

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

**DAVID W. AIKEN, JR.  
and MARILYN M. AIKEN**

**PLAINTIFFS**

v.

**CIVIL ACTION NO. 1:06CV741-LTS-RHW**

**RIMKUS CONSULTING GROUP, INC.  
GARY L. BELL, Individually,  
JAMES W. JORDAN, P.E., S.E., Individually,  
and USAA CASUALTY INSURANCE COMPANY,**

**DEFENDANTS**

**DEFENDANTS RIMKUS CONSULTING GROUP, INC.  
AND JAMES W. JORDAN, P.E., S.E.'S MOTION FOR  
JUDGEMENT AS A MATTER OF LAW**

Defendants Rimkus Consulting Group, Inc. and James W. Jordan, P.E., S.E., (Rimkus Defendants) move for an order granting judgment as a matter of law in their favor, as authorized by Federal Rule of Civil Procedure 50(a). Judgment as a matter of law is appropriate, as Plaintiffs have been fully heard on all their claims, and, after having been fully heard, there is no legally sufficient evidence for a reasonable jury to find for Plaintiffs on their claims.

**I. STANDARDS FOR JUDGMENT AS A MATTER OF LAW**

The court may render a judgment as a matter of law when there is no legally sufficient evidence for a reasonable jury to find for a party on an issue on which the party has been fully heard. Fed. R. Civ. P. 50(a)(1); *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110 (2000). A directed verdict is a device to save time and trouble involved in lengthy jury determination. *Rutherford v. Illinois Central R.R. Co.*, 278 F.2d 310, 312 (5<sup>th</sup> Cir. 1960). *See also Echeverria v. Chevron USA Inc.*, 391 F.3d 607, 610 (5<sup>th</sup> Cir. 2004) (citation omitted) (Rule 50 is intended to shorten and end needless trials). It further is a method for protecting neutral principles of law from powerful forces outside the scope of law--

compassion and prejudice. *Rutherford*, 278 F.2d at 312. Rule 50(a) allows a defendant to bring a motion for judgment as a matter of law at the close of plaintiff's evidence, or at the close of all the evidence. *Jones v. Associated Universities, Inc.*, 870 F.Supp. 1180, 1192 (E.D. N.Y. 1994).

A mere scintilla of evidence is insufficient to present a question for the jury. *Urban Developers LLC v. City of Jackson, MS*, 468 F.3d 281, 297 (5<sup>th</sup> Cir. 2006), citing, *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (*en banc*), overruled on other grounds, 107 F.3d 331, 336 (5th Cir.1997). Similarly, if the facts and inferences point so strongly and overwhelmingly in favor of one party, such that reasonable men could not arrive at a contrary verdict, the motion should be granted. *Id.*

A court should grant a Rule 50(a) motion not only when the non-movant presents no evidence, but also when there is not a sufficient “conflict in substantial evidence to create a jury question.” *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 804 (5th Cir.1997) (quoting *Boeing*, 411 F.2d at 375). In order to create a jury question on an issue, there must be a dispute in the substantial evidence, that is, evidence which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.” *Chaney v. New Orleans Pub. Facility Management*, 179 F.3d 164, 167 (5th Cir.1999). “[A] mere scintilla of evidence is insufficient to present a question for the jury” and even if the “evidence is more than a scintilla . . . some evidence may exist to support a position which is yet so overwhelmed by contrary proof as to yield a directed verdict.” *Id.* (citations omitted).

The purpose of Rule 50(a)(1) is to enable the court to determine whether there is any question of fact to be submitted to the jury, and whether any verdict in favor of the plaintiff would be erroneous as a matter of law. See 9 Charles A. Wright et al., *Federal Practice and Procedure: Civil* § 2521, at 537 (1971 & Supp.1993). Rule 50 thus “allows the court to take

away from the consideration of the jury cases in which the facts are sufficiently clear that the law requires a particular result.” *Id.*

## **II. BACKGROUND FACTS**

Plaintiffs assert causes of action for fraud, conspiracy, and gross negligence against Rimkus and Mr. Jordan. They assert claims for recovery of damages for mental anguish and emotional distress. Plaintiffs contend with respect to their claims that Rimkus and Mr. Jordan violated Rimkus’ policies as well as state and national standards of engineering ethics.

Rimkus Consulting Group, Inc. is a forensic engineering firm retained by USAA-CIC to perform a forensic engineering analysis to determine the extent to which wind versus water damaged the property belonging to the Plaintiffs in Pass Christian, Mississippi. Upon receiving the assignment, Roerto Chapa of S & B Infrastructure, Ltd., a subcontractor to Rimkus, performed a visual inspection of the property, taking photographs and making notes of his observations of the physical evidence available at the property. James W. Jordan, P.E., S.E., of Rimkus, prepared a report of findings as to the damages to Plaintiffs’ property, which he signed and sealed as a licensed engineer in the State of Mississippi. That report is dated December 20, 2005. The December 20, 2005, report lacked an itemization of damages. Rimkus closed its file on this investigation and no further work was performed on it until USAA-CIC contacted Rimkus in March 2006 with a request that Rimkus take a closer look at the wind element and clarify its findings as to wind. Mr. Jordan examined the December 20, 2005, report and the additional and more detailed weather data that had become available since Rimkus issued that report, and prepared a supplemental report clarifying the damages that would have occurred to Plaintiffs’ property. This report is dated March 23, 2006. The supplemental report reiterated the conclusions stated in the December 20, 2005, report and offered three supplemental conclusions.

Trial commenced on January 14, 2008. Plaintiffs' case-in-chief consisted almost wholly of the calling of Rimkus employees, among them Mr. Jordan and Mr. Paul Colman, and USAA representatives as adverse witnesses. Plaintiffs however were unable to elicit any testimony or produce any evidence that rose above the scintilla of evidence necessary to establish their claim, much less rise to the level of clear and convincing burden of proof they must meet to establish fraud, conspiracy, and gross negligence. The testimony that in fact was elicited is contrary to Plaintiffs' assertions of their claims and thus negates Plaintiffs' causes of action.

Plaintiffs rested on January 23, 2008. Plaintiffs have now been fully heard on their claims. The evaluation of whether judgment as a matter of law in favor of the Rimkus Defendants therefore is appropriate at this time. As will be shown, judgment as a matter of law should be entered in favor of the Rimkus Defendants on every one of Plaintiffs' claims.

### **III. JUDGMENT AS A MATTER OF LAW IN RIMKUS' FAVOR IS APPROPRIATE ON PLAINTIFFS' FRAUD CLAIM**

Plaintiffs bear the burden to prove by clear and convincing evidence each of the elements of a fraud cause of action. *See Great Southern Nat'l Bank v. McCullough Env. Services, Inc.*, 595 So.2d 1282, 1288-89 (Miss. 1992). "Clear and convincing evidence" is a heavier burden than a preponderance of the evidence. Clear and convincing evidence is that measure or degree of proof that produces in your mind a firm belief or conviction as to the truth of the claim or fact sought to be established. It is evidence so clear, direct, and convincing, as to enable the juror to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. *Moran v. Fairley*, 919 So.2d 969, 975 (Miss. App. 2005), *citing, Travelhost, Inc. v. Blandford*, 68 F.3d 958, 960 (5<sup>th</sup> Cir. 1995) (citations omitted). Clear and convincing evidence is such a high

standard that even the overwhelming weight of the evidence does not rise to the same level. *Moran*, 919 So.2d at 975 (citation omitted).

There is no way that a reasonable juror could find, after hearing the presentation of Plaintiffs' case, the evidence to be so clear, direct, and convincing, as to enable him or her to come to a clear conviction, without hesitancy, that Rimkus engaged in fraud. Plaintiffs have failed to meet their burden of proving that each of the following elements rise *above* the level of overwhelming weight of the evidence: (1) Rimkus made a representation to Plaintiffs; (2) The representation was false; (3) The representation was material; (4) Rimkus was aware of its falsity; (5) Rimkus intended for Plaintiffs to act or rely on the representation; (6) Plaintiffs were ignorant of the falsity of the representation; (7) Plaintiffs relied on the truth of the representation; (8) Plaintiffs had a right to rely on the representation; and (9) Plaintiffs were consequently and proximately injured as a result. *Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So.2d 777, 787 (Miss. 2004).

Plaintiffs assert that the actionable representations of Rimkus are in issuing the March 23, 2006, Supplemental Report. Specifically, they assert that there are three questions concerning their allegations that the Rimkus Defendants engaged in fraud:

- e. Whether, in issuing the Supplemental Report, Rimkus made a material misrepresentation, which it knew was false; whether Rimkus intended that its representation should be acted upon by Plaintiffs and in the manner reasonably contemplated; whether Plaintiffs were ignorant of its falsity; whether Plaintiffs relied on the truth of the representation; whether Plaintiffs had the right to rely thereon; and whether Plaintiffs were consequently and proximately injured thereby.
- f. Whether, in issuing a Supplemental Report, Jordan made a material misrepresentation, which he knew was false; whether Jordan intended that his representation should be acted upon by Plaintiffs and in the manner reasonably contemplated; whether Plaintiffs were ignorant of its falsity; whether Plaintiffs relied on the truth of the representation; whether

Plaintiffs had the right to rely thereon; and whether Plaintiffs were consequently and proximately injured thereby.

- g. Whether, in issuing a Supplemental Report without being physically present at the loss site, Jordan made a material misrepresentation, which he knew was false; whether Jordan intended that his representation should be acted upon by Plaintiffs and in the manner reasonably contemplated; whether Plaintiffs were ignorant of its falsity; whether Plaintiffs relied on the truth of the representation; whether Plaintiffs had the right to rely thereon; and whether Plaintiffs were consequently and proximately injured thereby.

*Amended Pretrial Order*, 17 - 18. A joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial. *McGehee v. Certaineed Corp.*, 101 F.3d 1078, 1080 (5<sup>th</sup> Cir. 1996) (citing *Branch-Hines v. Hebert*, 939 F.2d 1311, 1319 (5<sup>th</sup> Cir. 1991)). As will be shown, there is either no evidence or the facts and inferences point so strongly and overwhelmingly in favor of the Rimkus Defendants, such that reasonable men could not arrive at a contrary verdict, that the issuance of the supplemental report was not fraud. As further will be shown, no other acts of the Rimkus Defendants support the submission to the jury of the question of fraud.

**A. No Evidence of Representation**

There is no evidence that Rimkus made a representation to Plaintiffs. Indeed, Rimkus did not provide the Aikens with its report or supplemental report of findings concerning its investigation into the cause of damages to their house. (Trial Tr., 1/22/08, Page 69, Lines 3-5). Mrs. Aiken never had any communications with Rimkus. (Trial Tr., 1/17/08, Page 83, Lines 8-14). USAA-CIC was Rimkus' client, not the Aikens. (Trial Tr., 1/16/08, Page 107, Lines 14-17). The facts and inferences point so strongly and overwhelmingly in favor of Rimkus on the lack of a representation being made by Rimkus to Plaintiffs that reasonable men could not arrive

at a contrary verdict. Consequently, a motion for judgment in favor of Rimkus is proper. *Boeing*, 411 F.2d at 374.

**B. No Evidence of Falsity**

Likewise, the facts and inferences as to whether the representations, if any, made in the supplemental conclusions were false point so strongly and overwhelmingly in favor of Rimkus that reasonable men could not find otherwise. Alternatively, the facts and the inferences, as supported by the overwhelming weight of the evidence, at best establish a genuine disagreement between professionals. Plaintiffs have attempted to challenge the truth of Rimkus' reports on the basis that they do not reflect that tornadic winds destroyed their house prior to the arrival of the storm surge. Their evidence nevertheless is no more than a scintilla, which will not support the submission of the question to the jury. *Chaney*, 179 F.3d at 167. Plaintiffs' meteorological expert testified that no National Weather Service reports were ever issued confirming that a tornado had passed over the Aikens' property. (Trial Tr., 1/16/08, Page 146, Lines 21-23 & Page 148, Lines 4-5). Moreover, he admitted that the strength of a tornado is determined by the damage that it produces on the ground. (Trial Tr., 1/16/08, Page 159, Lines 6-7). He testified however that he does not have any experience in determining, by examining the ground, whether there has been a tornado. (Trial Tr., 1/16/08, Page 145, Lines 11-13).

Reasonable men further could not find that the supplemental report was not based on any new evidence. Mr. Jordan testified that the compilations of and resources for weather, storm surge, and wind height data were evolving following the storm and there were new as well as more detailed resources available by the time Mr. Jordan prepared the March 23, 2006, supplemental report. (Trial Tr., 1/16/08, Page 68, Lines 7-13 & Page 75, Lines 6-20). Dr. Ivy confirmed that the quantity of data increased in the months following Hurricane Katrina. (Trial

Tr., 1/17/08, Page 15, Lines 3-4). There is no question that the type of information available to Mr. Jordan when he prepared the March 23, 2006, Report was markedly and significantly different than the information available when the December 20, 2005, report was prepared.

Similarly, there is no evidence that a representation was false simply because Mr. Jordan was not physically present at the Plaintiffs' property before preparing Rimkus' reports. There is no dispute that Mr. Rovertto Chapa was a competent and qualified engineer who gathered necessary and pertinent information at the Plaintiffs' property which Mr. Jordan was able to rely on in preparing Rimkus' reports. He was trained thoroughly in the physical information at the site the Rimkus engineer licensed in Mississippi would need to consider in preparing a final report (Trial Tr., 1/22/08, Page 43, Line 1 - Page 44, Line 100). He further was in contact with other Mississippi engineers from Rimkus. (Trial Tr., 1/14/08, Page 129, Lines 6-8; Trial Tr., 1/16/08, Page 129, Lines 5-8; Trial Tr., 1/22/08, Page 44, Line 14-Page 45, Line 12). Furthermore, Dr. Ivy corroborated that he has relied on the inspections conducted by others when preparing a report. (Trial Tr., 1/17/08, Page 47, Line 2-5). Mr. Quick testified similarly and stated that the practice was proper. (Trial Tr., 1/18/08, Page 54, Lines 19-21) Consequently there is no conflict in the evidence and thus judgment in favor of Rimkus on the issue of falsity is appropriate. *Boeing*, 411 F.2d at 374-75.

Also in this regard, Mr. Jordan was the engineer of record for the Rimkus reports. As he was placing his seal on the report, it was his duty as a professional engineer licensed in Mississippi to have the final say as to the contents of the report. (Trial Tr., 1/15/08, Page 16, Lines 15-20). Mr. Quick confirmed this. (Trial Tr., 1/18/08, Page 58, Lines 5-9). Mr. Colman corroborated this also. (Trial Tr., 1/22/08, Page 59, Lines 19-23).

**C. No Evidence of Materiality**

There is additionally no evidence that any representation by Rimkus via its reports could have been material, because USAA-CIC did not deny Plaintiffs benefits on the basis of the Rimkus reports. To the contrary, USAA-CIC *paid* Plaintiffs' benefits under their wind coverage following its receipt of the Rimkus supplemental report. USAA-CIC found that the December 20, 2005, report did not give sufficient information upon which it could make a determination as to the benefits it could pay under the wind coverage; consequently, it requested clarifications as to what property would have been damaged by wind. (Trial Tr., 1/17/08, Page 113, Line 8-12; Page 127, Line 22 - Page 128, Line 3; Page 137, Line 2-11 & Lines 12-17; Page 139, Lines 11-25; Page 140, Line 16-Page 141, Line 16; Trial Tr., 1/22/08, Page 72, Line 9-Page 73, Line 15). Accordingly, Rimkus prepared its March 23, 2006, Supplemental Report. (Trial Tr., 1/15/08, Page 41, Line 17 - Page 42, Line 11 & Page 43, Line 21 - Page 44, Line 3; Trial Tr., 1/22/08, Page 111, Line 1-25). The supplemental report placed more emphasis on wind. (Trial Tr., 1/16/08, Page 60, Line 24-Page 61, Line 12). The facts and inferences on the materiality element point so strongly in favor of Rimkus that judgment as a matter of law in Rimkus' favor should be entered.

**D. No Evidence Rimkus Knew of Representation's Falsity, if Any**

The facts and the inferences, as supported by the overwhelming weight of the evidence, point so strongly to the lack of any knowledge of Rimkus that its representations were false that reasonable men could not possibly come to a contrary conclusion. Rimkus did not know its representations were false, because it stands behind its reports, and does not believe it made any false statements. (Trial Tr., 1/14/08, Page 127, Lines 6-17; Trial Tr., 1/15/08, Page 42, Lines 9-

11). There simply is no conflicting evidence of a substantial nature that would require the submission of the question of Rimkus' knowledge to the jury.

**E. No Evidence Rimkus Intended for Plaintiffs to Rely on Representations**

There is no evidence to present to the jury the question of whether Rimkus intended for Plaintiffs to act or rely on the representation. The evidence indisputably demonstrates that Rimkus did not intend for Plaintiffs to rely on any representations, because it prepared its December 20, 2005, Report and its March 23, 2006, Supplemental Report exclusively for USAA - CIC. (Trial Tr., 1/22/08, Page 69, Lines 3-5). The Plaintiffs presented no evidence that they hired Rimkus; rather, their evidence shows that USAA - CIC retained and paid Rimkus for its services. Any finding that Rimkus intended for Plaintiffs to rely on their representations would constitute error.

**F. No Evidence Plaintiffs Were Ignorant of Falsity of Representation**

The facts and inferences, as supported by the overwhelming weight of the evidence, point so strongly to the lack of ignorance of the Plaintiffs of the falsity of the representations that the question should not be submitted to the jury. As has already been discussed, Rimkus had no communications with the Plaintiffs. The Plaintiffs knew only that USAA-CIC had hired Rimkus to prepare a report as to the cause of damages to their house from Hurricane Katrina. A short time after Mr. Chapa performed his inspection of the Plaintiffs' property, Dr. Aiken contacted Dr. Ivy to obtain the opinion of a different engineer and Dr. Ivy went to the Plaintiffs' property to conduct his own analysis as to cause of damages. (Trial Tr., 1/17/08, Page 170, Lines 16-20). It can be inferred from their hiring of their own engineer that they assumed that Rimkus' report would be unfavorable to their interests. This nullifies any possible finding that they were

ignorant of the representation's falsity and thus submitting the question to the jury would be improper.

**G. No Evidence Plaintiffs Relied on Representations**

In the same manner, the facts and inferences, as supported by the overwhelming weight of the evidence, point so strongly to the lack of reliance by the Plaintiffs on any representations that no question concerning reliance should be submitted to the jury. Plaintiffs immediately hired their own engineer to evaluate the effect of wind versus water to their house after they became aware that USAA-CIC had hired Rimkus to perform this same analysis and after Mr. Chapa had told Dr. Aiken that he observed very little damage except that from waves. (Trial Tr., 1/17/08, Page 5, Lines 4-9; Page 6, Lines 1-9; Page 7, Lines 2-20). Dr. Ivy inspected Plaintiffs' property on October 30, 2005 (Trial Tr., 1/16/08, Page 170, Lines 16-20). After his inspection and analysis, he prepared his own findings as to the cause of damages to Plaintiffs' property. (Trial Tr., 1/16/08, Page 176, Line 6 - Page 180, Line 20). Plaintiffs' hiring of their own engineer to perform a damage evaluation renders void any finding of reliance. *Taylor v. Southern Farm Bureau Cas. Co.* 954 So.2d 1045, 1050 ¶ 13 (Miss.App.,2007) (citing *Martin v. Winfield*, 455 So.2d 762, 765-66 (Miss.1984)) (noting that Mississippi courts have held that where plaintiff has had an opportunity to investigate the statements upon which he allegedly relied, the plaintiff cannot be said to have reasonably relied on those statements). Judgment in favor of Rimkus on the question is appropriate as a matter of law.

**H. No Evidence Plaintiffs Had a Right to Rely on Representations**

There is no evidence that Plaintiffs had a right to rely on any representations made by Rimkus. As already discussed, Rimkus was retained by USAA-CIC and prepared its report

exclusively for USAA-CIC. Plaintiffs have not established any basis for submitting the issue of right of reliance to the jury.

**I. No Evidence of Proximate Injury**

Recovery is not permitted if the proximate cause of the monetary loss is other than the fraud alleged. *Lacy v. Morrison*, 906 So.2d 126, 130 ¶ 12 (Miss.App.,2004), *citing*, *Russell v. Southern National Foods, Inc.*, 754 So.2d 1246, 1256 (¶ 47) (Miss.2000). The proximate cause of an injury is that cause, which is natural or continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the results would not have occurred. *Hobbs Automotive, Inc. v. Dorsey*, 914 So.2d 148, 168 ¶ 94 (Miss. 2005), *citing*, *Delahoussaye v. Mary Mahoney's, Inc.* 783 So.2d 666, 671 (Miss.2001). Plaintiffs offered no evidence that the loss they claim arose as a proximate result of any misrepresentation by Rimkus.

**IV. JUDGMENT AS A MATTER OF LAW IN MR. JORDAN'S FAVOR IS APPROPRIATE ON PLAINTIFFS' FRAUD CLAIM**

Plaintiffs have presented no evidence that actions of Mr. Jordan were outside the scope of his employment with Rimkus. Any actions taken by Mr. Jordan were therefore actions of Rimkus. *Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co.*; 914 So. 2d 169, 176-77 (Miss. 2005). Accordingly, as there is either no evidence, or the facts and the inferences, as supported by the overwhelming weight of the evidence, point so strongly to the absence of any fraud by Rimkus that reasonable men could not possibly come to a contrary conclusion, judgment as a matter of law as to Mr. Jordan is appropriate and should be entered.

In the alternative, Plaintiffs have established no evidence of the measure or degree that would produce in the mind of an impartial juror a firm belief or conviction as to the truth of each of the following elements: (1) Mr. Jordan made a representation to Plaintiffs; (2) The

representation was false; (3) The representation was material; (4) Mr. Jordan was aware of its falsity; (5) Mr. Jordan intended for Plaintiffs to act or rely on the representation; (6) Plaintiffs were ignorant of the falsity of the representation; (7) Plaintiffs relied on the truth of the representation; (8) Plaintiffs had a right to rely on the representation; and (9) Plaintiffs were consequently and proximately injured as a result.

**V. JUDGMENT AS A MATTER OF LAW IN FAVOR OF RIMKUS DEFENDANTS IS APPROPRIATE ON PLAINTIFFS' CONSPIRACY CLAIM**

In order to submit to the jury a question of conspiracy, Plaintiffs have to present more than a scintilla of evidence that (1) There was an agreement between USAA-CIC and the Rimkus Defendants to attempt to defraud Plaintiffs by depriving them of insurance benefits; (2) There was an overt act of fraud in furtherance of the conspiracy; and (3) Plaintiffs were damaged as a result of the fraud in furtherance of the conspiracy. *Delta Chemical & Petroleum, Inc. v. Citizens Bank of Byhalia*, 790 So.2d 862, 877 (Miss. Ct. App. 2001). As with their fraud claim, Plaintiffs cannot recover unless they establish these claims by the heightened standard of clear and convincing evidence. There is no basis upon which an impartial juror could come to a clear conviction, without hesitancy, that Rimkus and USAA-CIC engaged in a conspiracy.

Plaintiffs cannot recover on their conspiracy claim without a finding that they can recover on their claim of fraud. *Wells v. Shelter Gen'l Ins. Co.*, 217 F.Supp.2d 744, 755 (S.D. Miss. 2002) (authority is legion that a civil conspiracy cannot stand alone, without reference to an underlying tort). There is either no evidence, or the facts and the inferences, as supported by the overwhelming weight of the evidence, point so strongly to the absence of any fraud by Rimkus that reasonable men could not possibly come to a contrary conclusion. Logically, therefore, submitting the issue of whether conspiracy existed to the jury would constitute error.

Moreover, Plaintiffs have produced no evidence of an agreement between USAA-CIC and Rimkus. (Trial Tr., 1/17/08, Page 147, Lines 9-25; Trial Tr. 1/22/08, Page 56, Lines 3-11 & Lines 19-24; Page 57, Lines 3-5). They have not produced any evidence that Rimkus agreed with USAA-CIC to prepare a report which, regardless of the true facts, would deliberately down-play the role that wind played in the Plaintiffs' loss, and overstate the role that storm surge played in the loss, in order to "deprive the plaintiffs of money." Mr. Jordan, Mr. Colman, and each USAA representative who testified denied an agreement to defraud Plaintiffs of insurance benefits. (Trial Tr., 1/17/08, Page 147, Lines 9-25; Trial Tr., 1/22/08, Page 68, Lines 16-21; Page 71, Lines 1-5; Page 108, Line 24 - Page 110, Line 12; Page 114, Line 10-Page 115, Line 3; Page 144, Lines 19-21).

Further, there is no evidence and no issue should be submitted to the jury as to whether Rimkus and Mr. Jordan conspired together. When an individual defendant is not shown to have acted outside of his employment capacities, he is incapable of conspiring with his corporate employer. "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Cooper v. Drexel Chemical Co.*, 949 F.Supp. 1275, 1285 (N.D. Miss. 1996) (citing *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir.1994) (citing *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (5th Cir.1952))). There is no evidence before the Court that Mr. Jordan acted in anything but his capacity as an agent of Rimkus in this case.

**VI. JUDGMENT AS A MATTER OF LAW IN FAVOR OF RIMKUS DEFENDANTS IS APPROPRIATE ON PLAINTIFFS' CLAIM FOR BREACH OF STANDARDS OF CARE**

Judgement as a matter of law is additionally appropriate on Plaintiffs' claim that Rimkus, and specifically, Mr. Jordan, "breached standards of care." There was no conflict on the

substantial evidence on this point. Dr. Ivy, when asked about changing language contained in a field inspector's report and changing language without having new evidence, responded simply that he would not have done these things. (Trial Tr., 1/16/08, Page 181, line 21 - page 182, Line 17, page 182, Lines 5-8). This in no way establishes any standard of care by which a jury can evaluate Mr. Jordan's conduct. Mr. Quick testified that the hurricane damage protocol complies with the applicable standard of care and was reasonable. (Trial Tr., 1/18/08, Page 58, Lines 1-4). Mr. Jordan testified extensively that he was not in violation of Rimkus policy. (Trial Tr., 1/15/08, Page 45, Lines 7-11 & 22-25; Page 46, Lines 1-24; Page 48, Lines 7-12 & 20-22; Page 49, Lines 1-5; Page 50, Lines 4-7). Mr. Colman testified that it is routine for engineers of record to use documents and photographs provided by subordinates. (Trial Tr., Page 59, Line 24 - Page 60, Line 14). Submitting the issue to the jury therefore would be erroneous.

Plaintiffs additionally have failed to bring forth sufficient evidence that there is a causal relationship between the purported breach by Mr. Jordan of the duty of care and Plaintiffs' alleged injury. The question is whether the facts constitute a succession of events so linked together as to make a natural whole. *Hankins Lumber Co. v. Moore*, 774 So.2d 459, 464-65 (Miss. App. 2000) (citing *Mississippi City Lines v. Bullock*, 194 Miss. 630, 13 So.2d 34, 36 (1943)). There simply is no evidence that if Mr. Jordan had physically been present at the Plaintiffs' property performing the functions Mr. Chapa undertook or spoken with Mr. Chapa before preparing the December 20, 2005, Report that USAA-CIC would have paid Plaintiffs more money under their wind coverage. There is no evidence that the breaches of any internal protocol or agency regulations are linked with USAA-CIC's denial of additional benefits as to make a natural whole.

**VII. JUDGMENT AS A MATTER OF LAW IN FAVOR OF RIMKUS DEFENDANTS IS APPROPRIATE ON PLAINTIFFS' CLAIMS FOR MENTAL ANGUISH AND EMOTIONAL DISTRESS**

A judgement as a matter of law in favor of the Rimkus Defendants is justified on Plaintiffs' claims for emotional distress and mental anguish. To the extent Plaintiffs' claim arises from the purported breach of the standard of care, it requires Plaintiffs to prove some sort of injury, whether it is physical or mental. *Edmonds v. Beneficial Miss., Inc.*, 212 Fed. Appx. 334, 337 (5<sup>th</sup> Cir. 2007) (citation omitted). Mrs. Aiken testified that her husband had gained forty pounds and others thought she and her husband were "money-grabbing rich people." (Trial Tr., 1/17/08, Page 78, Lines 10-22). This evidence does not rise to a physical or mental injury which would justify submitting to the jury the question on damages for emotional distress.

Likewise, there is insufficient evidence to submit to the jury the question of emotional distress damages arising from intentional acts of the Rimkus Defendants. The standard in Mississippi for emotional distress damages arising out of intentional acts is very high: a defendant's conduct must be 'wanton and wilful and [such that] it would evoke outrage or revulsion.' " *Croft v. Grand Casino Tunica, Inc.*, 910 So.2d 66, 75 (Miss. App. 2005) (citing *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 476 (5th Cir.2002)). In order to prevail and be entitled to recover such damages, the conduct of the defendant must have been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Croft*, 910 So.2d at 75 (citing *Brown v. Inter-City Federal Bank*, 738 So.2d 262 (¶ 9) (Miss.Ct.App.1999) (quoting *Pegues v. Emerson Elec. Co.*, 913 F.Supp. 976, 982 (N.D.Miss.1996))). Plaintiffs presented no evidence that the Rimkus Defendants' actions would evoke outrage or revulsion or rose to the degree as to go beyond all possible bounds of decency. Judgment in favor of the Rimkus

Defendants on Plaintiffs' mental anguish and emotional distress claims should be entered as a matter of law.

**VIII. JUDGMENT AS A MATTER OF LAW IN FAVOR OF RIMKUS DEFENDANTS IS APPROPRIATE ON PLAINTIFFS' CLAIMS FOR TORTIOUS INTERFERENCE WITH PERFORMANCE OF CONTRACT**

The four elements for this tort are: "(1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiffs in their lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) that actual damage and loss resulted." *Par Indus., Inc. v. Target Container, Co.*, 708 So.2d 44, 48 (Miss. 1998) (citing *Cenac v. Murry*, 609 So.2d 1257, 1268-69 (Miss.1992) (citing *Liston v. Home Ins. Co.*, 659 F.Supp. 276, 281 (S.D.Miss.1986))). Plaintiffs have shown no evidence that would justify submitting to the jury the issue of whether Rimkus or Mr. Jordan interfered with USAA-CIC's insurance contract with Plaintiffs. Critically, neither was even aware of what coverages the Rimkus reports were being used to evaluate. (Trial Tr., 1/22/08, Page 71, Lines 6-10).

**IX. JUDGMENT AS A MATTER OF LAW IN FAVOR OF RIMKUS DEFENDANTS IS APPROPRIATE ON PLAINTIFFS' CLAIMS FOR MALICE AND GROSS NEGLIGENCE**

The issue of punitive damages cannot be submitted to the jury before a finding has been made as to compensatory damages. *Hartford Underwriters Ins. Co. v. Williams*, 936 So.2d 888, 895-96 (Miss. 2006). Once an award of compensatory damages has been made against a party the Court may then hold an evidentiary hearing as to the award of punitive damages. *Id.* Accordingly, no issue should be submitted to the jury at this time concerning the grounds for the award of punitive damages, i.e., whether defendants acted with actual malice or gross negligence.

Plaintiffs nevertheless have not established sufficient evidence of malice or gross negligence to submit these issues to the jury. The level of proof offered by Plaintiffs has not risen to the clear and convincing level. It could not engender in the mind of a reasonable man a clear conviction that the Rimkus Defendants acted with “actual malice” or “gross negligence” which evidences a willful, wanton, or reckless disregard for the safety of others. The term “actual malice” is not merely the doing of an unlawful or an injurious act. Rather, the word implies that the act complained of was conceived, or thought of, in the spirit of ill will or spite. In other words, to reach the level of actual malice, the act must have been done without just cause or excuse, with the intent or purpose to inflict an injury. BLACK’S LAW DICTIONARY (8<sup>th</sup> ed. 2004).

The term “gross negligence” means a course of conduct, which under particular circumstances in any given cause, equals what amounts to a reckless indifference to the consequences of that course of conduct. *Id.* The term “willful” means an act done with the intention of producing the result that comes to pass and which act is done knowingly and purposefully without justifiable excuse. *Id.* This is to be distinguished from an act that is simply done carelessly or thoughtlessly or inadvertently. A willful act is not one that may be simply called a negligent act. The term “wanton” means without regard in any way for the rights of others and refusal to exercise any care in decisions that are made. *Id.* Likewise, conduct is in reckless disregard of Plaintiffs’ rights if, under the circumstances, it reflects complete indifference to the safety of others.

The facts and the inferences, as supported by the overwhelming weight of the evidence, point so strongly in favor that Rimkus Defendants acted with neither malice nor gross negligence that reasonable men could not possibly come to a contrary conclusion. There is no evidence that

Mr. Jordan acted out of ill will or spite. He did not know the Plaintiffs and there was no motivation for him to act spitefully. Further, on the stand he explained the reasons for each of his actions. Even assuming they were wrongful, Plaintiffs have produced no evidence that Mr. Jordan acted with more than simple carelessness or inadvertence. In short, there is no evidence that Mr. Jordan or his employer's actions rose to the level of wantonness. Judgement as a matter of law on Plaintiffs' gross negligence claims should be entered.

**X. JUDGMENT AS A MATTER OF LAW IN FAVOR OF RIMKUS DEFENDANTS IS APPROPRIATE ON PLAINTIFFS' CLAIMS THAT RIMKUS DEFENDANTS ARE EITHER AGENT OF USAA-CIC OR THAT RIMKUS DEFENDANTS ARE ADJUSTERS OR OTHERWISE INVOLVED IN THE BUSINESS OF INSURANCE**

There is no evidence that Rimkus was an agent of USAA-CIC. An agent is one who is authorized to act for or in place of another; a representative. Whether an agency has in fact been created is to be determined by the relations of the parties as they exist under their agreements or acts. *Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co.*; 914 So. 2d 169, 176-77 (Miss. 2005); *Booker ex rel. Certain Underwriters at Lloyd's of London v. Pettey*, 770 So. 2d 39, 45 (Miss. 2000); Black's Law Dictionary 68 (8th ed.2004); Miss. Code Ann. § 83-17-401. Plaintiffs put forth no evidence that USAA-CIC authorized Rimkus or Mr. Jordan to act on its behalf or in its place. There likewise is no evidence that the Rimkus Defendants and USAA-CIC agreed to create an agency relationship. Further, USAA-CIC did not advise Rimkus or Mr. Jordan as to any details concerning the inspection of the damages to Plaintiffs' house. (Trial Tr., 1/22/08, Page 70, Lines 19-25).

There further is no evidence that Rimkus or Mr. Jordan are adjusters or otherwise are involved in the business of insurance. (Trial Tr., 1/22/08, Page 47, Lines 1-4). Engineers are specifically excluded from the definition of adjuster in Mississippi Code Section 83-17-401.

Additionally, in defining which companies are subject to insurance regulations, Mississippi law provides:

“[I]nsurance company” . . . includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance or guaranteeing the obligations of others.

. . .

A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to be assured, upon the destruction, loss, or injury of something in which the assured or other party has an interest, as an indemnity therefor.

Mississippi Code Ann. § 83-5-5 (West 2007). Rimkus does not guarantee the obligations of others. It does not make promises to pay others upon “the destruction, loss, or injury” of something in which another has an interest. It does not fit in any way the definitions outlined in the Mississippi provisions governing insurers. Rimkus operates to provide unbiased independent professional reports. (Trial Tr., 1/22/08, Page 47, Lines 7-9). Accordingly, it would be improper to give to the jury any questions based on the premise that Rimkus or Mr. Jordan were acting on behalf of USAA-CIC or were in any way engaged in the business of insurance when it prepared its reports of findings.

## **XI. CONCLUSION**

There is no dispute in the substantial evidence, that is, evidence which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, as to each of the elements of Plaintiffs’ claims against Rimkus and Mr. Jordan. Plaintiffs have had the full opportunity to be heard and the entry of a judgment as a matter of law would save judicial resources, time, and trouble involved in lengthening the proceedings which have already been extended unnecessarily. Judgment as a matter of law

pursuant to Fed.R.Civ.P 50(a) should be entered in favor of Rimkus and Mr. Jordan on all claims asserted against them by Plaintiffs.

Respectfully submitted this the 23<sup>rd</sup> day of January, 2008.

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## CERTIFICATE OF SERVICE

I, JAMES C. SIMPSON, JR., one of the attorneys for RIMKUS CONSULTING GROUP, INC. and JAMES W. JORDAN, P.E., S.E., Defendants herein, hereby certify that I have this day filed the foregoing pleading in the United States District Court for the Southern District of Mississippi, Southern Division, via the Court's ECF system which sent notification of such filing to the following:

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WITNESS MY SIGNATURE hereto, this the 23rd day of January 2008.

/s/ James C. Simpson, Jr.

JAMES C. SIMPSON, JR.

**ATTORNEYS FOR DEFENDANTS RIMKUS  
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