IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2008-CA-01909

CURTIS BURNETT, JR. **APPELLANT**

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

R. BRADLEY BEST (MSB #[redacted])
TIFFANY HATCHER SMITH (MSB #[redacted])
ATTORNEYS OF RECORD FOR APPELLANT
HOLCOMB DUNBAR, P.A.
Post Office Drawer 707
Oxford, Mississippi 38655
(662) 234-8775

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2008-CA-01909

CURTIS BURNETT, JR. **APPELLANT**

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

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 disqualification or recusal.

1) Curtis Burnett, Jr., Appellant;

2) John A. Banahan, Esq., counsel for State Farm Mutual Automobile Insurance Company, Appellee;

3) H. Scot Spragins, Esq., counsel for State Farm Mutual Automobile Insurance Company, Appellee;

4) Ronnie Darby, agent for State Farm Mutual Automobile Insurance Company;

5) Mr. and Mrs. Curtis Burnett, Sr.;

6) R. Bradley Best, Esq. and Tiffany Hatcher Smith, Esq., counsel for Appellant;

7) Honorable Andrew C. Baker, Trial Court Judge

BY: [redacted]
TIFFANY HATCHER SMITH (MSB [redacted]
ATTORNEY OF RECORD FOR APPELLANT

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2008-CA-01909

CURTIS BURNETT, JR. **APPELLANT**

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

TABLE OF CONTENTS

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2008-CA-01909

CURTIS BURNETT, JR. **APPELLANT**

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

TABLE OF AUTHORITIES

CASE *PAGE*

STATUTES AND RULES

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2008-CA-01909

CURTIS BURNETT, JR. **APPELLANT**

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting summary judgment based on a material misrepresentation in the insurance policy application process.

2. Whether the trial court erred in granting summary judgment prior to addressing each of Appellant's claims.

3. Whether the trial court erred in denying Appellant's Written Statement of Proposed Corrections to the Appellate Record.

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2008-CA-01909

CURTIS BURNETT, JR. **APPELLANT**

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

STATEMENT OF THE CASE

This is an automobile accident case originally filed by Appellant, Curtis Burnett, Jr. (Burnett), against uninsured motorist carrier, State Farm Mutual Automobile Insurance Company (State Farm) and Lee Franklin (Franklin) on April 1, 2003. [R. 6-16]. Appellant's claims include bad faith refusal of uninsured/ underinsured motorist benefits (UM), uninsured motorist property damage (UMPD), and medical payments (MedPay) benefits, as well as a breach of duty of good faith and fair dealing, breach of fiduciary duty, negligent procurement of insurance coverage, and negligence. [R. 6-16].

I. STATEMENT OF FACTS

The accident which is the subject of the Appellant's Complaint occurred on Friday, September 21, 2001. Curtis Burnett, Jr. was 22 years old at the time[1]. He was a passenger in a 1985 white Buick Regal, driven by his girlfriend, Shante Pratt. The Buick Regal was insured by State Farm under policy no. C20842924A. [R. 112-136]. As this vehicle traveled east on Highway 6, in Batesville, Mississippi, Lee C. Franklin negligently pulled out directly in front of it and the two

---

[1] Curtis Burnett Jr.'s date of birth is December 31, 1978. [R. 202].

vehicles collided.

On Monday, September 24, 2001, one working day after the accident, Burnett, while on crutches due to his injuries, visited his State Farm agent's office, informed State Farm of the accident, and asked for assistance. Burnett was accompanied by his mother, Mary Burnett. The Burnetts were turned away from any coverage with State Farm, even though they had MedPay, UM and UMPD coverage, and were instructed to file a claim against Franklin.[2] [R. 244-245]. In other words, Appellant contends that State Farm's agent essentially told him to "go sue someone else." Over a year later, on November 15, 2002, after Burnett employed counsel and made a demand to open a file, State Farm finally opened a claim for his accident. Burnett again provided State Farm with evidence of his injuries, specifically a severe injury to his left knee that ultimately required reconstructive surgery, and demanded payment of at least his medical expenses. [R. 177]. However, on February 17, 2003, State Farm demanded *pre-suit* depositions of doctors before they would consider making any payments, including MedPay. [R. 137]. After State Farm failed to provide any coverage, or MedPay payments, Appellant filed his Complaint on April 1, 2003. [R. 6-16]. Only after filing the Complaint did State Farm make a partial payment of MedPay benefits. In Burnett's suit, he asserted claims for bad faith delay and denial of UM and other policy benefits against State Farm. Although State Farm agent Ronnie Darby was not joined in the suit, Burnett alleged causes of action against State Farm for its agent's conduct under theories of agent/ principal liability. [R. 8-9]. The suit also combined these claims with negligence claims against the "uninsured motorist" (in this case, an underinsured motorist), Lee Franklin. Burnett alleged that he sustained damages for

---

2 Q: Okay. So other than you giving the lady the accident report and her telling you in response to your question, I believe, which was, "What steps do we need to take now?" – A: Yes, sir. Q: – her saying, "You need to pursue the people that caused the wreck" – A: Yes, sir, their insurance company. [R. 244-245].

numerous personal and emotional injuries, including lost wages, loss of enjoyment of life, past present and future pain and suffering, past present and future medical bills and expenses, mental anguish and emotional distress. [R. 140].

In State Farm's answer, it admitted that Appellant was a resident relative of his parents', Mary and Curtis Burnett, Sr., household at the time of the accident. [R. 8, 36]. State Farm further acknowledged that the Burnetts maintained multiple insurance policies with State Farm providing uninsured/ underinsured motorist coverage as well as medical payments coverage. [R. 8, 36].

Three vehicles were insured by State Farm that could potentially "stack" to provide UM, UMPD or MedPay coverages. The declaration page for the accident vehicle, 1985 Buick Regal, was issued to "Curtis Burnett, 233 Ruby Road, Courtland, MS 38620." [R. 325]. Two additional policies on a 1993 Lexus GS300 and a 1995 Pontiac Grand Am each with $50,000 per person and $100,000 per accident UM coverage were issued to "Curtis and Mary Burnett, 74 Hawkins Road, Courtland, MS 38620." [R. 326-327]. The later two policies also contained $10,000 in UMPD coverage each. [R. 326-327]. [3] State Farm initially asserted that no UM or UMPD was procured on the accident vehicle. However, State Farm failed to produce a valid written rejection of UM or UMPD coverage as required by Miss. Code Ann. § 83-11-101. To the extent that no UM or UMPD coverage existed for the accident vehicle, Burnett asserted a claim against State Farm based on its agent's negligent failure to procure such coverage, and breach of fiduciary duties.

---

[3] The Burnett family, including Curtis Burnett, Jr. previously resided at 233 Ruby Road and moved to 74 Hawkins Road. This presumably explains why one of the vehicles was listed at the Ruby Road location and the other vehicles were listed at the Hawkins Road location. [R. 225].

II. COURSE OF PROCEEDINGS BELOW

This case presents a rather tortured history of unresolved discovery disputes and unresponsive requests for relief from the trial court. Ultimately, the trial court granted summary judgment on an issue (misrepresentation on the policy application) that was never raised or disclosed by State Farm in pleadings or discovery and after a pattern of refusals by the lower court to rule on any of Appellant's motions. To explain these events to the Court, a brief background on these issues follows.

Extensive discovery disputes between the parties began in 2004 and continued, unresolved, until Defendant's Motion for Summary Judgment was granted on May 30, 2007. Appellant filed his first Motion to Compel Discovery Responses on June 29, 2004, after State Farm objected to nearly every discovery request, including requests regarding the actions and compensation system of agent Ronnie Darby. It was Appellant's position that the agent had a financial incentive to turn customers away from making claims under their own policies with State Farm. Appellant also requested basic discovery regarding his bad faith allegations, such as similar lawsuits or complaints against the agent for turning customers away from their own coverage. After an August 2004 hearing on the Motion to Compel, the trial court asked Appellant's counsel to provide it with a proposed order granting the requested relief.[4]

However, upon noting this request, State Farm sent a letter to the judge claiming that complying with Appellant's discovery request would cost at least $140,000 and that producing the documents would cost $420,000 to $700,000. [Tr. Vol. I, 13]. The correspondence to the court

---

[4] The transcript of the August 2004 hearing was not available, however a history of that hearing was recounted in the subsequent hearing on the same motion. *See* Transcript, Vol. I, 12-14. As explained in Section III, the trial court denied Appellant's request to include this correspondence in the Record before this Court.

promised to advise the court of final figures within a week. [Tr. Vol. I, 12 -14]. Discovery was at a standstill waiting on State Farm to claim how expensive it was to produce some basic "bad faith" litigation discovery. Indeed, State Farm did not reply back to the trial court until June, 2005. [Tr. Vol. I, 13]. After receiving the correspondence from State Farm, the trial court never ruled on Appellant's Motion to Compel.

After one year passed from the date of the hearing on Appellant's Motion to Compel, Appellant noticed another hearing seeking the same relief and seeking a trial setting. On September 8, 2005, the trial court again heard arguments. [Tr. Vol. I, 5-34]. As a result of this hearing, instead of ruling on Appellant's motions, the Court advised the parties to take the depositions of Burnett, Frankin and the corporate representative deposition of State Farm, to which the parties agreed. [Tr. Vol. I, 33-34]. Burnett, pursuant to this instruction from the Court, gave deposition testimony on November 16, 2005. Franklin was deposed on the same day.

After Burnett submitted to deposition, State Farm reneged on its reciprocal obligation and refused to produce the agent or a corporate representative to provide deposition testimony. This position is evidenced by State Farm's April 24, 2006 letter objecting to any further depositions of parties until a Motion For Summary Judgment was filed. State Farm stated that they anticipated filing the motion within two weeks. *See* page 83-84 of Exhibit "A." This letter is not contained in the Record as the lower court denied Appellant's request to include it in the Record before this Court.[5] However, the letter is referenced in the hearing transcript of July 13, 2006. [Tr. Vol. I, 46]. Thus, discovery was again at a standstill apparently awaiting State Farm's motion for summary judgment. Not unexpectedly, the motion was not soon forthcoming.

---

[5] This issue is fully explained in Section III.

In addition, State Farm, furthering its dilatory tactics, attempted to thwart Burnett's settlement with co-defendant, Franklin. Appellant contended that State Farm unreasonably withheld its consent to such settlement. On July 10, 2006. Appellant filed a Motion to Amend Complaint addressing this unreasonable withholding of consent to Burnett's settlement with Franklin. [R. 54-75].

Having not received any motion from State Farm and in light of State Farm's refusal to participate in discovery, Appellant filed a second Motion to Compel on May 13, 2006. *See* pages 76-82 of Exhibit "A." The motion objected to State Farm's continued refusal to provide full and complete responses to certain discovery requests and cited State Farm's refusal to engage in further discovery. It further requested sanctions for State Farm's admitted violation of Rule 45 of the Mississippi Rules of Civil Procedure for failure to provide Burnett notice of subpoenas[6] and reiterated Appellant's request for a trial date. *See* pages 76-82 of Exhibit "A."

The trial court heard arguments on this Motion on July 13, 2006. State Farm responded to the various disputes, in part, by advising the Court that it still planned to file a summary judgment motion which, in their view, would eliminate the need to rule on any of Appellant's grievances. Incredibly, the trial judge accepted this suggestion and refused to rule on Appellant's motions. State Farm reported to the Court that it would file its Motion for Summary Judgment the next day. [Tr. Vol. I, 68]. State Farm did not file its Motion for Summary Judgment the next day and Appellant's counsel repeatedly objected to the delay. *See* pages 87-90 of Exhibit "A." Indeed, it was over a month, on August 16, 2006, before State Farm filed the motion. [R. 76]. Appellant filed his

---

[6] State Farm issued what was effectively a "stealth subpoena" for records that involved Burnett without noticing counsel or even filing a return of the subpoena. State Farm admitted to this rules violation, calling it a mere mistake. [Tr. Vol I, 66-67].

Response to State Farm's Motion for Summary Judgment on May 16, 2007. [R. 138]. Arguments were heard by the trial court on May 17, 2007. [Tr. Vol. II]. State Farm's Motion for Summary Judgment was granted on May 30, 2007. [R. 328-329]. This was an interlocutory order as the case continued against Franklin.

Appellant subsequently settled his case against Franklin, and on October 21, 2008, the trial court entered a Final Judgment of dismissal.[7] Appellant timely filed this appeal on November 12, 2008. [R. 330-331]. After examining the record, Appellant filed a Written Statement of Proposed Corrections to the Appellate Record. *See* Exhibit "A." Defendant filed an objection to Appellant's proposed corrections and filed its own Proposed Correction To The Appellate Record. *See* Exhibit "B." Appellant filed a Response to Defendant's Objection and Proposed Correction on March 4, 2009. *See* Exhibit "C." On March 12, 2009, the trial court entered an Order denying supplementation of the Appellate Record for 9 of the 11 items submitted by Appellant as they "would not be helpful to the appellate court's decision in this matter" and granted State Farm's one addition to the Record. *See* Exhibit "D."

SUMMARY OF THE ARGUMENT

The trial court erred in granting summary judgment based on a material misrepresentation in the insurance policy application process as to the owner and principal driver of the accident vehicle. More specifically, State Farm failed to provide evidence of *any* misrepresentation. State Farm did not bring forth any evidence of false statements by the policyholder or applicant. State Farm failed to provide even the most basic evidence of a misrepresentation in the application

---

[7] The clerk did not include this Final Judgment as part of the Record.

process, the application itself. State Farm further refused to produce agent Ronnie Darby, or any other corporate representative to testify. In fact, discrepancies in the additional policies issued to the Appellant's father, create a genuine issue of material fact as to prelude summary judgment.

State Farm, likewise, failed to prove the materiality of the alleged misrepresentation. Indeed, the policy at issue provides a procedure, other than voiding the policy, for dealing with incorrect information on the policy application. This policy procedure, at the very least, creates a question of fact as to materiality that should have precluded summary judgment.

The trial court further erred in granting summary judgment prior to the completion of discovery and prior to addressing each of Appellant's claims. Finally, the trial court erred in denying Appellant's proposed corrections to the Appellate Record, depriving this Court of the benefit and use of a complete record on appeal.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ON A MATERIAL MISREPRESENTATION.

A. STATE FARM FAILED TO PROVIDE ANY EVIDENCE OF A MISREPRESENTATION.

In granting summary judgment to State Farm, the trial court relied solely upon an alleged material representation, at the inception of the policy application, as to two facts regarding: (1) the ownership of the vehicle and (2) the principal driver.[8] [R. 328-329]. The court erred in granting the

---

[8] The Order granting summary judgment to State Farm states that "[t]his Court is of the opinion and rules that a material misrepresentation in the purchase of the insurance contract as to the true owner of the car and who was principal driver of the car is sufficient for State Farm to avoid the contract." (emphasis added) [R. 328-329].

motion insofar as State Farm never presented *any* evidence of false statements by the policyholder or applicant. Appellant admits that he purchased the Buick Regal with help from his father.[9] [R. 250]. However, he was unable to testify regarding the application process for the policy as his parents dealt with State Farm's agent.[10] [R. 262, 246]. State Farm did not request to take the deposition of Curtis Burnett, Sr. or Mary Burnett. Despite numerous requests from Appellant, State Farm refused to produce agent Ronnie Darby for deposition, even after the trial court advised the parties to proceed with depositions. [Tr. Vol. I, 33-34].

This Court ruled that insurance contracts in this state are construed strictly against the insurer. Mutual Ben. Health & Acc. Assn. v. Blaylock, 163 Mill. 567, 573, 143 So. 406 (1932). Specifically, the language of the Mississippi UM statute "must be construed liberally to provide coverage and strictly to avoid or preclude exceptions or exemptions from coverage." Aetna Cas. and Sur. Co. v. Williams, 623 So. 2d 1003, 1008 (Miss. 1993); Harris v. Magee, 573 So. 2d 646 (Miss. 1990). State Farm provided no testimony or evidence whatsoever regarding the information that Appellant's father, Curtis Burnett, Sr., provided to agent Ronnie Darby at the time of purchase of the insurance contract. ***Did someone represent to State Farm on the application that the Buick was owned by Curtis Burnett, Sr. instead of Curtis Burnett, Jr.?*** State Farm's Memorandum In Support of Motion for Summary Judgment merely alleges that "the vehicle involved in the underlying accident was not owned by the policyholder." [R. 343]. State Farm provides no supporting evidence of the

---

9 Q: But you bought the Buick Regal. I mean, that was your money from your work that paid for the Buick Regal? A: With the help of my father, yes, sir. [R. 250].

10 Q: Did you handle insuring that Buick Regal, or is that something your mom and dad did? A: They did. I just, you know, paid them. [R. 262].
Q: Have you ever had any conversations with Ronnie Darby? A: No, sir. [R. 246].

alleged misrepresentation. Hence, if this insurance contract is strictly construed against State Farm in the light most favorable to the Appellant, as required, it is clear that the evidence does not support a finding of a misrepresentation.

In demonstrating that the motion was granted in error, Appellant asks this Court to consider a simple question: ***What was the misrepresentation?*** The Court will find, as it reviews the Record, that State Farm clearly failed to provide evidence of any untrue statement in the application process. Indeed, State Farm does not even present the application itself for consideration. ***How can State Farm accuse Appellant or others of lying on the application without providing the application?*** In discovery, Appellant requested "the entire claims file relating to the accident in this case, including all correspondence, reports, notes or information stored on computer regarding the Plaintiff or the named insureds on all applicable policies of insurance." *See* pages 12-13 of Exhibit "E." State Farm did not provide the application for insurance which was allegedly falsely procured, or any other such written evidence of misstatements by the policyholder. Such information is certainly relevant and responsive to this request for production. However, State Farm objected to the request "as it requests information which contains attorney/client privilege, attorney/ client work product, information which was prepared in anticipation of litigation" and did not provide the application to Appellant. *See* pages 12-13 of Exhibit "E." In light of this refusal, this Court should find that State Farm waived any misrepresentation argument.

Incredibly, after refusing to participate in discovery, or submit to a 30(b)(6) deposition, it utilized a corporate representative to attempt to support its alleged misrepresentation claim. David

Hartlein, who was never identified as a person with knowledge regarding this case[11], provided an affidavit stating, "State Farm issued auto policy no. C20842924A to Curtis Burnett, Sr. and charged certain premiums based upon information which he provided. Had State Farm been provided true and accurate information regarding the ownership of the vehicle in question, being a 1985 Buick Regal, then State Farm would not have agreed to provide coverage on the same terms." [R. 111]. The affidavit did *not* state what untrue or inaccurate information was provided to State Farm or who, if anyone, provided State Farm with such information. ***Again, where is the misrepresentation?*** Further, none of the traditional nine elements of a misrepresentation claim were even presented to the court. *See,* Great Southern Nat. Bank v. McCullough Environmental Services Inc., 595 So. 2d 1282, 1289 (Miss. 1992)(identifying the nine elements of a misrepresentation claim that must be proven by clear and convincing evidence). Nowhere in the affidavit was any information provided as to what facts were presented at the policy application. Curtis Burnett Sr. may very well have indicated that the policy was for his son, or that he was helping his son purchase the vehicle. On the other hand, agent Darby may never have even asked these questions. We simply do not know what was presented at the policy application as State Farm has obstructed every attempt at discovery.

Furthermore, the evidence that *is* found in the Record creates a genuine issue of material fact as to the identity of the policyholder. It is clear that summary judgment properly lies only when there is no genuine issue of material fact. Mississippi Ins. Guar. Ass'n v. Harkins & Co., 652 So. 2d 732, 735 (Miss. 1995). The declaration page for the accident vehicle, 1985 Buick Regal, was issued to "**Curtis Burnett.**" [R. 325]. Appellant's father, Curtis Burnett, Sr. owned two additional policies

---

[11] *See* pages 43-44 of Exhibit "A." The Court should not condone tactics like this, wherein State Farm failed to identify a relevant corporate witness and then used that secret witness to support a dispositive motion.

for a 1993 Lexus GS300 and a 1995 Pontiac Grand Am. These policies are issued to "**Curtis and Mary Burnett.**" [R. 326-327]. The policies do not distinguish between Curtis Burnett, Sr. and Curtis Burnett, Jr. Thus, the mere fact that the policies are issued in different names creates a question of fact as to the identity of the policyholder. Indeed, it appears that when State Farm intends to issue policies to Burnett's *parents*, it clearly knows how to do so and identifies the married couple. However, State Farm construes and unilaterally interprets a policy issued solely to "Curtis Burnett" to only represent the father when it works to State Farm's advantage.

In other words, although State Farm's corporate representative claimed through his affidavit that, had State Farm known the true owner of the policy it would not have issued it under the same terms, the actual language of the policy indicates otherwise. Mr. Hartlein's affidavit is meritless without record support of agent Darby's knowledge and conveniently State Farm has refused to allow Appellant to depose agent Darby. However, any ambiguity should clearly be construed against State Farm and in favor of UM coverage.

Furthermore, even though State Farm provided an affidavit from a corporate representative, it consistently refused to produce any corporate representative for deposition, despite the Court's September 8, 2005 instruction to proceed with depositions of the parties. [Tr. Vol. I, 33-34]. Appellant was consequently deprived of the ability to question Mr. Hartlein regarding the facts on which he based his affidavit. Appellant was, likewise, deprived of the ability to rebut State Farm's unproven accusations.

The trial court cites Wilson v. State Farm Fire and Casualty Company for the proposition that a material misrepresentation on an insurance application will permit the insurer to void or rescind the policy before or after a loss. Wilson v. State Farm Fire and Casualty Company, 761 So. 2d 913 (Miss. Ct. App. 2000). The Wilson case is easily distinguished from the present matter insofar as

State Farm, in the Wilson matter, provided, in writing, specific misrepresentations by the plaintiff concerning non-renewal and claims history. Wilson, 761 So. 2d at 918-919. Further, State Farm, in the Wilson matter, provided proof in the form of a statement under oath by the Plaintiff demonstrating untrue or misleading statements. *Id.* In the present case, State Farm did not provide *any* specific written allegations or proof whatsoever demonstrating false statements in the procurement of the insurance policy. Further, in the Wilson matter, the agent who took the application and the underwriting operations supervisor who reviewed the application were deposed and provided testimony regarding the application and underwriting process. *Id.* The trial court in this matter allowed State Farm to withhold such crucial witnesses from Burnett during discovery. State Farm demanded deposition testimony from Burnett in an attempt to gather information for its own summary judgment motion and then refused to allow the Appellant to conduct further discovery to fully respond to the allegations. Such deceitful tactics should not be condoned by this Court.

Alternatively, the Court should find that State Farm has waived any misrepresentation argument as it did not allege any such claim in its Answer. [R. 18-34]. Misrepresentation is a fraud allegation and should be plead as an affirmative defense. *See,* Martin v. Winfield, 455 So. 2d 762, 764-66 (Miss. 1984)(affirming circuit court's ruling that plaintiff's claim of fraudulent misrepresentation failed to prove, by clear and convincing evidence, one or more of the elements of his affirmative defense of fraud).

Furthermore, State Farm admitted in its Answer that the "Burnetts maintained multiple insurance policies with State Farm providing uninsured/underinsured motorist coverage as well as medical payments coverage." [R. 36]. Indeed, State Farm made a partial payment of MedPay pursuant to those coverages to Burnett. These admissions and conduct on the part of State Farm are wholly inconsistent with denying the existence of coverage and claiming that the policies were void

ab initio. Such actions should constitute a waiver. Scottish Union & National Ins. Co. v. Warren Gee Lumber Co., 80 So. 9 (Miss. 1918); *see also*, Insurance Co. v. Smith, 48 So. 1020, 1021 (Miss. 1909)(stating insurance companies can waive policy provisions by their conduct).

Additionally, to the extent State Farm claims that it discovered an alleged misrepresentation on the policy application during the process of litigation, this Court should find that such practice is improper post-claims underwriting. This Court held that Insurers are obliged to their insureds to do their underwriting at the time an application is made, not after a claim is filed, as it is "patently unfair" for an insured to obtain a policy, pay his premiums, and operate under the assumption that he is insured against a specific risk, only to later learn, afer he submits a claim, that he is not insured and therefore unable to obtain another policy to cover the loss. Lewis v. Equity Nat. Life Ins. Co., 637 So. 2d 183, 188-89 (Miss. 1994). *See also,* American Home Life Ins. Co. v. Hollins, 830 So. 2d 1230, 1236 (Miss. 2002)(reiterating condemnation of post-claim underwriting practices).

B. STATE FARM FAILED TO PROVIDE EVIDENCE OF MATERIALITY OF THE ALLEGED MISREPRESENTATION.

"The materiality of a representation is determined by the probable and reasonable effect which truthful answers would have had on the insurer." *Sanford v. Federated Guaranty Insurance Company,* 522 So. 2d 214, 217 (Miss. 1988). In Sanford, the Court specifically noted that generally "substantial truth" and materiality are both questions of fact for a jury to resolve, making summary judgment inappropriate. *Sanford,* 522 So. 2d at 217. In this case, a question of fact was clearly created as to the materiality of any alleged misrepresentation made on the policy application. Although it is somewhat surreal to discuss an alleged misrepresentation on a policy application that was never disclosed by State Farm and is not in the Record, for purposes of this argument, it is assumed that false information was provided at the inception of the policy as to the owner of the

vehicle and its principle driver (i.e. the two bases the lower court relied upon). As noted above, Burnett testified that he was not present at the policy application.[12] [R. 262, 246]. Of course, Burnett was a minor of only 20 years old at the time the policy was issued. [R. 325, 202]. Since no evidence was provided that Burnett Jr. made false statements, State Farm should not have been permitted to void any coverage as to this innocent insured. In addition, State Farm has never demonstrated how ownership by a minor resident of the insureds' household materially effects the risk on an insurance policy. This fact alone should preclude summary judgment.

In any event, State Farm's policy provides an agreed upon procedure for handling incorrect information on a policy application. State Farm breached its own insurance contract by attempting to invalidate coverage *ab initio*, in stark contrast to the manner it agreed to follow in its policy. The policy states:

> "The premium for this policy is based on information State Farm has received from you or other sources. If the information is incorrect or incomplete or changes during the policy period, you must inform State Farm of any changes regarding the following:
>
> a. your car, or its use, including annual mileage,
>
> b. the persons who regularly drive your car, including newly licensed family members,
>
> c. your marital status, or
>
> d. the location where your car is principally garaged.
>
> You agree that if this information or any other information used to determine the premium is incorrect or incomplete or changes during the policy period, we may decrease or increase the premium during the policy period based upon the corrected, completed or changed information. You agree that if the premium is decreased, or increased during the policy period, State Farm will refund or credit to you any decrease in premium you will pay for any increase in premium." [R. 134-135].

---

12 *See* footnote 10.

As the very least, this provision in State Farm's policy creates a question of fact as to the materiality of any alleged misrepresentation. Summary judgment was inappropriate.

C. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT PRIOR TO THE COMPLETION OF DISCOVERY

The trial court consistently denied Appellant's attempts to gather and present evidence. State Farm egregiously withheld information and witnesses from Appellant during discovery. State Farm demanded deposition testimony from Burnett in an attempt to gather information for their own summary judgment motion and subsequently alleged a misrepresentation in the application process. State Farm then refused to allow the Appellant to conduct further discovery to fully respond to the allegations. The trial court erroneously considered and granted Defendant's motion for summary judgment without allowing Appellant the opportunity, pursuant to the Mississippi Rules of Civil Procedure, to gather and present all rebuttal evidence.

"The motion for summary judgment is the functional equivalent of the motion for directed verdict made at the close of all the evidence, which simply occurs at an earlier stage. In considering the motion, the trial court must view all the evidence (admissions in pleadings, depositions, affidavits, answers to interrogatories, etc.) in the light most favorable to the non-movant." Sanford v. Federated Guaranty Insurance Company, 522 So. 2d 214, 217 (Miss. 1988); Southern Farm Bureau Casualty Insurance Co. V. Brewer, 507 So. 2d 369, 370 (Miss. 1987); Brown v. Credit Center, Inc., 444 So. 2d 358, 363 (Miss. 1983)). The trial court's conduct in the present matter is analogous to granting a directed verdict against the Plaintiff at trial prior to allowing him to put on his entire case in chief. Such conduct would clearly be improper.

As previously discussed, the trial court did not allow Appellant to depose agent Ronnie Darby. Ronnie Darby is a licensed insurance agent in the State of Mississippi, who exclusively solicits and sells insurance policies on behalf of State Farm. All information reported to agent Darby, or any employee of this agent's office, is imputed to State Farm under the principles of agency law in Mississippi. Southern United Life Insurance Co. v. Caves, 481 So. 2d 764, 765 (Miss. 1985). Likewise, the trial court did not allow Appellant to depose any corporate representative of State Farm, including Mr. Hartlein who provided an affidavit in support of State Farm's claim of a material misrepresentation without supporting evidence. Furthermore, the trial court did not require State Farm to produce the application for insurance even though State Farm's entire argument involves an alleged misrepresentation in the procurement of the insurance contract. "The comment to M.R.C.P. 56 on summary judgment states that summary judgment is not a substitute for the trial of disputed fact issues, rather, the motion may only determine whether there are issues of fact to be tried. Because summary judgment is a powerful instrument that affects the substantive rights of a party, the party against whom summary judgment is sought should be given the benefit of every reasonable doubt." Wilson v. State Farm Fire and Casualty Company, 761 So. 2d 913, 916 (Miss. 2000); Daniels v. GNB Inc., 629 So. 2d 595, 599 (Miss. 1993). The trial court in this matter clearly did not give Appellant the benefit of every doubt. Instead, State Farm was allowed to thwart the discovery process at every turn. The trial court ruled on State Farm's Motion for Summary Judgment before the discovery process was complete and hence prior to hearing all the evidence. Thus, it is axiomatic that the ruling was not supported by sufficient evidence and erroneous. Furthermore, the trial court failed to follow well established precedent and view the Motion for Summary Judgment in the light most favorable to the non-movant.

II. THE TRIAL COURT FAILED TO ADDRESS APPELLANT'S REMAINING CLAIMS.

Appellant alleged claims against State Farm that would not be extinguished even if the Court finds a material misrepresentation under policy no. C20842924A. The Complaint filed in this matter alleges negligent procurement of insurance coverage, breach of fiduciary duty and breach of duty of good faith and fair dealing. The trial court's Order Granting Summary Judgment does not address these remaining issues. For example, although State Farm failed to produce a valid written rejection of UM coverage, it claimed that no UM or UMPD was procured on the accident vehicle. To the extent that no UM coverage existed for the accident vehicle, Burnett asserted a claim against State Farm based on its agent's negligent failure to procure such coverage. Furthermore, Appellant's claims focused on Ronnie Darby's actions and inactions for which, under agency laws, would be imputed to State Farm. Appellant's claim that agent Ronnie Darby had a financial incentive to turn customers away from making claims under their own policies was not addressed by the trial court. At the very least, the trial court's dismissal should be reversed as to these claims.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S WRITTEN STATEMENT OF PROPOSED CORRECTIONS TO THE APPELLATE RECORD.

Appellant acknowledges that it is the responsibility of the parties to designate appropriate portions of the record necessary to reflect the issues that are raised on appeal. In the Interest of N.W., 978 So. 2d 649, 654 (Miss. 2008). M.R.A.P 10(b)(2) states that "if the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."

This case was dismissed on Defendant's motion for summary judgment. Appellant anticipated the need to present evidence of State Farm's withholding of information and witnesses because the trial court's ruling was based on assertions that were not established in discovery, and thus, unsupported by the evidence. Pursuant to M.R.A.P. 10(b)(5), Appellant examined the record and timely requested the addition of certain discovery documents that are material to issues raised by Appellant on appeal.[13] *See* Exhibit "A," Written Statement of Proposed Corrections to the Appellate Record, with Exhibits.

Discovery matters are not ordinarily included in the record because questions seldom arise on appeal that involve discovery disputes[14] and the addition of discovery documents is unnecessary

---

[13] The following documents numbered 1 through 9 were excluded by the trial court and documents numbered 10 and 11 were allowed because they were unopposed:

1) Defendant State Farm's Motion for Protective Order, filed on June 25, 2004;
2) Plaintiff's Motion to Compel Discovery Responses with Exhibits;
3) Plaintiff's Response to Defendant State Farm's Motion for Protective Order;
4) October 21, 2004 letter to Judge Andrew C. Baker from Scott Corlew, attorney for State Farm
5) October 7, 2004 letter to Judge Andrew C. Baker from R. Bradley Best, attorney for Plaintiff
6) January 3, 2005 letter to Judge Andrew C. Baker from Scott Corlew, attorney for State Farm
7) Plaintiff's Motion to Compel Discovery, For Trial Setting, and for Sanctions, filed on May 12, 2006
8) July 20, 2006 letter to Judge Andrew C. Baker from R. Bradley Best, attorney for Plaintiff
9) August 8, 2006 letter to Judge Andrew C. Baker from R. Bradley Best, attorney for Plaintiff
10) Defendant State Farm's Itemization of Facts Pursuant to Uniform Circuit and County Court Rule 4-03(2), filed August 17, 2006
11) Plaintiff's Response to Defendant's Itemization of Facts

[14] *See*, In the Interest of N.W., 978 So. 2d 649 (Miss. 2008) (finding that subpoenas and summonses are not ordinarily included in the record because questions seldom arise over a witness or party failing to appear. However, where the issue of notice is in the forefront of appeal, it is the parties responsibility to designate appropriate documents.)

in the vast majority of cases. However, M.R.A.P. 10(b)(3) states that "[p]apers relating to discovery including depositions, interrogatories. requests for admission, and all related notices, motions or orders" are excluded only "absent designation" and M.R.A.P. 10(b)(5) clearly provides an avenue for designating such documents when they are material to the issues on appeal. Pursuant to M.R.A.P. 10(b)(5), Appellant requested the above referenced additions in order to provide this Court with a complete and accurate record of the course of proceedings of the trial court.

State Farm objected to Appellant's proposed additions on the basis that "the discovery dispute between the parties will in no way effect the appellate court's decision in this matter." *See* Exhibit "B." Appellant rebutted this assertion as the issues involved in the summary judgment motion, which were ultimately dispositive of this case, relate to facts that were not established in discovery and therefore, the proposed additions of discovery documents are "inextricably tied" to the issues on appeal. *See* Exhibit "C." The trial judge denied #1 - #9 of Appellant's proposed additions and stated that "Plaintiff's Notice of Appeal concerns the trial court's ruling on the Defendant's Motion for Summary Judgment; therefore discovery disputes between the parties would not be helpful to the appellate court's decision in this matter." *See* Exhibit "D." Appellant contends that this ruling was an abuse of discretion. Further, the trial judge's decision to exclude from this Court the use of certain documents was prejudicial and fundamentally unfair. In effect, the trial judge has arbitrarily precluded Appellant from raising certain relevant issues and has deprived this Court of the benefit and use of a complete record on appeal.

In the same Order denying #1 through #9 of Appellant's additions, the trial court allowed Defendant to amend the Appellate Record to include its Memorandum of Authorities in Support of it's Motion for Summary Judgment as it "would be helpful" to the appellate court. *See* Exhibit "D."

The addition of this document demonstrates the inconsistent and arbitrary nature in which the trial judge determined what documents were allowed and what documents were excluded. Defendant's Memorandum of Authorities in Support of Motion for Summary Judgment, allowed for inclusion, was not a document that was filed with the Court, whereas many of the items requested for addition by Appellant were documents that were filed with the Court and are public record, yet were not allowed.

In conclusion, the Appellant is responsible for designating the record in a manner sufficient to allow the appellate court to review his issues. Sanghi v. Sanghi, 759 So. 2d 1250 (Miss. 2000). Appellant followed the procedure laid out in M.R.A.P. 10 to create a Record that would convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the basis of the appeal. The trial court erred in denying Appellant's proposed additions to the Record, specifically #1 through #9 of Plaintiff's Written Statement of Proposed Corrections to the Appellate Record as such documents are clearly appropriate and necessary for this Court's consideration of the issues on appeal. Consequently, this Court lacks the benefit of a complete record on appeal and should reverse the trial court's decision to allow the Appellant to supplement the record with the excluded items described in detail above. This is the only action which would allow this Court to fully consider the issues which are presently on appeal.

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2008-CA-01909

CURTIS BURNETT, JR. **APPELLANT**

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

ADDENDUM

CERTIFICATE OF SERVICE

I, TIFFANY HATCHER SMITH, of Holcomb Dunbar, P.A., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

Honorable Andrew C. Baker
Panola County Circuit Court
P O Drawer 368
Charleston, MS 38921-0368

John A. Banahan, Esq.
Bryan, Nelson, Schroeder
Castigliola & Banahan, PLLC
1103 Jackson Ave.
Pascagoula, MS 39568-1529
And, the original and three (3) copies of the same to:

Betty W. Sephton
Mississippi Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, the 26th day of May, 2009.

TIFFANY HATCHER SMITH