

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

EDWARD E. GEMMILL

PLAINTIFFS

VERSUS

1:05CV692 LG-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

**MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT OR IN THE ALTERNATIVE MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO PUNITIVE DAMAGES AND EXTRA CONTRACTUAL CLAIMS**

Comes now STATE FARM FIRE AND CASUALTY COMPANY (hereinafter referred to as State Farm), and files this its Memorandum Brief in Support of Motion for Summary Judgment or in the Alternative Motion for Partial Summary Judgment as to Punitive Damages and Extra Contractual Claims and for cause would show unto the Court as follows, to wit:

FACTS

The Plaintiff filed the instant suit November 18, 2005, alleging that at the time he purchased the policy in question; State Farm did not tell the Plaintiff that the homeowners policy excluded flood but not surge, and that State Farm had the present undisclosed intention not to honor its all peril coverage when non-excluded surge occurred. At the deposition of the Plaintiff, Edward E. Gemmill, he testified that he could not remember any representations made, when he purchased the policy by his agent, Errol Bradley, or any other State Farm employees. (Dep. of Edward Gemmill, p. 23, l. 15 through p. 24, l. 25). He also states he does not remember any recommendations by

Mr. Bradley or any State Farm employees as to amounts of coverage or types of coverage needed. (Dep. of Edward Gemmill, p. 20, ll. 13 –25).

In paragraph 4 of the Complaint the Plaintiff alleges that he relied upon the non-disclosed representations made by State Farm, and did not seek additional coverage. However, a review of the deposition of Edward E. Gemmill reveals that, in fact, the Plaintiff did have flood insurance with State Farm. (Dep. of Edward Gemmill, p. 18, l. 24 – p. 19, l. 14).

In paragraph 8 of the Complaint the Plaintiff again alleges that State Farm misrepresented coverage to be provided and/or failed to inform the Plaintiff of the undisclosed intention not to honor the coverage in question thus intentionally misrepresenting the material facts upon which the Plaintiff relied. As shown hereinabove the Plaintiff states that State Farm did not make any representations to him with respect to coverage as set out herein above.

Finally, the Plaintiff alleges that through its advertising State Farm has assumed and breached a fiduciary duty to the Plaintiff. No additional facts have been provided to support this theory.

BURDEN OF PROOF

A grant of summary judgment is appropriate when, “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...” Federal Rules of Civil Procedure 56(c).

“When a motion for summary judgment is made and supported as provided in this rule,

an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Federal Rules of Civil Procedure 56(e).

Rule 56 "with or without supporting affidavits." In cases like the instant one, where the non-moving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answer to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore required the non-moving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex Corp v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d. 265 (1986).

ARGUMENT

Representations and Misrepresentations

In order to recover on his claims of misrepresentation the Plaintiffs must prove:

- (a) A misrepresentation or omission of a fact;
- (b) That the representation or omission is material or significant;

- (c) That the representation was the product of negligence;
- (d) That the Plaintiff reasonably relied upon the misrepresentation or omission; and
- (e) That it suffered damages as a direct and proximate result of such reasonable reliance.

Berklinc Corp. v. Bank of Mississippi, 453 So.2d. 699, 702 (Miss.1984), see also Spragins v. Sunburst Bank, 605, So.2d 777 (Miss.1992). The Plaintiff cannot sustain his claims of misrepresentation as he cannot show a representation nor reasonable reliance upon same. The Plaintiff alleges that he reasonably relied upon representations made by State Farm; however, in deposition reveals that in actuality he cannot remember any representations by Errol Bradley or any other State Farm employees. (Dep. of Edward Gemmill, p. 23, l. 15 through p. 24, l. 25). Further, the Plaintiff cannot argue that he reasonably relied upon the representation that surge would be covered when it is clearly excluded and he purchased a flood insurance clearly evidencing his understanding that flooding was not covered. (Dep. of Edward Gemmill, p. 18, l. 24 – p. 19, l. 14). As set out hereinabove the State Farm homeowners policy clearly excludes water damage stating:

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the ever occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

- c. **Water Damage**, meaning:

(1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not.

This Court has already upheld this very clause recently in Tuepker v. State Farm, 105cv559 (S.D. Miss. 2006). See also, Firemens Ins. Co. v. Schulte, 200 So.2d 240 (Miss.1967); Lunday v. Lititz Mutual Ins. Co., 276 So.2d 696 (Miss.1973); Lititz Mutual Ins. Co. v. Sherrill, 174 F.2d 945 (5th Cir.1949); Grace. Lititz Mutual Ins. Co., 257 So.2d 217 (Miss.1972); Commercial Union Ins. Co. v Byrne, 248 So.2d 777 (Miss.1971) and Lititz Mutual Ins. Co. v. Boatner, 254 So.2d 765 (Miss.1971).

Finally, as to the argument that the Plaintiff justifiable relied upon the representations that flooding would be covered and did not seek additional coverage, as shown by his own testimony he did seek additional coverage and purchased a flood insurance policy. (Dep. of Edward Gemmill, p. 18, l. 24 – p. 19, l. 14). Finally, considering his purchase of a flood policy any representations could not have been material; because, he did purchase flood insurance.

FIDUCIARY DUTY

The Plaintiff has alleged that State Farm breached its fiduciary duty to him. However, there is no inherent fiduciary duty in an insurance contract. Langston v. Bigellow, 820 So.2d 752, 756 (Miss. App. 2002) (citing, The Estate of Jackson v. Mississippi Life Insurance Company, 755 So.2d 15 (Miss. App. 1999), and also Gorman v. Southeastern Fidelity Insurance Company, 621 F. Supp. 33,38 (N.D. Miss. 1985)). Mississippi courts have held that the duty owed by the insurance carrier is merely a contractual obligation on the part of the insurer to pay a claim. Langston v. Bigellow, 820

So.2d 752, 756 (Miss. App. 2002). Furthermore, the purchase of insurance is an arms length transaction and does not contain an inherent fiduciary relationship between the agent and the insured. Booker v. American General, 257 F. Supp. 2d 850 (S.D. Miss.2003); see also Walden v. American General, 244 F. Supp. 2d 689 (S.D. Miss. 2003) and Gorman v. Southeaster Fidelity Ins. Co., 621 F. Supp. 33, 38 (S.D. Miss.1985); Skinner v. Usable life, 200 F. Supp.2d 636 (S.D. Miss. 2001) and Smith v. Union National Life Ins. et al., 286 F. Supp.2d 782 (S.D. Miss.2003). The Plaintiff has alleged that State Farm's advertising has created this fiduciary duty; however, has not developed any facts regarding this advertising or advanced any theories regarding how this advertising created a fiduciary duty.

PARTIAL SUMMARY JUDGMENT AS TO PUNITIVE DAMAGES AND/OR EXTRA CONTRACTUAL DAMAGES

In the alternative, Mississippi law does not favor punitive damages; they are considered an extraordinary remedy and are allowed only with great caution and within narrow limits. Standard Life Ins. Co. of Indiana v. Veal, 354 So.2d 239, 247 (Miss.1978). In a bad faith or breach of contract claim, "the trial court must first determine, as a matter of law, whether the issue of punitive damages on account of alleged bad faith should be submitted to the jury." Cossitt v. Federated Guar. Mut. Ins. Co., 541 So.2d 436, 443 (Miss. 1989). If the insurer had a "legitimate or arguable reason to deny the claim, then there is no need for the Court to contemplate the element of willfulness or gross negligence of the insurer's actions, as that legitimate or arguable reason would utterly preclude the submission of punitive damages to the jury." Pioneer Life Ins. Co. of Illinois

v. Moss, 513 So.2d 927, 930 (Miss.1987). The Plaintiffs' burden of demonstrating to the Court that the insurer had no legitimate or arguable reason to deny the claim is a heavy one. Blue Cross & Blue Shield of Mississippi v. Campbell, 466 So.2d 833, 842 (Miss.1985).

In order to submit the issue of punitive damages to a jury, or alternatively to defeat a summary judgment motion, the Plaintiffs bear the burden of proving all the following elements, to-wit:

- I. That the claim was denied;
2. That there is no legitimate or arguable reason for the denial; and
3. The insurer committed a willful, intentional or malicious wrong, or acted with gross or reckless disregard for the rights of the insured.

Barber v. Balboa Ins. Co., 747 So.2d 863, ¶ 14 (Miss. App. 1999) *citing*, Pioneer Life Ins. Co., 513 So.2d at 927, 930.

It is true that any damages caused by flooding and/or water damage as set out herein above have been denied based upon State Farm's investigation of the loss; however, the Plaintiff was paid additional living expenses and his flood limits were also paid; therefore, there has not been a complete denial of the claim. Furthermore, there is strong evidence that the home was damaged by excluded water damage which is confirmed by the Plaintiff's acceptance of his flood limits. (Dep. of Edward Gemmill, P. 19, ll. 15 – 23).¹ Also, as shown by the attached report of Kurt Gurley and Robert Dean

¹ His flood policy limits were \$128,100 which were paid.

there is strong evidence that the home was not destroyed by wind and was taken by the surge validating State Farm's denial of the water damages as excluded by the policy and clearly indicating an arguable and legitimate reason for the denial of the flood, and/or water damages. Further, there has been no willful, intentional or malicious wrong, nor any evidence of gross or reckless disregard for the rights of the insured rising to the level of an independent tort. As such, the Plaintiff's punitive damage claim must fail.

CONCLUSION

As all of the Plaintiff's claims are based upon representations by State Farm that flood and/or water damage would be covered by the homeowners policy; State Farm is entitled to summary judgment as a matter of law; because, the Plaintiff has admitted he cannot remember any specific representations made by Errol Bradley or any other State Farm employees; nor, can he have relied upon these representations even if made as he did purchase flood insurance. No facts establish that a fiduciary duty has been created between State Farm and the Plaintiff. In the alternative, this case does not rise to the requisite level to merit punitive or extra-contractual damages; as such, State Farm

is entitled to partial summary judgment as to the Plaintiff's punitive and extra-contractual damage claims.

Respectfully submitted,

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Attorneys for Defendant,

**STATE FARM FIRE AND CASUALTY
COMPANY**

BY: /s/ *Scott Corlew*
SCOTT CORLEW (10333)

CERTIFICATE OF SERVICE

I, **SCOTT CORLEW**, one of the attorneys for the Defendant, **STATE FARM FIRE AND CASUALTY COMPANY**, do hereby certify that on August 25, 2006, I electronically filed the foregoing Memorandum Brief in Support of its Motion for Summary Judgment or in the Alternative Motion for Partial Summary Judgment as to Punitive Damages and Extra Contractual Damages, with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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