

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

RICHARD TEJEDOR

PLAINTIFF

VS.

CIVIL ACTION NO.: 1:05cv679LG-RHW

**PHILIP HARVEY and
STATE FARM FIRE AND CASUALTY COMPANY**

DEFENDANTS

**MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT OR IN THE ALTERNATIVE MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO FIDUCIARY DUTY AND
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 Fiduciary Duty and 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 hurricane deductible did not imply hurricane coverage nor inform him of State Farm's present undisclosed intention to refuse to pay for a covered wind loss or for storm surge even though that term is not listed in the so-called flood exclusion. The Plaintiff further alleges that he relied upon these representations and did not seek additional coverage. However, in his deposition he stated that he had purchased flood insurance with

another carrier. (Dep. of Richard Tejedor, p. 26, l. 22, – p. 27, l. 5). The Plaintiff also argues State Farm, in bad faith, denied the Plaintiff's homeowners claim. Finally, the Plaintiff alleges that through its advertising State Farm has assumed and breached a fiduciary duty to the Plaintiff.

After investigating the claim, State Farm determined the destruction of the home was the result of water and/or flooding and the claim was denied in a phone call, followed by a letter dated October 6, 2005. The State Farm policy states:

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.

State Farm did not retain an engineer in the claim; however, the damages were determined to be the result of water and surge and confirmed by the experts it retained after suit was filed which validated the claim representative's investigation. The experts found that:

This report has presented two lines of evidence indicating the strong probability that water agents (storm surge and waves) were the dominant destructive mechanism at the Tejedor property.

Dean, p. 20

Very strong probability that the structural failure (wall collapse) suffered at the Tejedor residence was due to storm surge and waves rather than wind.

Gurley, p. 2

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 Plaintiff 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.

Berkline 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 misrepresentation nor reasonable reliance upon same. The Plaintiff states in deposition that an employee of Phil Harvey, State Farm agent told him flood insurance was not required and delayed purchasing flood insurance for him. (Dep. of Richard Tejedor, p. 34, ll. 4 – 9). The Plaintiff alleges that he reasonably relied upon representations made by State Farm; however, in deposition he reveals that in actuality he secured coverage through another carrier. (Dep. of Richard Tejedor, p. 26, l. 22, – p. 27, l. 5). Since Mr. Tejedor did not rely upon

the representations of Mr. Harvey's employee he cannot recover on his misrepresentation claim. Further, he cannot have suffered any damage as he purchased flood insurance through another carrier choosing his own limits.

Further, Mississippi law provides that policyholders are bound as a matter of law by the knowledge of the contents of a contract into which they entered regardless of whether they have actually read the contract. See *Cherry v. Anthony, Gibbs & Sage*, 501 So. 2d 416, 419 (knowledge of insurance policy's contents imputed to insured as a matter of law.) In this context, Mississippi law is crystal clear:

A written contract cannot be varied by prior oral agreements. Moreover, as an evidentiary matter, parol evidence to vary the terms of a written contract is inadmissible. Finally, a person is under an obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract.

Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., 584 So. 2d 1254, 1257 (Miss. 1991) (citations omitted). Therefore, it is impossible for Tejedor to recover on his claims of misrepresentation since he is charged with knowledge of the terms of the policy.

FIDUCIARY DUTY

The Plaintiff has also 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. Bigelow, 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:

1. 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.

As set out herein above 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 loss 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).

Based upon its investigation State Farm determined that the destruction of the home was the result of water and therefore excluded. It is admitted that the cause of the destruction is a factual matter, if pled; however, the reports of Dean and Gurley show that the denial was not arbitrary; therefore, precluding the award of punitive damages. Furthermore, the Plaintiff did accept the payment of his flood insurance limits and therefore must acknowledge that at least some of his damages are the result of water further evidencing a legitimate dispute as to the cause of the damages. (Dep. Richard Tejedor, p. 12, ll. 6 -14). Finally, there is no evidence of any willful or grossly negligent conduct rising to the requisite level to merit punitive damages.

CONCLUSION

As all of the Plaintiff's claims are based upon alleged 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. The Plaintiff has shown

that he did not rely upon the alleged representations of State Farm as he purchased flood insurance through another carrier. No facts exist to 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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**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 Defendants, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that on August 24, 2006, I electronically filed the foregoing Memorandum Brief in Support of Motion for or In the Alternative Motion for Summary Judgment on the Issues of Punitive Damages, with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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