy; the builder had sufficient control and management to enable him to fulfill his contractual obligations and build the house as warranted); *Jerry Davis, Inc. v. Maryland Ins. Co.*, 387 F.Supp. 2d 387 (E.D. Pa. 1999)(customer's breach of contract claim concerning an electrician's faulty wiring work at a nightclub the customer was building did not allege an "occurrence" covered under the electrician's commercial general liability policy especially considering that the policy also contained an "impaired property" exclusion); *U.S. Fire Ins. Co. v. Milton Co.*, 35 F. Supp.2d 83 (D.D.C. 1998)(breach of contract is not an "accident."); *Gibson & Associates, Inc. v. Home Ins. Co.*, 996 F. Supp. 468 (N.D. Tex. 1997)(Under Texas law, insured's alleged breach of contract with city was not "occurrence" within meaning of its commercial general liability insurance policy); *Hartford Cas. Co. v. Cruse*, 938 F.2d 601 (5th Cir. 1991)(As opposed to consequential damages, direct damages that naturally follow from breach of contract are conclusively presumed to have been in contemplation of parties and may therefore constitute expected or intended damages rather than covered "occurrence" under comprehensive general liability policy; such policy does not cover such direct damages, which are cost of doing business.)

there is a lack of case law in Mississippi regarding the issue involved, the Mississippi Supreme Court "is compelled to examine case law from other jurisdictions which are on point and thus persuasive.") In fact, Rea's counsel in the underlying litigation advised that Rea's was not paying the $60,000 in "property damage." Rather, he contends, he was paying solely due to a contract claim. [R.E.16, R.3985-3992].

In sum, the alleged underlying conduct was intentional and willful, and amounted to a breach of contract. Applying *Architex* and its precedent, there was no "occurrence." Lacking an "occurrence," Great River's policy does not provide coverage for the claims asserted against Rea's in the Broom litigation. The lower court erred in denying Great River's summary judgment.

3. Even Assuming There Was "Property Damage" Caused by an "Occurrence," Coverage Is Excluded Under the Work Product Exclusions

A commercial general liability policy contains exclusions for an insured's defective work product. The general purpose for these [and related] business exclusions has been stated as follows:

> [c]overage under a commercial general liability insurance policy is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or work is not that for which the damaged person bargained. Pursuant to this understanding, certain exclusions have been included within the standard commercial general liability policy for the express purpose of excluding coverage for risks relating to the repair or replacement of the insured's faulty work or products, or defects in the insured's work or product itself. These "business risk" exclusions, as they are commonly called, are intended to provide coverage for tort liability, not for the contractual liability of the insured for loss which takes place due to the fact that the product or completed work was not that for which the other party had bargained.

Zurich Am. Ins. Co. v. Nokia, 268 S.W.3d 487, 500 (Tex. 2008)(citing 9A COUCH ON INSURANCE § 129:16). The *Nokia* court also referenced *T.C. Bateson Constr. Co. v. Lumbermens Mut. Cas. Co.*, 784 S.W.2d 692, 694-95 (Tex. App.--Houston [14th Dist.] 1989, writ denied) [35] ("The purpose of comprehensive liability insurance coverage is to provide protection to the insured for personal injury or for property damage caused by the completed product but not for the replacement and repair of that product."), *La Marche v. Shelby Mut. Ins.* Co., 390 So.2d 325, 326 (Fla. 1980) (noting that "[t]he majority view holds that the purpose of this comprehensive liability

insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product"); *W. Cas. & Sur. Co. v. Brochu,* 105 Ill. 2d 486, 475 N.E.2d 872, 878, 86 Ill. Dec. 493 (Ill. 1985) (noting that "'the policy in question does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident'") (quoting *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 796 (N.J. 1979)). See also *Meng v. Bituminous Casualty Corporation*, 626 F. Supp.1237 (S.D. Miss. 1986).

In its briefing, Great River presented the court with its argument on at least two (2) exclusions. The lower court did not address or discuss the policy's exclusions. Thus, it is not clear as to why the court (presumably) found they did not apply.

a. "Damage to Property" Exclusion Applies

Assuming "property damage" caused by an "occurrence," coverage is excluded under the "damage to property" exclusion.

This exclusion provides, in relevant part:

> This insurance does not apply to:
>
> * * *
>
> "Property Damage" to:
>
> * * *
>
> (5) That particular part of real property on which you on any of your contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations;
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> * * *
>
> Paragraphs (3),(4),(5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.[10]
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products completed operations hazard."

[R.E.11, R.2363-2364].

[10] There is no evidence of any "sidetrack agreement."

This exclusion is intended to exclude coverage for situations where the insured (or its subcontractors) caused damage to the property on which they are working, while they are working. Assuming *arguendo* there was "property damage" caused by an "occurrence," the above "damage to property" exclusion would exclude from coverage such "property damage."

Exclusion (j)(5) applies. Broom seeks recovery for damage to "that particular part of [Broom's] real property on which [Rea's] or any of [Rea's] contractors or subcontractors working directly or indirectly on [Rea's] behalf are performing operations." And further, assuming there was "property damage," it "arose out of [the above] operations." The clear and unambiguous language of this exclusion precludes coverage for the claims asserted against Rea's. This exclusion applies regardless of whether Rea's actually performed the work themselves or contracted the work out to third parties. Thus, even assuming there was "property damage" caused by an "occurrence," the policy's exclusion for "damage to property" would exclude from coverage the claims asserted against Rea's in the underlying action.

Exclusion (j)(6) likewise applies. Assuming "property damage" caused by an "occurrence," the policy excludes coverage for "property damage" to any property that must be restored because Rea's (or its subcontractors') work was incorrectly performed on it. There is an exception to this exclusion for damage that occurs after the work is completed, i.e., "products completed operations hazard." The policy states that exclusion (j)(6) does not apply to damages included within the "products completed operations hazard." "Products completed operations hazard" is defined as "all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except:

(1) Products that are still in your physical possession;
(2) Work that has not yet been completed or abandoned. However, 'your work' will be deemed completed at the earliest of the following times:
    (a) When all of the work called for in your contract has been completed;

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site;
(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

(R.E.11, R.2373).

The policy further states that, "[w]ork that may need service, maintenance, correction, repair or replacement, but which is otherwise complete will be treated as completed." *Id.* Broom alleged that the work was not completed as agreed. Broom did not allege "property damage." However, even were one to assume she alleged "property damage,"such damage would not fall within the "products completed operations hazard." Thus, Exclusion (j)(6) would apply to exclude coverage for such damages.

So, assuming there was "property damage" caused by an "occurrence," exclusion (j)(5) and (j)(6) act to preclude coverage for such damages.

b. "Property damage" to "impaired property"

Exclusion (m) in Great River's policy has been found to be valid by federal courts in Mississippi and by the Fifth Circuit Court of Appeals. *See Harrison v. Ohio Casualty Ins. Co.*, 199 F.Supp.2d 518, 524 (S.D. Miss. 2000); *Federated Mutual Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720, 727 (5th Cir. 2000). Mississippi's appellate courts have not yet had the opportunity to address and/or interpret the exclusion. The "impaired property" exclusion excludes from coverage:

c. "Property damage" to "impaired property" or property that had not been physically injured, arising out of:
(1) a defect, deficiency, inadequacy or dangerous condition in your product or your work or
(2) a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

Under "Definitions," the policy defines "impaired property" as:

tangible property, other than your product or your work that cannot be used or is less useful because:

a. it incorporates your product or your work that is known or thought to be defective, deficient or dangerous; or

b. You have failed to fulfill the te rms of a contract or agreement, if such property can be restored to use by:

1. The repair, replacement, adjustment, or removal or your product or your work or

2. Your fulfilling the terms and conditions of the contract or agreement.

[R.E.11, R.2364].

This exclusion is intended to exclude coverage for loss to tangible property, when it incorporates an insured's work and/or product. In its opposition to Great River's Motion for Summary Judgment, Rea's suggested that Broom was unable to use portions of her property due to the work of Rea's subcontractors. Even assuming such suggestion to be correct, this exclusion would apply to exclude coverage for such damage and/or loss. Applying the exclusion, both of the definitions of "impaired property," (a) and (b), respectively, are satisfied. First, Broom's property is "tangible property, other than Rea's product or Rea's work, that "cannot be used or is less useful because it incorporates Rea's work that is thought to be defective and/or deficient." And second, Rea's [allegedly] "failed to fulfill the terms of a contract or agreement." Further, Broom's property could be restored to use by "the repair, replacement, adjustment, or removal or [Rea's] work or [Rea's] fulfilling the terms and conditions of the contract or agreement." Thus both definitions are satisfied.

In sum, the "impaired property" at issue applies. Assuming, *arguendo,* there was "property damage" in the case *sub judice* caused by an "occurrence," such "property damage" is specifically excluded from coverage as "property damage" to "impaired property."

II. THE LOWER COURT ERRED IN DENYING GREAT RIVER'S MOTION FOR DIRECTED VERDICT

A. Standard of Review

"In considering a motion for involuntary dismissal under Rule 41(b), the trial court should consider 'the evidence fairly, as distinguished from in the light most favorable to the plaintiff,' and the judge should dismiss the case if it would find for the defendant." *See Ladner v. Stone County,* 938 So. 2d 270 (Miss. Ct. App. 2006)(*Century 21 Deep S. Props., Ltd. v. Corson*, 612 So.2d 359, 369 (Miss. 1992)). "We must apply the substantial evidence/manifest error standard to an appeal of a grant or denial of a motion to dismiss pursuant to M.R.C.P. 41(b)." *Id.* "Where there arguably is evidence that a party might be entitled to a judgment, the court errs in dismissing the case." *Id.* (citing *Aronson v. Univ. of Miss.*, 828 So.2d 752, 756 (P14) (Miss. 2002)). "We defer to findings of fact and review legal conclusions de novo." *Id.* "The interpretation of insurance policy language is a question of law." *Caldwell Freight Lines v. Lumbermens Mut. Cas. Co.,* 947 So. 2d 948 (Miss. 2007)(citing *Lewis v. Allstate Ins. Co.*, 730 So.2d 65, 68 (Miss. 1998)). Thus, the review is *de novo*.

B. There is No Evidence to Support a Judgment in Favor of Rea's

While referred to as a directed verdict, at the close of Rea's case[11], Appellants moved for a dismissal of Rea's case. In *Ainsworth v. Callon Petroleum, Co.*, 521 So.2d 1272 (Miss. 1987) , the Court held that a request for a directed verdict at a bench trial is appropriately referred to as a motion for involuntary dismissal pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure. Appellants[12] made a request for the dismissal of Rea's claims following the close of Rea's case in

---

[11] Sam Thomas, Esq., was called out of turn for convenience purposes.

[12] Further, for the reasons discussed herein below under section III.F., Rea's failed to present any evidence of any liability on the part of Union Standard Insurance Company, Union Standard Insurance Group and/or W.R.Berkley Corporation. For the reasons stated under III.F., the lower court erred in denying Appellants request for a directed verdict as to Union Standard Insurance Company, Union Standard Insurance Group and/or W.R.Berkley Corporation, in addition to the reasons set forth herein above.

chief, which was summarily denied.

For the reasons already discussed, and discussed below, the lower court's denial of Appellants' request for dismissal of Rea's claims was not supported by substantial evidence, resulting in manifest error. Appellants incorporate herein by reference its arguments as set forth within this brief.

III. THE LOWER COURT ERRED IN RENDERING A JUDGMENT IN FAVOR OF REA'S

A. Standard of Review

This appeal concerns the lower court's interpretation and application of the law.[13] "When reviewing a chancellor's interpretation and application of the law, the standard of review is *de novo.*" *Evans v. Evans,* 75 So. 3d 1083 (Miss. Ct. App. 2011). *See also, Tucker v. Prisock*, 791 So. 2d 190 (Miss. 2001)(citing *In re Carney*, 758 So. 2d 1017, 1019 (Miss. 2000)).

B. Rea's Was Not Entitled to a Judgment on Its Claims

For the reasons already discussed, Rea's was not entitled to a judgment on its claims against the four (4) Appellants. Further, in addition to the evidence submitted, Sam Thomas, Esq. testified at trial at length concerning the policy and claims asserted against Rea's. (His testimony was taken out of order to accommodate both Mr. Thomas and the parties).

Further, the policy's "expected or intended" exclusion would apply to exclude coverage for the claims asserted against Rea's. It excludes from coverage "property damage" expected or intended from the standpoint of the insured. [R.E.11, R.2361; *Trial Exhibit* 1]. Broom alleged

---

Appellants incorporate herein by reference its argument set forth in section III.F. as an additional basis for error in the lower court denying Appellants' request for a directed verdict, i.e., involuntary dismissal.

[13] The lower court made one finding of fact, i.e., that there was no contract between Broom and Rea's. However, this "fact" is not a material one nor does it affect Great River's request for relief. None of the parties to the underlying case ever argued that there was a "contract" between Broom and Rea's. Rather, the contracts were between several parties related to work at Broom's property.

intentional and wilful conduct on the part of the underlying defendants, which included Rea's and its subcontractors/sub-subcontractors. At trial, Rea's (through its owner) admitted that trucks which haul dirt will create ruts on property (assuming ruts were present). *See Trial Transcript, p. 161, lines 17-20.* Further, Rea's sub-subcontractor, W.C.Pitts, continued to dump dirt on Broom's property even after Broom demanded that he stop doing do. *See Trial Exhibit 13, p.47, Deposition of Margaret Broom, p. 142.* He also dumped "prairie dirt" instead of the more favorable dirt that he promised. At a minimum, the "property damage" was expected from the standpoint of the insured as the defendants conduct was (in the words of Broom) "willful" and "reckless."

And further, the contractual liability exclusion contained in Trial Exhibit 1 precluded coverage for Rea's claims. It excludes from coverage (in relevant part):

> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or,
>
> (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. . .

[R.E.11, R.2361; *Trial Exhibit* 1].

According to the notation on Rea's settlement check, Rea's paid to settle the potential contract claim, not for any "property damage." *See Trial Exhibit 16.*

In sum, reviewing the record *de novo*, Rea's was not entitled to a judgment on its claims.

C. The Lower Court's Award for Attorneys Fees Was Not Warranted

In his Final Judgment(s), the lower court awarded Rea's attorney fees because "Rea's Country Lane had to take steps to protect themselves, as well as to protect the interest of the insurance company." [R.E.8, R.4070].

In *Veasley*, the Court explained -

> Some justices on this court have suggested that extra-contractural damages ought be awarded in cases involving a failure to pay on an insurance contract without an arguable reason even where the circumstances are not such that punitive damages are proper. Pioneer Life at 932. (Sullivan, J., concurring, joined by D. Lee, Prather and Robertson, JJ.). Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss. Additional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.

Universal Life Ins. Co. v. Veasley, 610 So. 2d 290, 1992 Miss. LEXIS 72 (Miss. 1992)

It has been held that *Veasley* did not "establish a new, pure foreseeability standard for awarding attorney's fees in a breach of contract case." *Veasley* suggests that its application (in the insurance context) is limited to those cases where the failure to pay on an insurance contract is "without an arguable reason." This interpretation is echoed in the 2010 case of *United Servs. Auto Ass'n v. Lisanby*, where the Court explained:

> [e]xtracontractual damages, such as awards for emotional distress and attorneys' fees, are not warranted where the insurer can demonstrate "an arguable, good-faith basis for denial of a claim." *United Amer. Ins. Co. v. Merrill*, 978 So. 2d 613, 627 (citing *State Farm Ins. Co. v. Grimes*, 722 So. 2d 637 (Miss. 1998); *Standard Life Ins. Co. v. Veal*, 354 So. 2d 239 (Miss. 1977)). This Court has said that the "plaintiff bears a heavy burden" of proving that the denial of an insurance claim was in bad faith. *Windmon v. Marshall,* 926 So. 2d 867, 872 (Miss. 2006) (citing *Blue Cross & Blue Shield v. Campbell*, 466 So. 2d 833, 844 (Miss. 1984)).

United Servs. Auto. Ass'n v. Lisanby, 47 So. 3d 1172 (Miss. 2010).

Great River clearly had an arguable basis to deny coverage. Upon receipt of the claim, Great River reviewed the complaint, policy of insurance and loss notice, and referred the claim to competent outside coverage counsel, Steven Cookston. Cookston reviewed the materials, and provided his opinion to Great River on whether its policy provided coverage for, and/or a duty to

defend, the claims asserted against Rea's in Broom's lawsuit. Later, Cookston received and reviewed additional materials from Kilpatrick relative to the underlying litigation. He then prepared his supplemental opinion to Great River concerning whether anything in the additional materials changed his opinion. Rea's was timely advised of both coverage decisions. Cookston's opinions were supported by law and objective independent opinions opining there was no coverage and no duty to defend. The expert witness who testified at trial testified that there was no coverage and no duty to defend. Great River certainly had an arguable basis to deny coverage. In sum, the lower court erred in awarding Rea's attorney fees for pursuing its bad faith lawsuit against Appellants as Great River had an arguable basis to deny Rea's claim.

D. The Lower Court Erred In Awarding Pre- and Post- Judgment Interest Beginning March 6, 2003

In its final Judgment dated June 17, 2009, the lower court awarded Rea's "pre-judgment interest and post-judgment interest of 6 percent per annum beginning March 6, 2003, the date that the underlying cause was settled." The lower court erred in awarding any such interest.

1. Pre-Judgment Interest is Not Supported by Mississippi Law

Prejudgment interest is not allowed because this suit was not brought for liquidated damages. *Tupelo Redevel. Agency v. Abernathy*, 913 So. 2d 278, 286 (Miss. 2005) (prejudgment interest is "available only if the money due was liquidated *and* there was no legitimate dispute that the money was owed"). See also, *Coho Resources, Inc. and Gary Cockrell V. Luther Mccarthy, Administrator of the Estate of Kelvin Dale Mccarthy, Deceased; and Bobby Stroo and Wife, Patti Stroo,* 829 So. 2d 1 (Miss. 2002). Further, there was a legitimate dispute concerning whether Graet River's policy provided coverage for Rea's claim, as discussed herein above. Applying Mississippi law, the lower court abused its discretion in awarding pre-judgment interest to Rea's.

2. Post-Judgment Interest From March 6, 2003 is Not Warranted

The lower court awarded post-judgment interest "beginning March 6, 2003." If post-judgment interest is to be allowed, it should run from the time of the final and appealable judgment entered by this Court, June 17, 2009, not from the date of the Complaint. This is particularly so, given that the amount was not liquidated until the date of the Final Judgment (June 17, 2009). In sum, the lower court abused its discretion is awarding post-judgment interest "from March 3, 2003."

E. The Lower Court Erred In its Calculation of Attorney Fees that Rea's Paid to Its Counsel In the Underlying Litigation

As Trial Exhibit "15," Rea's presented the attorney bills of Andy Kilpatrick, Rea's counsel in the underlying litigation filed by Broom. Those invoices total $61,511.57. However, in its Final Judgment dated June 17, 2009, the lower court awarded Rea's $63,937.79 in "attorney fees in defending said cause." There is no evidence to support such an amount. This "discrepancy" is either due to a miscalculation, or to account for other expenses itemized by Rea's. To the extent it is the former, the amount should be corrected.

To the extent it is the latter, Rea's is not entitled to those amounts. Specifically, Rea's requested the lower court to award it $13,333 in out of pocket costs pursuant to (its interpretation of) the Supplementary Payments Provision of Great River's policy. [R.4124]. Great River opposed such request. [R.4156]. The Supplementary Payments Provision provides, in relevant part:

> We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
>
> . . . .
>
> 4. All reasonable expenses incurred by the insured **at our request** to assist us in the investigation or defense of the claim or suit, including actual loss of earnings **up to $250 a day** because of time off from work.

[R.E.11, R.2366].

The dispositive fact is that the policy covers only expenses incurred *at the insurer's request*. None of the expenses claimed by Rea's were "at the insurer's request." Rather, they were ordinary costs of having to participate in a lawsuit, which Rea's would have incurred regardless of whether Great River assumed Rea's defense or not. Supplementary payments for "[o]ther reasonable expenses incurred at our request" were at issue in the Florida case of *Steele v. Kinsey,* 801 So. 2d 297 (Fla. Ct. App. 2001). That court reasoned:

> The common meaning of "request" is "the act of asking, or expressing a desire, for something; solicitation or petition." Webster's New World College Dictionary 1218 (4th ed. 2001). The legal meaning of the word is "[a]n asking or petition. The expression of a desire to some person for something to be granted or done, particularly for the payment of a debt or performance of a contract." Black's Law Dictionary 1172 (5th ed.1979). Both of these commonly understood definitions reinforce the clear use of the term within the context of the policy — **that the insurer intended to pay for expenses that it had authorized and over which it had control**, such as the selection of a service or product of known value and cost.

Steele, 801 So. 2d at 299 (emphasis added). The *Steele* court held that the insured's costs and expenses were not covered under the supplementary payments provision:

> When faced with an unambiguous provision, the trial court cannot give it any meaning beyond that expressed by the plain language and must construe the provision in accord with the ordinary meaning of the language. The words at issue here, "reasonable expenses incurred at our request," **can only mean that the insurer must request the product or service that incurs the expense**. We see no need to construe them further.

Id. at 300 (emphasis added). Thus, to the extent this overage is to include some of the expenses incurred by Rea's, Great River submits that such expenses are not recoverable. These costs and expenses were in no way related to any request by Great River, as is required pursuant to the clear and unequivocal language of the above provision, and this Court ruled correctly in excluding them.

F. There is No Evidence To Support a Judgment Against W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company

The only "factual findings" made by the lower court were as to Great River Insurance

Company. In its "Judgment" dated July 11, 2005, the lower court found that "*Great River* owed a duty to defend." (Emphasis supplied). Similarly, in its Judge of September 8, 2008, the lower court found that damages in the form of attorney fees "shall be assessed against the defendant." Defendant is singular. There are no factual findings concerning W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company.

There is no evidence supporting a finding of any liability on the part of W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company. Tihe policy(ies) at issue were issued by Great River. *See Trial Exhibit 1.* The claim was handled by Great River Insurance Company. *See Trial Exhibit 5.* Rea's admitted at trial that the insurance company he was dealing with was Great River Insurance Company. *See Trial Transcript, p. 143, lines 18-23.* Great River Insurance Company hired coverage counsel, Steven Cookston, Esq. *Id.* And Great River Insurance Company made the ultimate decision to deny Rea's claim. *See Id.*. There is simply no evidence that any of the these three (3) entities had any involvement with Rea's claim.

Realizing this, Rea's has suggested that these entities may have been the "alter ego" of Great River Insurance Company. There is no evidence in the trial record supporting such an allegation.

1. There Is No Evidence to Support Rea's Negligence Claim

"To prevail on a negligence claim, a plaintiff must establish by a preponderance of the evidence each of the elements of negligence: duty, breach, causation and injury." *See Paz v. Brush Engineered Materials*, 949 So. 2d 1 (Miss. 2007)(citing *Miss. Dep't of Mental Health v. Hall*, 936 So.2d 917, 922 (Miss. 2006)). Rea's never offered any evidence at trial to demonstrate a duty, breach, causation and/or damages as it pertains to these three Appellants. Given the lack of any evidence, the lower court erred in awarding a judgment to Rea's as against these three Appellants.

2. There Is No Evidence to Support Rea's Breach of Contract / Bad Faith Claim

"The elements of a breach of contract are: (1) the existence of a valid and binding contract; (2) that the defendant has broken, or breached it; and (3) that the plaintiff has been thereby damaged monetarily." *Favre Prop. Mgmt.v. Cinque Bambini*, 863 So. 2d 1037 (Miss. Ct. App. 2004)(citing *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992)).

The contracts at issue (the policy(ies)), were issued by Graet River Insurance Company to Rea's. There is no evidence of any contractual relationship between Rea's and the other three Appellants. Accordingly, the lower court erred in awarding a judgment in favor of Rea's against these three Appellants.

3. There Is No Evidence to Support Rea's Claim for Breach of Good Faith and Fair Dealing

A duty of good faith and fair dealing is implicit in every contract for insurance. *See Taylor v. Southern Farm Bureau Casualty Co.*, 954 So. 2d 1045 (Miss. Ct. App. 2007). As discussed, there is no evidence of any relationship between Rea's and W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company, much less evidence of a contractual relationship between Rea's and said Appellants. The lower court erred in awarding a judgment in favor of Rea's against W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company.

4. There is No Evidence That W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company Were The Alter Egos of Great River Insurance Company

As the court in *Gammill* explained,

> the corporate veil should not be pierced unless the corporation exists to perpetuate a fraud or is a mere instrumentality, agent, adjunct, or sham designed to subvert the ends of justice. . .[t]he piercing doctrine is to be applied with great caution and not precipitately,. . .[A]bsent a sufficient allegation of particularized facts, judicial economy

> requires that the corporate veil should not be preliminarily pierced for long-arm jurisdiction on the mere unsubstantiated allegations in the pleadings.

Gammill v. Lincoln Life and Annuity Distributors, Inc., 200 F.Supp.2d. 632 (S.D. Miss. 2001).

There was no factual or legal finding that these three Appellants were somehow the "alter ego" of each other and/or of Great River Insurance Company. Likewise, there is no evidence to support a finding that W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company were the alter ego(s) of Great River Insurance Company

5. There Is No Evidence to Support Any of Rea's Remaining Allegations Against W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company

Rea's Third Party Complaint does not specifically identify the causes of action it intends to pursue. To the extent any other causes of action could conceivably be interpreted from hits Third Party Complaint, there is no evidence of any duty (legal or contractual) owed by W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Companythat could support any such cause of action.

For the reasons discussed herein above, the lower court erred in granting a judgment in favor of Rea's on its claims against W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company.

IV. CONCLUSION

There is no coverage for the claims asserted against Rea's in the Broom litigation. Because there is no coverage, there was no duty to defend. There was no "property damage" caused by an "occurrence." Even assuming "property damage" caused by an "occurrence," exclusions (a),(b), (j)(5), (j)(6) and (m) operate to exclude coverage for the claims. The lower court erred in denying Great River's Motion for Summary Judgment, Appellants' request for a directed verdict, i.e., involuntary dismissal, and by entering a judgment in favor of Rea's on its claims against Appellants.

WHEREFORE, PREMISES CONSIDERED, Appellants, W.R. Berkley Corporation, Union Standard Insurance Group and/or Union Standard Insurance Company and Great River Insurance Company respectfully requests that this Honorable Court reverse the lower court's judgment and render a judgment in favor of Appellants on Rea's claims against them, for the reasons stated. Appellants would request any other relief to which they may be entitled to on the premises.

Respectfully submitted, this the 9th day of April, 2012.

BY: _____

Robert P. Thompson, MSB No. [redacted]
Caryn L. Anlage, MSB No. [redacted]
ATTORNEYS FOR PETITIONER

OF COUNSEL:
COPELAND, COOK, TAYLOR, & BUSH, P.A.
1076 Highland Colony Parkway, Suite 100
P.O. Box 6020
Ridgeland, Mississippi 39158
Telephone (601) 856-7200
Facsimile (601) 856-7626

CERTIFICATE OF SERVICE

I, Caryn Milner, of counsel for Appellants/Cross-Appellees, do hereby certify that I have this day caused to be forwarded by U.S. Mail, postage pre-paid, a true and correct copy of Brief of Appellants/Cross-Appellees to:

Clyde H. Gunn, III, Esq.
Christopher C. Van Cleave, Esq.
Corban & Gunn
Post Office Box 1916
Biloxi, Mississippi 39533-1916

Honorable Judge Larry Buffington
Covington County Chancery Court
P O Box 924
Collins, Mississippi 39428

This the 9th day of April, 2012.

Caryn Milner