

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

**NORMAN J. BROUSSARD and  
GENEVIEVE BROUSSARD**

**PLAINTIFFS**

**VERSUS**

**1:06cv6LG-RHW**

**STATE FARM FIRE AND CASUALTY COMPANY**

**DEFENDANTS**

**MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT  
OR IN THE ALTERNATIVE 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 Punitive Damages and Extra Contractual Claims and for cause would show unto the Court as follows, to wit:

**FACTS**

The Plaintiffs filed the instant suit November 28, 2005, alleging bad faith denial of their insurance claim and breach of a fiduciary duty between themselves and State Farm. State Farm determined the destruction of the home was the result of water and/or flooding and the claim was denied by letter dated October 21, 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 event 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 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 (5<sup>th</sup> 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).

State Farm did not retain an engineer in the claim; however, the damages were determined to be the result of water and surge 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 Broussard property.

Dean, p. 20

Very strong probability that the structural failure (wall collapse) suffered at the Broussard 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).

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**ARGUMENT**

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 admitted that the claim was denied; however, as validated by its experts the cause of the destruction to the Plaintiffs' home was a result of water and/or surge as shown by the reports of Gurley and Dean attached to the Motion for Summary Judgment which are not covered by the Plaintiffs' homeowners policy. These reports validate that the denial was for an arguable or legitimate reason defeating the Plaintiffs' claims for punitive 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.

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 event 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.

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 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).

As set out herein above based upon the policy language it was determined that the destruction of the home was the result of water damage and therefore excluded. It is admitted that the cause of these damages is a factual matter; however, the reports of Dean and Gurley show that the denial was not arbitrary therefore precluding the award of punitive damages. Furthermore, there is no evidence of any willful or grossly negligent conduct rising to the requisite level to merit punitive damages.

### **FIDUCIARY DUTY**

The Plaintiffs have alleged that State Farm breached its fiduciary duty to them. 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 Plaintiffs have alleged that State Farm's advertising has created this fiduciary duty; however, have not developed any facts regarding this advertising or advanced any theories regarding how this advertising created a fiduciary duty.

### **CONCLUSION**

No facts exist to establish that a fiduciary duty was created between State Farm and the Plaintiffs. Further, 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 judgement or on the issues of punitive and extra-contractual damage claims and

fiduciary duty.

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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