CASE NO. 2008-CA-02011

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN P. MLADINEO AND SHERRY MLADINEO,

APPELLANTS

V.

RICHARD EARL SCHMIDT, Individually, as an agent of Nationwide within the scope of his agency, and as an agent and/or employee of the Michael Felsher Insurance Agency within the course and scope of his agency and/or employment; **MICHAEL FELSHER INSURANCE AGENCY,** as an agent of Nationwide and/or principal of Agent Richard Earl Schmidt; and **NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY,**

APPELLEES

BRIEF OF APPELLEES RICHARD EARL SCHMIDT, MICHAEL FELSHER INSURANCE AGENCY, AND NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

(ORAL ARGUMENT NOT REQUESTED)

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-02011

JOHN P. MLADINEO AND
SHERRY MLADINEO **APPELLANTS**

VERSUS

RICHARD EARL SCHMIDT, et al. **APPELLEES**

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. John P. Mladineo, Plaintiff/Appellant;
2. Sherry Mladineo, Plaintiff/Appellant;
3. Nationwide Property & Casualty Insurance Company, Defendant/Appellee;
4. Richard Earl Schmidt, Defendant/Appellee;
5. Michael Felsher Insurance Agency, Defendant/Appellee;
6. H. Mitchell Cowan, Watkins Ludlam Winter & Stennis, P.A., attorney for Defendants/Appellees;
7. Laura L. Hill, Watkins Ludlam Winter & Stennis, P.A., attorney for Defendants/Appellees;
8. Kenneth S. Clark, Kirkland & Ellis, LLP, attorney for Defendants/Appellees;
9. Charles R. Wilbanks, Jr., Wells Moore Simmons & Hubbard, PLLC, attorney for Plaintiffs/Appellants;
10. Matthew R. Dowd, Wells Moore Simmons & Hubbard, PLLC, attorney for Plaintiffs/Appellants;

11. Frank T. Moore, Wells Moore Simmons & Hubbard, PLLC, attorney for Plaintiffs/Appellants.

Respectfully submitted, this the 4th day of January, 2010.

H. Mitchell Cowan

H. MITCHELL COWAN

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE RULES

SECONDARY SOURCES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-02011

JOHN P. MLADINEO AND SHERRY MLADINEO — **APPELLANTS**

VERSUS

RICHARD EARL SCHMIDT, et al. — **APPELLEES**

STATEMENT OF ISSUES

1. Whether the trial court properly granted summary judgment in favor of Richard Schmidt, Michael Felsher and Nationwide Property and Casualty Insurance Company on all claims asserted against them by John Mladineo and Sherry Mladineo, since the flood exclusion contained in the homeowners policy is clear and unambiguous and the policy containing that provision was delivered to the Mladineos more than four months in advance of Hurricane Katrina.

2. Whether the Mladineos can reasonably and justifiably rely on their insurance agent's alleged misrepresentation of coverage when the insurance policy they received more than four months before their loss clearly and unambiguously excluded such coverage.

3. Whether the Mladineos can avoid their established duty under Mississippi law to read their insurance policy.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-02011

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VERSUS

RICHARD EARL SCHMIDT, et al. **APPELLEES**

STATEMENT REGARDING ORAL ARGUMENT

Appellees do not request oral argument in this appeal. The trial court's Order Granting Summary Judgment was correct. The Circuit Court therefore did not commit any errors of law that would warrant reversal. Nor does this appeal raise any complicated issues of fact or unsettled issues of law; to the contrary – all issues raised by Appellants are in fact well-settled under existing Mississippi law. Accordingly, Appellees submit that oral argument is not necessary to the determination of the issues presented by this appeal.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-02011

JOHN P. MLADINEO AND
SHERRY MLADINEO — APPELLANTS

VERSUS

RICHARD EARL SCHMIDT, et al. — APPELLEES

BRIEF OF APPELLEES

I. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Plaintiffs/Appellants John and Sherry Mladineo filed this lawsuit in the Circuit Court of Jackson County, Mississippi on September 29, 2006. Thereafter, Nationwide Property and Casualty Insurance Company ("Nationwide") timely removed the case to federal court on November 16, 2006 on the basis of diversity jurisdiction. The case was remanded to state court on May 16, 2007, where it was assigned to Special Circuit Judge Billy Bridges. The parties then exchanged initial sets of written discovery and, on November 14, 2007, jointly entered into an Agreed Scheduling Order.

Shortly thereafter, Plaintiffs moved for and obtained leave to file an Amended Complaint. Defendants timely answered Plaintiffs' Amended Complaint on February 20, 2008, and the parties continued to participate in discovery, including depositions and additional document productions. As discovery progressed, the parties jointly sought and obtained an amendment of the Scheduling Order. Thus, an Amended Agreed Scheduling Order was entered May 8, 2008, which extended the discovery and motions deadlines to the mutually agreed-upon dates of October 10, 2008 and October 24, 2008, respectively.

Operating under that Scheduling Order, Defendants filed their Motion for Summary Judgment on September 17, 2008 – more than one month in advance of the agreed-upon motions deadline. Briefing of that Motion was completed on October 9, 2008, and a hearing was conducted before the Honorable Judge Billy Bridges on October 10, 2008. After hearing argument of counsel for several hours, the trial court took Defendants' Motion for Summary Judgment under advisement. Then, on November 7, 2008, the court entered its Order Granting Summary Judgment and dismissed all of Plaintiffs' claims as a matter of law. Plaintiffs filed their Notice of Appeal on December 5, 2008.

B. STATEMENT OF FACTS

This entire action arises from Plaintiff John Mladineo's ("Mladineo") brief dealings with Nationwide agent Richard Schmidt concerning the sale and purchase of a Nationwide homeowners insurance policy for Plaintiffs' property located at 1210 Iola Road in Ocean Springs, Mississippi. (R. 281, R.E. 1). Mladineo is a well-educated physician who has lived and practiced medicine in the Jackson, Mississippi area since 1978. (R. 859, R.E. 24 at pp. 8-9). At the time of his deposition in March 2008, Mladineo and his wife had maintained Nationwide homeowners insurance on their Jackson residence for over fifteen (15) years. (R. 860-861, R.E. 25-26 at pp. 13-14).

In February 2005, Plaintiffs entered into a contract to purchase a new residence in Ocean Springs, Mississippi. (R. 865, R.E. 30 at p. 32). Mladineo testified that, since they maintained Nationwide homeowners coverage on their primary residence in Jackson, they "decided that [they] would just continue with the coverage with Nationwide" for the home in Ocean Springs. (R. 867-868, R.E. 32-33 at pp. 41-42). Accordingly, Mladineo stated that he looked in the phonebook, telephoned the Felsher Insurance Agency ("Felsher Agency") in Ocean Springs, and

"indicated that I ***wanted to speak with an agent about obtaining some homeowners insurance.***" (R. 867-868, R.E. 32-33 at pp. 41-42) (emphasis added)[1]. Nationwide agent Richard Schmidt ("Schmidt") came to the phone.

Between February 15, 2005 and March 5, 2005, Mladineo had several telephone conversations with Schmidt concerning the insurance coverage Mladineo sought to obtain for the subject property. (R. 868, R.E. 33 at p. 44). In fact, all of Mladineo's dealings with Schmidt were by telephone; he did not have any face-to-face interaction with anyone at the Felsher Agency prior to Hurricane Katrina. (R. 868, R.E. 33 at p. 44). Mladineo testified that he advised Schmidt that he had Nationwide coverage on his Jackson home and wanted to continue with that coverage for his new home. (R. 868, R.E. 33 at pp. 44-45). Mladineo now alleges that he specifically made an "inclusive request" for insurance that would provide "complete coverage for wind and water damage" to the subject property. (R. 868-869, R.E. 33-34 at pp. 45, 49). In response to this request, Mladineo alleges that Schmidt informed him that their property was not in a flood plain and that a separate policy of flood insurance would not be required by Plaintiffs' mortgagee. (R. 868, R.E. 33 at p. 45).[2] In turn, Mladineo alleges Schmidt suggested that they purchase a "hurricane policy," which would allegedly provide coverage for all damages sustained during a named storm. (R. 868, R.E. 33 at p. 45).[3] Interestingly, Mladineo's notes from a conversation he claims to have had with Schmidt concerning the alleged difference

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[1] Emphasis added unless otherwise noted.

[2] Mladineo's residential property appraisal likewise indicated "Subject property is not located in a FEMA special flood hazard area," which Mladineo acknowledged during his deposition (R. 892, R.E. 57 at p. 139).

[3] It is worth noting that Richard Schmidt disputes Mladineo's testimony that he was encouraged by Schmidt to buy a "hurricane policy." Schmidt stated during his deposition that he has never used the term "hurricane policy" and therefore would not have made any such suggestion to Mladineo. (R. 1938, R.E. 81 at p. 49). Nevertheless, for purposes of their summary judgment motion, Appellees accepted all of Mladineos' contentions as true.

between a "hurricane policy" and a "regular homeowner wind/hail policy" indicate "***same coverage,***" but "***diff[erent] ded[uctible].***" (R. 876-877, R.E. 41-42 at pp. 77-79) (emphasis added). *See also* Feb. 2005 Handwritten Note from John P. Mladineo "My Notes In Talks With Nationwide Agent – R. Schmidt" (R. 621, R.E. 83). This handwritten note was contemporaneously created by Mladineo during his telephone conversations with Schmidt. (R. 876-877, R.E. 41-42 at pp. 77-79).

Mladineo admits that he had been the primary person responsible for handling insurance matters in his household since 1978. (R. 863, R.E. 28 at p. 22-23). And since the Easter flood of 1979 in Jackson, he had known that standard homeowners policies do not provide coverage for flood damage. (R. 865, R.E. 30 at pp.30-31). Mladineo also knew that separate policies of flood insurance were available under the National Flood Insurance Program. (R. 861, 869, R.E. 26, 34 at pp. 16-17, 47-48). Nonetheless, ***Mladineo never affirmatively requested a flood insurance policy from Richard Schmidt after Schmidt advised Mladineo that flood insurance would not be required by his lender.*** (R. 870, R.E. 35 at pp. 51-52). Indeed, when specifically asked whether he requested a flood insurance policy during his deposition, Mladineo stated "[y]ou're distorting the facts," and only when pressed did he admit "No, I did not." (R. 870, R.E. 35 at pp. 51-52). This failure, he stated, was because he thought the so-called "hurricane policy" would cover flood. (R. 870, R.E. 35 at pp. 51-52).

The closing on the Ocean Springs property took place on March 10, 2005. (R. 871, R.E. 36 at p. 54). Prior to that time, Mladineo never requested a sample policy or otherwise asked to see a copy of his insurance policy. (R. 872, R.E. 37 at pp. 58, 60). Mladineo admits that he subsequently received a copy of his policy by mail approximately six (6) weeks after the March 10 closing. (R. 871, 878, R.E. 36, 43 at pp. 54, 83). The declarations page to that policy was

expressly entitled "***Homeowner*** Policy Declarations." (R. 877, R.E. 42 at pp. 80-81) (emphasis added). Mladineo admits that he did not read the policy when he received it. (R. 871, R.E. 36 at p. 55). Instead, he filed it away with his personal papers at his Jackson home, coincidentally in the same file that housed his Jackson homeowners policy. (R. 871, R.E. 36 at p. 55-56). Ultimately, although he had possession of the Ocean Springs policy for approximately four months prior to Hurricane Katrina – or, stated differently, for one-third the length of the entire 12-month policy period – Mladineo admits that he never read his insurance policy at any time prior to the hurricane. (R. 871, R.E. 36 at p. 55).[4] In addition, Mladineo did not have any further conversations with any Nationwide employee or agent after the March 10 closing. (R. 873, R.E. 38 at p. 62).

Nationwide does not issue "hurricane policies." The policy form that was issued to Plaintiffs was a standard HO 23-A homeowners policy, with a form H-6107 Hurricane Deductible Endorsement. (R. 914-953, R.E. 84-123). Indeed, Mladineo admitted during his deposition that the HO 23-A homeowners insurance policy form is the same main policy form he maintained on his home in Jackson, a fact which he noticed prior to Hurricane Katrina. (R. 907, R.E. 72 at p. 201). *See also* Ridge Drive Declarations Page (R. 954-55, R.E. 124-125). The only difference was "that the policy on the Ocean Springs [house] had the hurricane deductible endorsement." (R. 907, R.E. 72 at p. 201). Nationwide's HO 23-A homeowners policy provides, in pertinent part:

> Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:

[4] Mladineo also admitted that, despite maintaining Nationwide homeowners coverage for his Jackson residence for more than fifteen (15) years, he had never read that policy either. (R. 863-864, R.E. 28-29 at pp. 25-26).

> (1) **flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.**

(R. 930, R.E. 100) (emphasis added). In addition, the H-6107 Hurricane Deductible Endorsement contains a similar exclusion, which states:

> Coverage under this policy includes loss or damage caused by the peril of windstorm during a hurricane . . . **Hurricane coverage does not include loss caused by flooding, including but not limited to flooding resulting from high tides and storm surges.**

(R. 918, R.E. 88) (emphasis added).

Mladineo admitted that when he purchased the Ocean Springs policy, he understood that the policy itself set forth the applicable coverages and exclusions for his insurance. (R. 878-879, R.E. 43-44 at pp. 85-86). Moreover, when he read these two exclusions during his deposition, Mladineo admitted he understood them, and that had he read them prior to Hurricane Katrina, he would have known that the subject homeowners policy did not cover flood damages resulting from the hurricane. (R. 880, R.E. 45 at pp. 91-92).

Hurricane Katrina made landfall along the Mississippi Gulf Coast on August 29, 2005, and the Mladineos reported their claim to Nationwide under the subject homeowners policy on or about September 1, 2005. (R. 872, R.E. 37 at p. 61).[5] Thereafter, a Nationwide adjuster inspected the loss under the terms of the subject policy. During that inspection, ***the adjuster asked Mladineo whether he had flood insurance for the property and Mladineo responded "No."*** (R. 873-874, R.E. 38-39 at pp. 65-66) (emphasis added). Instead, Mladineo stated that he believed his "hurricane policy" included flood coverage. (R. 873-874, R.E. 38-39 at pp. 65-66). Ultimately, Nationwide paid the Mladineos a total of $27,885.36 for wind damage to the subject

[5] The Mladineos' property was a standing loss and wind damage was clearly identified and distinguished from flood damage.

property as a result of its adjustment of the subject claim. (R. 883, R.E. 48 at p. 105). However, Nationwide denied coverage for those damages caused by Hurricane Katrina's storm surge under the water damage exclusions in the subject policy and Hurricane Deductible Endorsement. (R. 2027-28, R.E. 126-127).

Mladineo admitted during his deposition and in his interrogatory responses that he has no claim against Nationwide, Schmidt or the Felsher Agency for uncompensated wind damage to the subject property. (R. 883, R.E. 48 at p. 105). Stated another way, Mladineo agrees that he was fully compensated by Nationwide for wind damage. Instead, all of the Mladineos' claims derive from John Mladineo's contention that Schmidt failed to advise him of the water damage exclusions in the subject policy prior to the March 10, 2005 closing on the Ocean Springs property and instead represented to him that a "hurricane policy" would cover such damage. (R. 886, R.E. 51 at pp. 114-16). Interestingly, however, Mladineo acknowledged that insurance agents earn commissions when they sell separate flood insurance policies, and stated that he had "no idea" why Schmidt would misrepresent the terms of the homeowners policy when he could earn a separate commission by selling a flood policy. (R. 888-889, R.E. 53-54 at pp. 124-27). Likewise, Schmidt testified that his job is commission-based, and "If you don't sell, you don't eat." (R. 1933, R.E. 80 at p. 28).

On October 26, 2005, Mladineo met with Schmidt to discuss Nationwide's denial of coverage. (R. 874, R.E. 39 at pp. 68-69). As a result of that meeting, Schmidt prepared and submitted an Agent Professional Liability Incident Report, indicating Mladineo's concerns regarding coverage for flood damage. (R. 874, R.E. 39 at p. 69). That report was forwarded to Nationwide for investigation. Notably, Mladineo admitted during his deposition that he did not believe Schmidt completed or submitted the Incident Report on Mladineo's behalf. (R. 875, R.E.

40 at p. 71) ("I'm not sure 'on my behalf' is appropriate."). Nationwide investigated Schmidt's report regarding the flood damage to the Mladineos' residence and ultimately determined that there had been no agent error with respect thereto because Mladineo received a copy of his policy, which clearly and unambiguously excluded flood coverage. (R. 881, R.E. 46 at p. 96). Furthermore, as Mladineo confessed during his deposition, Schmidt never admitted that he affirmatively misrepresented any of the terms of the policy; instead, Schmidt stated only that he "apparently" never advised Mladineo of the existence of the flood exclusion. (R. 886, R.E. 51 at p. 115). *See also* Deposition of Schmidt (R. 1956, R.E. 82 at p. 118).

On September 29, 2006, the Mladineos filed the subject lawsuit against Nationwide, Schmidt and the Felsher Agency, asserting the following claims: (1) failure of agent to procure requested coverage; (2) negligence; (3) negligent misrepresentation; (4) "independent tort;" (5) breach of contract; (6) breach of the duty of good faith and fair dealing; (7) tortious breach of contract; and (8) bad faith. (R. 281-301, R.E. 1-21).

II. SUMMARY OF THE ARGUMENT

In this Hurricane Katrina claim, the Mladineos do not dispute that their vacation home – which remained standing after the storm – was damaged by flood waters. Rather, they claim that the policy they received (but knowingly failed to read) several months before Hurricane Katrina, should have been a "Hurricane Policy" – a product that does not exist and that Nationwide does not offer – and should have included coverage for damage caused by flood waters. Because Mississippi law requires an insured to read his policy and imputes knowledge of the contents of the policy to the insured whether he does so or not, the trial court correctly granted summary judgment in favor of Appellees on all of the Mladineos' claims.

The Mladineos try in every way imaginable to skirt around this well-settled rule of law, but to no avail. The trial court correctly held that the Mladineos' misrepresentation, negligence, and independent tort claims fail as a matter of law. It is undisputed that the Mladineos received a copy of their homeowners policy a full four months prior to Hurricane Katrina and knowingly failed to read it. Four months constitutes one-third of the entire twelve-month policy period for the subject policy and provided more than enough time for the Mladineos to read that policy and ascertain any problems with their coverage. Indeed, Mladineo admits that, had he read his policy, he would have known he had no flood coverage. Because Mississippi law requires an insured to read his policy and imputes knowledge of what is contained therein, the Mladineos have no claim based upon their not having flood insurance. The policy clearly excludes such coverage – a fact the Mladineos would have known had they bothered to read it – and reliance on any alleged contrary misrepresentations that would have been revealed or clarified by reading the policy is *per se* unreasonable.

The trial court also correctly dismissed the Mladineos' failure to procure and negligence claims. To begin, the Mladineos cannot maintain their failure to procure insurance claim because their policy was delivered and they had four months to review it. By that point, the insured knows or is deemed to know what coverage he has. If he does not have the coverage he wants and fails to do anything to cure the deficiency, he loses his right to complain that the agent failed to obtain the requested coverage. Furthermore, there is no indication that Schmidt failed to use reasonable care in obtaining a policy conforming to the request of the insured, which is all he is required to do under Mississippi law. Instead, the undisputed facts, at most, indicate nothing more than a miscommunication between Schmidt and Mladineo or a misunderstanding by Mladineo regarding the coverage Mladineo allegedly sought.

Despite the Mladineos' strained attempts to re-characterize these settled principles of Mississippi law, none of the authorities relied upon by the trial court have been limited to their facts as the Mladineos contend, nor have the Mladineos cited any valid authority to the contrary. Indeed, they cannot. Since John Mladineo admitted he received the policy four months before Hurricane Katrina, and since the policy he received unambiguously excludes coverage for flood damage, his failure to procure claims fail as a matter of law. Additionally, none of the Mladineos' other alleged "bases" for a negligence claim against Schmidt save them from summary judgment for the simple reason that the facts they allege – even if true – are wholly immaterial to their claim or their damages.

The Mladineos' claims for breach of contract and breach of the implied duty of good faith and fair dealing also were correctly dismissed. First, the Mladineos do not seek recovery for unpaid wind damage; rather, they admit that the only damage for which they seek coverage was caused by flooding. Since flooding is unambiguously excluded from coverage in the subject insurance policy, Nationwide has not breached its contract with the Mladineos by denying that portion of their claim. Furthermore, since nothing that agent Richard Schmidt allegedly said can legally change the policy to expand its coverage, and since the Mladineos received the policy with its unambiguous flood exclusion, the policy is enforceable as written. Nationwide is entitled to enforce its written policy exclusions; therefore, Nationwide breached no duty of good faith and fair dealing by applying the flood exclusion to deny that portion of the Mladineos' claim.

Moreover, the so-called "duty to read" and "imputed knowledge" doctrines are substantive rules of law that govern the enforcement of all legal contracts, including insurance contracts. They are not affirmative defenses, and a defendant cannot "waive' its right to rely

upon established principles of Mississippi law in a summary judgment motion by actively participating in litigation that the Plaintiffs instituted. Furthermore, Appellees invoked their right to rely upon the provisions of the policy in each of their Answers, including the water damage exclusions, and affirmatively stated that the Mladineos' claims were barred by those policy provisions. Moreover, Appellees operated within the parameters of an ***Agreed*** Scheduling Order throughout this litigation, and actually filed their Motion for Summary Judgment more than four weeks ahead of the October 24, 2008 motions deadline set forth therein. For these reasons, the Mladineos' convoluted waiver argument – which is nothing more than an attempt to throw everything against the wall and see what sticks – is wholly misplaced and inapplicable in this case.

Nor can the Mladineos successfully create a claim for bad faith based on Nationwide's alleged failure to properly and adequately investigate whether its agent committed negligence in procuring the subject policy. Nationwide owed no duty to the Mladineos to investigate the Agent Professional Liability Incident Report filed by Schmidt. Even if Nationwide owed a duty, which it denies, such duty in this instance would be to Schmidt. Mladineo admitted as much in his deposition when he recognized that the incident report was not submitted "on his behalf." Moreover, Mississippi law does not permit an injured party to maintain a direct damages action against an alleged tortfeasor's liability insurer. Consequently, the trial court correctly held that the Mladineos cannot create the illusion of coverage under a policy that does not exist and to which they are not a party.

For these reasons and those discussed below, the trial court correctly granted Appellees' Motion for Summary Judgment with respect to all of the Mladineos' claims.

III. ARGUMENT

A. STANDARD OF REVIEW

Mississippi appellate courts apply a *de novo* standard of review to a grant of summary judgment by the trial court. *Hudson v. Courtesy Motors, Inc.,* 794 So. 2d 999, 1002 (Miss. 2001). Summary judgment is proper "if 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 a judgment as a matter of law." Miss. R. Civ. P. 56(c). The evidence must be viewed in the light most favorable to the non-movant. *Northern Elec. Co. v. Phillips,* 660 So. 2d 1278, 1281 (Miss. 1995).

"The burden of demonstrating that no genuine issue of material fact exists is on the moving party." *Lewallen v. Slawson,* 822 So. 2d 236, 238 (Miss. 2002). Where the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). The non-moving party may not defeat a motion for summary judgment with mere general allegations or unsupported denials of material fact. *Drummond v. Buckley*, 627 So. 2d 264, 267 (Miss. 1993).

Only when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party" is a full trial on the merits warranted. *Lindsey v. Sears Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment." *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985). "[T]he existence of

a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the *material* issues of fact." *Id.* (emphasis in original).

B. THE TRIAL COURT CORRECTLY HELD THAT THE MLADINEOS' CLAIMS ARE BARRED DUE TO THEIR IMPUTED KNOWLEDGE OF THE CONTENTS OF THEIR POLICY.

Plaintiffs cannot recover for any alleged misrepresentation, independent tort, breach of contract, or breach of the duty of good faith and fair dealing. To prevail on these claims, Plaintiffs must establish that they ***reasonably relied*** on Schmidt's alleged misrepresentations,[6] a hurdle they cannot leap. Plaintiffs' claims were properly dismissed for one simple reason – the Nationwide policy that Plaintiffs received four months prior to Hurricane Katrina clearly and unambiguously excluded coverage for flood damage. Under Mississippi law, Plaintiffs are deemed to have knowledge of this policy exclusion, making any reliance on Schmidt's alleged representation to the contrary unreasonable as a matter of law. As Mississippi courts have ruled time and again, a person cannot recover for damages allegedly caused by a misrepresentation that would have been revealed or clarified by a simple reading of the contract. The Mladineos are no different.

(1) Mississippi Law Requires The Mladineos To Read Their Policy.

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[6] As an aside, the Mladineos contend that Appellees should be liable for Schmidt's alleged misrepresentations that the subject policy provided coverage for all water damage caused by named storms. Yet, Dr. Mladineo admittedly knew that flood coverage was separate from homeowners coverage, and that he did not have a flood policy. (R. 861, 865, 869-870, R.E. 26, 30, 34-35 at pp. 16-17, 30-31; 47-48; 51-52). He also admitted that Schmidt told him he did not need to purchase a flood insurance policy because the subject residence was not in a flood zone, and flood insurance was not required by Dr. Mladineo's lender. (R. 869, R.E. 34 at p. 47). Telling homeowners that they are not required to buy flood insurance because they are not in a flood zone is quite different from telling them that they do not need to buy flood insurance if they want coverage for water damage. Indeed, the former is not a representation that the Mladineos' homeowners policy provided flood coverage. In an attempt to skirt this knowledge, Plaintiffs' misrepresentation, independent tort, breach of contract, and breach of the duty of good faith and fair dealing claims are based solely on the allegation that Schmidt told Dr. Mladineo he would get a "Hurricane Policy," covering the property for wind and water damage. Nationwide, however, does not sell any product known as a "Hurricane Policy."

It is undisputed that the Mladineos received their Nationwide homeowners policy four months prior to Hurricane Katrina. Even though four months constitutes one-third of the entire twelve-month policy period, neither John nor Sherry Mladineo ever read their Nationwide policy. Nevertheless, under clear Mississippi law, the Mladineos had a duty to read their policy and were bound by its provisions whether they read it or not. *See GuideOne Mut. Ins. Co. v. Rock*, No. 1:06CV218-SA-JAD, 2009 WL 2195047, at *2-*3 (N.D. Miss. July 22, 2009) (citing multiple Mississippi state court cases for proposition that insureds are, as a matter of law, bound by knowledge of policy contents regardless of whether they actually read policy); *Gibson v. Markel Internat'l, Ltd.*, No. 1:07CV1245-HSO-JMR, 2008 WL 3842977, at *4 (S.D. Miss. Aug. 14, 2008) (policyholders have duty to read policy and whether or not policy is read, knowledge of its contents will be imputed to policyholder); *Williams v. Coldwell Banker First Greenwood-LeFlore Realty, Inc.*, No. 4:05CV192-P-A, 2008 WL 695503, at *1 (N.D. Miss. March 13, 2008) (person is bound by contents of policy whether he reads them or not); *Ballard v. Commercial Bank of DeKalb*, 991 So. 2d 1201, 1207 (Miss. 2008) (recognizing that individuals have legal obligation to read contracts they enter into), citing *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1257 (Miss. 1991); *Swindle v. Harvey*, No. 2008-CA-00560-COA, 2009 WL 1758840, at *8 (Miss. Ct. App. June 23, 2009) (parties to contracts have "inherent duty" to read contract terms), citing *Bailey v. Estate of Kemp*, 955 So. 2d 777, 783 (Miss. 2007); *Riley v. F.A. Richard & Assocs., Inc.*, 16 So. 3d 708, 718 (Miss. Ct. App. 2009) (rejecting misrepresentation claims because plaintiff had legal duty to read his contracts), *cert. denied*, 17 So. 3d 99 (Miss. 2009).

In a Hurricane Katrina case directly on point – and construing the same Nationwide homeowners policy – the plaintiffs/insureds argued that since they asked for "full coverage,"

they should have received flood coverage. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 438 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (2008). Rejecting the plaintiffs' argument, the United States Court of Appeals for the Fifth Circuit, applying Mississippi law, held as follows:

> ***The insured has an affirmative duty to read the policy.*** *Smith v. Union Nat'l Life Ins. Co.*, 286 F.Supp.2d 782, 788 (S.D.Miss.2003); *Gulf Guar. Life Ins. Co. v. Kelley*, 389 So.2d 920, 922 (Miss.1980). Whether the policy was read or not, however, constructive knowledge of its contents is imputed to the policyholder. *Ross* [*v. Citifinancial, Inc.*, 344 F.3d 458, 464 (5th Cir. 2003) (quoting *Godfrey*, 584 So. 2d at 1257)].

Id.

Despite the Mladineos' suggestion that the *Leonard* opinion is somehow contrary to Mississippi substantive law on this point, the Mississippi Supreme Court, the Mississippi Court of Appeals, and Mississippi federal district courts sitting in diversity have repeatedly reaffirmed the rule of law that a person is deemed to know the contents of his insurance policy, stating:

> Furthermore, this Court has held that whether an insured reads the entire insurance policy, the "knowledge of its contents would be imputed to them as a matter of law."

Oaks v. Sellers, 953 So. 2d 1077, 1082 (Miss. 2007), quoting *Stephens v. Equitable Life Assur. Soc'y of the United States*, 850 So. 2d 78, 82 (Miss. 2003) and *Cherry v. Anthony*, 501 So. 2d 416, 419 (Miss. 1987).[7] Even more importantly, the Supreme Court has specifically held that ***a person cannot complain about a misrepresentation that would have been disclosed by a simple reading of the contract.*** *Oaks*, 953 So. 2d at 1082.; *see also Ballard*, 991 So. 2d at 1207, citing *Godfrey*, 584 So. 2d at 1257.

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[7] The Mladineos' attempt to characterize the *Oaks* and *Stephens* opinions as "mere dicta" is unavailing. Whether those entire opinions centered around the duty to read and imputed knowledge doctrines does not strip the cases of their strong precedential effect. In both cases, the Mississippi Supreme Court followed a long line of Mississippi cases by reiterating the settled rule that "a person is under an obligation to read a contract ... 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." *Id.* (quoting *Stephens*, 850 So. 2d at 82).

As the United States District Court for the Southern District of Mississippi recently pointed out in *Allgood v. Metropolitan Life Insurance Co.*, 543 F. Supp. 2d 591 (S.D. Miss. 2008):

> ***Insureds themselves have an affirmative duty to read the terms and conditions of their policies.*** *Titan Indem. Co. v. City of Brandon, Miss.*, 27 F.Supp.2d 693, 697 (S.D. Miss. 1997). An insured cannot avoid the terms of the contract "merely because [they] failed to read it." *Oglesbee v. Nat'l Sec. Fire & Cas. Co.*, 788 F.Supp. 909, 913 (S.D.Miss. 1992).

Allgood, 543 F. Supp. 2d at 593 (emphasis added). In *Allgood*, the court enforced a policy provision that voided life insurance coverage if the parties divorced. Because the insured and beneficiary/wife had divorced shortly before the insured's death, she could not collect her ex-husband's life insurance policy proceeds even though she had paid the premiums. Plaintiff was unaware of the policy provision and argued that it should not be enforced against her. The court rejected her position, stating that knowledge of the exclusion was imputed to her because she had an affirmative duty to read the policy. *Id.*; *see also Frye v. Southern Farm Bureau Cas. Ins. Co.*, 915 So. 2d 486, 492 (Miss. Ct. App. 2005) ("[A] party has a duty to read an insurance contract and knowledge of the contract's terms will be imputed to the party even if she does not read it."). The court further stated: "***Although this places the burden on the insured to meticulously review their policy contracts, that burden is created by the unambiguous terms of the contract and supported by unequivocal state law.***" *Allgood*, 543 F. Supp. 2d at 594.

In this case, all of the Mladineos' claims derive from John Mladineo's contention that he believed he had flood coverage because Mr. Schmidt told him that he had a "Hurricane Policy." But this claim is legally untenable. Had the Mladineos simply read the policy, they would have known they had no flood coverage – a fact which John Mladineo admitted during his deposition. Nonetheless, since Plaintiffs are imputed with knowledge of their insurance policy despite failing

to read it, Plaintiffs' misrepresentation claims must fail. Indeed, as the Mississippi Court of Appeals has repeatedly reiterated:

> ***[A] person is under an obligation to read a contract prior to signing it, and will not be heard to complain of an oral misrepresentation which would have been corrected by reading the contract.*** *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber and Supply Co. Inc.*, 584 So. 2d 1254, 1257 (Miss.1991). Both the 2001 and 2002 insurance policies explained the whole life cash value portion of the policy and both riders. Even if Hawkins had mislead Evans, which we do not find, everything was set forth in the policies, and it was easy to understand. ***Evans admitted during her deposition that she did not read the policy. Mississippi Case law provides as a matter of law that insureds are bound by the contents of a contract that they enter into even if they have not actually read it.*** *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss.1987).

Evans v. Horace Mann Life Ins. Co., 946 So. 2d 410, 413 (Miss. Ct. App. 2006); *see also Swindle*, 2009 WL 1758840, at *8 ("[A] party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read it and explain it.") (internal quotations and citations omitted); *Riley*, 16 So. 3d at 718 (same).

Because a simple reading of the policy would have disclosed the lack of flood coverage in the subject policy, Plaintiffs' misrepresentation claims – all of which are predicated upon John Mladineo's unjustified belief that he had flood coverage – were properly dismissed.

(2) Dr. Mladineo's Alleged Reliance On Mr. Schmidt's Representation Is Unreasonable As A Matter Of Law.

For over three decades, courts applying Mississippi law have held that an "[i]nsured is charged with knowledge of the terms of the policy upon which he relied for protection." *Atlas Roofing Mfg. Co. v. Robinson & Julienne, Inc.*, 279 So. 2d 625, 629 (Miss. 1973). *See also Strong v. First Family Fin. Servs., Inc.*, 202 F. Supp. 2d 536, 543 (S.D. Miss. 2002); *Stephens*, 850 So. 2d at 82; *Cherry*, 501 So. 2d at 419; *Parker v. Horace Mann Life Ins. Co.*, 949 So. 2d 57, 59 (Miss. Ct. App. 2006), *cert. denied*, 949 So. 2d 37 (Miss. 2007); *Haggans v. State Farm Fire*

& Cas. Co., 803 So. 2d 1249, 1252 (Miss. Ct. App. 2002). As a result, Mississippi courts and federal courts applying Mississippi law have repeatedly held that, in the face of a clear and unambiguous contract, an insured's reliance upon contrary representations by an agent is unreasonable as a matter of law. *See Leonard*, 499 F.3d at 440 ("[T]he Leonards' reliance on Fletcher's statements was objectively unreasonable in light of the policy language clearly excluding water damage, including damage caused by a flood"); *id.* ("Under Mississippi law, a party's reliance on representations by an insurance agent that contradict the policy language is unreasonable.") (citing *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 464 (5th Cir. 2003)); *Stephens*, 850 So. 2d at 83 (Rejecting misrepresentation claims against insurer because, "insureds are bound as a matter of law by the knowledge of the contents of a contract in which they entered notwithstanding whether they actually read the policy. Any alleged oral agreement in this case does not have any effect on the written contract.") (internal citations omitted); *Hutton v. Am. Gen. Life & Accident Ins. Co.*, 909 So. 2d 87, 95 (Miss. Ct. App. 2005) ("In the face of the contract, a party's reliance upon contrary representations by the agent is unreasonable.").

Even the cases upon which the Mladineos rely in their brief reaffirm this point. In *Smith v. Nationwide Ins. Co.*, No. 1:08CV683-LTS-RHW, 2009 WL 736199 (S.D. Miss. March 18, 2009), the United States District Court for the Southern District of Mississippi held that the plaintiffs failed to state a claim of misrepresentation as a matter of law because "***[t]he reliance the plaintiffs assert is unreasonable as a matter of law if the agent's representations were inconsistent with the written terms of the policy.***" *Smith,* 2009 WL 736199, at *3, citing *Leonard,* 499 F.3d 419. Thus, although the Mladineos allege that the *Leonard* opinion is not determinative of this case, ***the authority they cite in their brief expressly relied on that opinion.***

Contrary to the Mladineos' allegations in their brief, the policy need not be present at the time of the representation in order for a plaintiff's reliance to be *per se* unreasonable. Indeed, most of the seminal agent misrepresentation cases in Mississippi, as well as recent decisions citing those opinions, are silent as to whether the plaintiffs did or did not have a copy of the policy at the time of the alleged misrepresentation. *See, e.g., Cherry*, 501 So. 2d 416; *Smith*, 2009 WL 736199; *GuideOne*, 2009 WL 2195047.

Ultimately, the Mladineos cannot avoid unmistakable Mississippi law. The Mladineos' Nationwide insurance policy clearly and unambiguously excludes flood damage, a fact the Mladineos do not dispute. Because the alleged misrepresentations by Richard Schmidt regarding the scope of coverage under the policy contradict the clear terms of the policy itself, the Mladineos' alleged reliance thereon was unreasonable as a matter of law. *See, e.g., Stephens*, 850 So. 2d at 82. As a result, the Mladineos cannot establish a key element of their misrepresentation/breach of contract claims, and Appellees were correctly granted summary judgment as a matter of law.

(3) *Merrill* And *Hollins* Do Not Change This Analysis And Have No Governing Effect In This Case.

The Mladineos' heavy reliance on *American Income Life Insurance Co. v. Hollins*, 830 So. 2d 1230 (Miss. 2002) and *United Insurance Co. v. Merrill*, 978 So. 2d 613 (Miss. 2007), *cert. denied*, 128 S. Ct. 1257 (2008) is misplaced – neither of those cases affect the analysis or the end result of this homeowners coverage dispute. Both *Merrill* and *Hollins* were post-claim underwriting cases in which the plaintiffs challenged their life insurers' ***rescission*** of their policies based upon alleged misrepresentations made by the insureds in their policy applications. Because the plaintiffs' agents in those cases knowingly omitted or misrepresented the insureds' health history in their policy applications despite full disclosure from the insureds themselves,

and because the defendant insurers chose to fully rescind the policies – as opposed to merely enforcing them as written – the court allowed insurers to be bound by the actions of their agents in those limited circumstances despite the policy's written terms.[8]

Neither *Merrill* nor *Hollins* have ever been applied or followed outside the context of post-claim underwriting policy rescission, and they have no application to cases such as the one at bar in which the plaintiffs are attempting to ***modify and expand their existing coverage*** to include perils that are otherwise expressly excluded under an existing policy. Indeed, the *Hollins* opinion specifically distinguishes itself from this well-settled line of cases, including specifically *Pongetti v. First Continental Life & Accident Co.*, 688 F. Supp. 245 (N.D. Miss. 1988), stating:

> ***In Pongetti,*** the plaintiff claimed to have disclosed a prior medical condition to the agent, who completed the application form and told her that "so long as the company kept her check and did not direct her to get a physical, she would be covered." The agent denied those allegations. ***The federal district court found it unnecessary to resolve whether the statement was made, finding that the plaintiffs had not satisfied the detriment element of apparent authority.*** Its holding was based on the fact that the policy remained in force and would operate to cover conditions which were not preexisting. ***Pongetti may therefore be distinguished from the case at bar, as AILIC rescinded its policy with Hollins in response to her claim. She was no longer covered for any condition which arose before or after the policy took effect and,*** therefore, did not receive the coverage for which she bargained.

Hollins, 830 So. 2d at 1237. Notably, *Pongetti* specifically rejected the plaintiff's argument that contrary misrepresentations by his agent estopped the insurance company from denying the coverage represented on the following grounds:

> This Court follows the general rule that waiver or estoppel can have a field of operation only when the subject matter is within the terms of the policy, and they cannot operate radically to change the terms of the policy so as to cover additional subject matter. ***Waiver or estoppel cannot operate so as to bring within the***

[8] The precedential effect of *Hollins* is also diminished because it is a plurality opinion, split with four justices joining in the merits of the main opinion, four justices dissenting, and one justice concurring in result only.

> ***coverage of the policy property, or a loss, or a risk, which by the terms of the policy is expressly excepted or otherwise excluded. An insurer may be estopped by its conduct or knowledge from insisting upon a forfeiture of a policy, but the coverage or restrictions on the coverage cannot be extended*** by the doctrines of waiver or estoppel.

Pongetti, 688 F. Supp. at 249, citing *Employers Fire Ins. Co. v. Speed*, 133 So. 2d 627, 629 (Miss. 1961).

This key distinction renders *Merrill* and *Hollins* inapplicable to the present case. Here, the Mladineos asked for and received homeowners coverage for their property. Moreover, they knew that whatever coverage they had was contained in the policy delivered by Nationwide. Nationwide has never sought to forfeit or rescind the Mladineos' homeowners policy. To the contrary – the Mladineos received over $27,000 in benefits under that policy for the covered peril of wind damage resulting from Hurricane Katrina. As flood damage is expressly excepted from coverage under the policy, however, the Mladineos cannot, as a matter of law, expand their policy to include flood coverage based upon the allegedly contrary representations of their agent. *See Ross*, 344 F. 3d at 464.

In *Leonard,* the United States Court of Appeals for the Fifth Circuit applied settled principles of Mississippi law and similarly decided this issue as follows:

> Under Mississippi law, ***an agent's representations that purport to modify the insurance contract can bind an insurer only if the statements were made pursuant to actual or apparent authority***. Because Nationwide does not authorize its agents to orally modify contracts, only apparent authority is pertinent here.
>
> ....
>
> A policyholder seeking to recover based on an agent's apparent authority must show three things: (1) acts or conduct ***on the part of the principal*** indicating the agent's authority; (2) ***reasonable reliance on those acts***; and (3) a detrimental change in position as a result of such reliance.

Leonard, 499 F.3d at 439 (internal citations omitted).

Because "[u]nder Mississippi law, a party's reliance on representations by an insurance agent that contradict the policy language is unreasonable," *id.* at 438, and because constructive knowledge of the terms of a policy will be imputed to a policyholder regardless of whether he read it, *Ross*, 344 F.3d at 464, the Fifth Circuit correctly found that "[t]he Leonards failed to present an actionable claim of negligent misrepresentation because they cannot prove ... the elements required to show apparent authority." *Leonard*, 499 F.3d at 440. Here, as in *Leonard*, the policy specifically precluded the agent from altering the policy terms (R. 951, R.E. 121). Thus, any belief by Mladineo that Schmidt had the power to do so was inherently unreasonable. *See Leonard*, 499 F.3d at 440. Moreover, one of the key representations in *Leonard* – like the representations in this case – was made "[u]pon purchase of the policy." *Id.* at 439. Thus, there is no "key distinction" regarding the timing of the representations as Plaintiffs allege. *Leonard* applies directly to the facts of this case and *Leonard*, not *Merrill* or *Hollins*, is determinative of the issues before this Court.

Indeed, as recently as February 2008, and under circumstances similar to those at bar, the United States District Court for the Southern District of Mississippi distinguished *Merrill* and followed *Leonard* in granting summary judgment in favor of the counter-defendant insurance company and dismissing the insured's misrepresentation claims as a matter of law. *See Fidelity & Guar. Life Ins. Co. v. Williams*, No. 1:06CV959-LG-RHW, 2008 WL 336605, at *4 (S.D. Miss. Feb. 1, 2008). In *Williams*, the counter-plaintiff insured relied upon *Merrill* and contended that the representations of his insurance agent during the application process bound his insurer to coverage under the subject policy despite provisions of the policy to the contrary. *Id.* at *3. In rejecting plaintiff's argument, the *Williams* court drew extensively from the *Leonard* opinion and

found that the insured's negligent misrepresentation claims "fail on the first two elements of apparent authority." *Id.* at *4. Specifically, the court held:

> ***Any reliance on [the agent's] statement was objectively unreasonable in light of the provisions to the contrary*** included in the application form signed by Delmar. *Leonard*, 499 F.3d at 440. The Court therefore concludes that ***[the agent's] representation*** that coverage would begin immediately ***did not bind Fidelity to coverage under any conditions other than those stated in the policy ....***

Id. Moreover, the Mississippi Supreme Court has since reaffirmed the principle that "[a]s a matter of law, one may not reasonably rely on oral representations, whether negligently or fraudulently made by the lender, which contradict the plain language of the documents." *Ballard*, 991 So. 2d at 1207 (upholding lower court's dismissal of fraud and misrepresentation claims).

Since the Mladineos received a copy of their insurance policy and since that policy unambiguously excluded coverage for flood damage, the Mladineos have failed to present an actionable claim of negligent misrepresentation against Nationwide, Schmidt or the Felsher Agency because any reliance by Plaintiffs on Schmidt's contrary representations is unreasonable as a matter of law. *See Leonard*, 499 F. 3d at 440; *Williams*, 2008 WL 336605, at *4. The trial court therefore correctly rejected the Mladineos' reliance on *Merrill* and *Hollins* and entered summary judgment in favor of Appellees.

(4) Asking For "Full Coverage" Does Not Give Rise To A Misrepresentation Claim.

To the extent that the Mladineos contend they requested "full coverage" or a "hurricane policy," or somehow surmised that their policy "covered everything," the Mladineos' allegations are still insufficient to support recovery against Appellees as a matter of law. The Mississippi Supreme Court has held that a request for "full coverage" does not require an insurance agent to provide coverage for all conceivable risks or perils. *See Aetna Cas. & Sur. Co. v. Berry*, 669 So.

2d 56, 65, 76 (Miss. 1996) (Even if insured requests "full coverage," agent has no duty to explain or procure all available coverages, with exception of uninsured motorist benefits.), *overr'd on other grounds*, *Owens v. MS Farm Bureau Cas. Ins. Co.*, 910 So. 2d 1065 (Miss. 2005). This is consistent with cases from other jurisdictions that have recognized the same common law principles. *See, e.g., DeWyngaerdt v. Bean Ins. Agency*, 855 A.2d 1267, 1270 (N.H. 2004) (A request for "full coverage" is "too broad and too vague to constitute a *specific request*" for a particular kind of coverage) (emphasis in original).

If John Mladineo wanted flood coverage, he needed to request it rather than assuming, despite the policy's plain terms, that Nationwide's "windstorm" coverage included both wind and water damage. *See, e.g., Haggans*, 803 So. 2d at 1252 (It is only the "duty of an insurance agent to exercise reasonable diligence in obtaining a policy ***conforming to the request of the insured.***"); *Motors Ins. Co. v. Bud's Boat Rental, Inc.*, 917 F.2d 199, 205 (5th Cir. 1990) ("[T]he client is himself considered responsible for ***adequately advising*** the agent of the coverage needed."). Because the Mladineos do not allege, and have never alleged, that they specifically requested ***flood*** insurance or that Schmidt affirmatively represented that the Mladineos' policy specifically covered ***flood*** damage, the Mladineos simply have not stated a cognizable misrepresentation claim, and the lower court properly granted Nationwide summary judgment as a matter of law.

(5) As A Matter Of Law, There Has Been No Breach Of Contract Or Breach Of The Implied Duty Of Good Faith And Fair Dealing.

The Mladineos also claim that Nationwide is liable for breach of contract and tortious breach of contract for its refusal to pay them for damages undisputedly caused by flood. It is also undisputed that the only policy in effect at the time of Hurricane Katrina clearly excluded flood damage. (R. 880, R.E. 45 at p. 91); (R. 930, R.E. 100). The Mladineos do not claim that

the flood exclusion in the policy is ambiguous or unenforceable. Further, no one alleges that the uncompensated damage to the Mladineo property was caused by wind, a peril actually covered under the Nationwide homeowners policy. Rather, the Mladineos' sole claim is that Nationwide is liable for their flood damage because (they allege) Schmidt did not tell them about the flood exclusion.

Specifically, the Mladineos claim that "Nationwide has engaged and continues to engage, in a course of conduct towards Plaintiffs calculated to evade, or having the foreseeable effect of evading, ***the spirit of the subject policy as represented by Schmidt*** and the Felsher Agency, and to deny them all the reasonably expected benefits of the transaction resulting in Plaintiffs' purchase of the subject policy ***as modified by the representations of Schmidt and the Felsher Agency.***" (R. 291-292, R.E. 11-12). Thus, instead of contending that Nationwide breached or denied the benefits of the policy actually issued, the Mladineos argue that Nationwide breached its duties concerning the "policy ***as represented.***" Since the Mladineos cannot prevail on their misrepresentation/negligence/failure to procure claims, they cannot prevail on their claim for breach of contract.

In an insurance context, the Mississippi Court of Appeals has held that there is no breach of the duty of good faith and fair dealing unless there is a denial of benefits or failure to provide benefits that could have been expected under the contract. *Frye v. Southern Farm Bureau Cas. Co.*, 915 So. 2d 486, 492 (Miss. Ct. App. 2005). Mississippi law is also clear that "an agent's representations that purport to modify the insurance contract can bind an insurer only if the statements were made pursuant to actual or apparent authority." *Leonard*, 499 F.3d at 439. Notably, however, the elements of apparent authority cannot, as a matter of law, be met without a showing of reasonable reliance by the insured. *Id.*

As previously discussed, where a person "relies" on representations that directly contradict the plain language of their insurance policy, that "reliance" is *per se* unreasonable. Because it is undisputed that the Mladineos' policy – which they possessed for four months before Hurricane Katrina – unambiguously excluded flood coverage, the Mladineos cannot legally contend that such excluded coverage "could have been expected from the contract." *See Frye*, 915 So. 2d at 492. Further, because their Nationwide policy clearly precluded the agent (Schmidt) from altering the policy's terms, the Mladineos could not have reasonably relied on any alleged "apparent" authority. *Leonard*, 499 F.3d at 440. Thus, their claim that Nationwide breached its duty of good faith and fair dealing fails as a matter of law.

Moreover, Nationwide cannot be liable to the Plaintiffs for enforcing the terms of its contract as written. The duty of good faith and fair dealing implied into every contract means that neither party will do anything that will injure the right of the other to receive the benefit of the agreement. *Hartford Accident Indem. Co. v. Foster*, 528 So. 2d 255, 281 (Miss. 1988). Thus, there can be no breach of the duty of good faith and fair dealing where there is no breach of contract. *Robinson v. Southern Farm Bureau Cas. Co.*, 915 So. 2d 516, 520-21 (Miss. Ct. App. 2005). It also is not a breach of the duty of good faith and fair dealing to assert the rights in the contract. *See General Motors Acceptance Corp. v. Banan*, 732 So. 2d 262, 269 (Miss. 1999); *see generally Merchants & Planters Bank of Raymond v. Williamson*, 691 So. 2d 398, 405 (Miss. 1997).

Here, Plaintiffs were supplied a homeowners policy which had a clear and unambiguous flood exclusion in it. The fact that Plaintiffs failed to read the policy does not change its terms. Under Mississippi law, the exclusion is valid, the Plaintiffs are charged with knowledge of it, and

Nationwide is entitled to rely upon it. *See generally id.* The trial court correctly granted summary judgment in favor of Appellees on these claims.

C. THE TRIAL COURT CORRECTLY DISMISSED THE MLADINEOS' FAILURE TO PROCURE AND NEGLIGENCE CLAIMS AS A MATTER OF LAW.

The Mladineos contend that Richard Schmidt, as an agent for Nationwide, failed to provide "coverage for water damage to the dwelling caused by named storms." (R. 286, R.E. 6). Based on this allegation, the Mladineos allege they are entitled to recover actual damages "in an amount necessary to repair all damages to the dwelling caused by water or storm surge during Hurricane Katrina." (R. 286-287, R.E. 6-7). Ultimately, the Mladineos' failure to procure claim is wholly untenable, and it fails under both the facts of this case and established Mississippi law.

As a preliminary matter, the Mladineos' allegation that Richard Schmidt did not provide coverage for water damage to the subject dwelling is factually untrue. The standard homeowners policy form issued to the Mladineos by Nationwide, including the form H-6107 Hurricane Coverage and Deductible Provision Endorsement, expressly provided coverage for damage caused by rain, snow and sleet "if the direct force of windstorm first damages the building causing an opening through which the above enters and causes damage." (R. 918, R.E. 88). Thus, the policy procured by Richard Schmidt did provide coverage for certain types of water damage to the Mladineos' property and excluded only those damages caused by the specifically-defined peril of flood.

To the extent the Mladineos' failure to procure claims are premised on the allegation that Richard Schmidt failed to obtain ***flood insurance*** for the Mladineos' dwelling, such claims fail as a matter of law. In Mississippi, an insurance agent owes a duty to use reasonable care in procuring insurance that conforms to the request of the insured. *Haggans*, 803 So. 2d at 1252. Any negligence or other breach of that duty by the agent which operates to defeat the insurance

coverage requested may render the agent liable for any resulting loss. *Simpson v. M-P Enters., Inc.*, 252 So. 2d 202, 207 (Miss. 1971). As in any negligence case, however, such damages are only warranted where the plaintiff presents proof that his or her loss is actually caused by the alleged negligent conduct.

In the present case, the facts do not establish a negligent failure to procure by Schmidt. Mladineo claims he made an inclusive request for coverage from all wind and water damage from named storms. But Mladineo admits that he knew homeowners policies typically do not cover flood. He also admittedly knew that flood policies were available through the NFIP. Further, Mladineo maintained a Nationwide homeowners policy on his residence in Jackson and therefore had actual knowledge of the coverage provided therein. Schmidt advised Mladineo that his property was not in a flood plain and that a separate flood insurance policy would not be required by his lender. ***In response to this information, Mladineo never requested a separate flood insurance policy anyway, and Schmidt never agreed to procure a flood insurance policy.*** The homeowners policy Schmidt ultimately provided, however, did cover wind damage as well as certain types of water damage associated with named storms.

Under these facts, there is no indication that Schmidt failed to use reasonable care in obtaining a policy conforming to the request of the insured. *See Haggans*, 803 So. 2d at 1252. Instead, the undisputed facts, at most, indicate a miscommunication between Schmidt and Mladineo or a misunderstanding by Mladineo regarding the coverage Mladineo allegedly sought. *See, e.g., Chester v. State Farm Fire & Cas. Co.*, No. 1:07CV132-LTS-RHW, 2008 WL 660440, at *2 (S.D. Miss. Mar. 6, 2008) ("Chester does not allege that McHan misinformed her concerning the availability of flood coverage, and since McHan secured the coverage Chester asked for, I do not believe Chester's allegations against McHan concerning his failure to procure

flood coverage can support a claim of negligence"); *Payment v. State Farm Fire & Cas. Co.*, No. 1:07CV1003-LTS-RHW, 2008 WL 5381925, at *2 (S.D. Miss. Dec. 18, 2008) (describing the plaintiff's separate misrepresentation/estoppel and failure to procure claims as "a distinction without a difference").

Furthermore, as previously discussed, a long-standing Mississippi rule provides that insureds have an affirmative duty to read the terms and conditions contained in their insurance policies. *Certain Interested Underwriters at Lloyds v. Gulf Nat'l Ins. Co.*, 898 F. Supp. 381, 385 (N.D. Miss. 1995), *aff'd*, 95 F.3d 48 (5th Cir. 1996); *Gulf Guar. Life Ins. Co. v. Kelley*, 389 So. 2d 920, 922 (Miss. 1980). If an insured neglects to fulfill this duty, he will be imputed with constructive knowledge of the policy's contents and provisions as a matter of law. *Stephens v. Equitable Life Assurance Soc'y of the United States*, 850 So. 2d 78, 82 (Miss. 2003); *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987). Thus, an insured may not neglect to familiarize himself with his insurance policy and then complain about its terms and conditions. *Kelley*, 389 So. 2d at 922; *Allgood v. Metro. Life Ins. Co.*, 543 F. Supp. 2d 591, 593 (S.D. Miss. 2008); *Titan Indem. Co. v. City of Brandon, Miss.*, 27 F. Supp. 2d 697, 698-99 (S.D. Miss. 1997).

Applying these legal principles, courts in Mississippi and numerous other jurisdictions have held that an insured's knowing failure to read his insurance policy bars any future claims against his insurance agent for failing to procure requested coverage. The rationale for such a holding is clear: where an insured is provided fair notice of the terms of his insurance policy, "and more than ample time to reject it if [he] did not consider it adequate or satisfactory," any injury that results from insufficient coverage could have been avoided by the insured and

therefore is not the proximate result of negligence on the part of the agent. *Atlas Roofing Mfg. Co., Inc. v. Robinson & Julienne, Inc.*, 279 So. 2d 625, 629 (Miss. 1973).

Over thirty-five years ago, the Mississippi Supreme Court applied these very principles to reverse a lower court and render judgment in favor of the defendant-insurance agent against claims of failure to procure adequate insurance. *See Atlas Roofing*, 279 So. 2d 625. In reaching its holding, the Supreme Court specifically recognized that the plaintiff had received documentation from its insurer, "in which the type and terms of coverage to be provided were spelled out," but made no complaint about that coverage between the time the insurance was procured, and the date of the loss. *Id.* at 629. Based on those facts, the court found that "Atlas [had] fair notice of the terms of the insurance and more than ample time to reject it if it did not consider it adequate or satisfactory." *Id.* As a result, the court "concluded upon the whole record that Atlas failed to meet the burden which rested upon it to establish by evidence that its loss was the result of negligence upon the part of the [agent]." *Id.* at 630.

Moreover, as recently as 2002, the Mississippi Court of Appeals upheld summary judgment in favor of a defendant insurance agent, based in part on the same reasoning applied in *Atlas Roofing*. In *Haggans v. State Farm Fire and Casualty Co.*, 803 So. 2d 1249, 1250-51 (Miss. Ct. App. 2002), Plaintiffs filed suit against their insurer and insurance agent, alleging that the agent failed to procure the insurance requested. Finding in favor of the defendant agent as a matter of law, the Court of Appeals explicitly noted that, "although Haggans argues that he believed the property to be insured, he did receive a copy of the policy. Whether Haggans in fact read the policy or not, as an insured, he is deemed to have knowledge of [its] contents." *Haggans*, 803 So. 2d at 1252. Therefore, even if the agent did in fact breach the duty to procure

requested coverage, "Haggans failed to set forth any issue as to causation of injury. Accordingly, summary judgment was appropriate." *Id.*

Contrary to the Mladineos' allegation, *Atlas* was not and never has been limited to its facts. While a greater period of time may have passed between delivery of the insured's policy and the date of the loss in *Atlas*, that particular timing has no effect on the court's finding that, as a matter of law, "the terms of the insurance were fully and fairly disclosed to Atlas, both by the cover note and the policy itself," and that "Atlas [had] fair notice of the terms of the insurance." *Atlas*, 279 So. 2d at 629. Nor did the court in any way confine its definition of "ample time to reject [the coverage]" to the specific time period at issue in that case. Rather, the *Atlas* Court merely followed the foregoing legal principles and correctly found that the plaintiff's failure to procure and negligence claims against the agent were barred, as a matter of law, by its fair notice (or "imputed knowledge") of the terms of its insurance policy, and its failure to object. *Id; see also Rosenstock v. Miss. Home Ins. Co.*, 35 So. 309, 311 (Miss. 1903) ("The silent acceptance of the policy by the assured closed the contract, ***and bound the assured to the agreement tendered by the policy....***").

Similarly, the Mladineos had a copy of the subject policy in their possession for four months – one-third of the entire policy period. That policy provided fair notice of the terms therein, and four months is more than enough time for the Mladineos to determine whether the coverage provided was adequate and to reject it if it was not. Indeed, it only took mere minutes for Mladineo to read the subject policy exclusions during his deposition and to admit the provisions clearly informed him that flood damage was not covered under the subject policy. Furthermore, not only did the Plaintiffs have fair notice of their coverage in the Ocean Springs policy itself, it is undisputed that the Plaintiffs had maintained the exact same Nationwide HO

23-A policy form on their residence in Jackson for several years prior to the storm. As a result, Plaintiffs cannot reasonably contend that they did not have fair notice of their coverage, and their failure to procure and negligence claims against Schmidt fail for the same reason the plaintiff's claims failed in *Atlas*.

The Mladineos also improperly attempt to re-characterize *Haggans* by omitting half of the court's holding. The Mladineos correctly state that the *Haggans* Court based ***part*** of its holding on the fact that the requested coverage could not be obtained for a vacant dwelling; therefore, there could not have been a breach of the duty to procure such coverage by the agent. *Haggans*, 803 So. 2d at 1252. However, the Court then proceeded to explain that ***even if there had been a breach*** of the duty to procure requested coverage, ***"[Plaintiff] failed to set forth any issue as to causation of injury."*** *Id.* This equally important part of the court's holding – which the Mladineos would have this Court ignore – was based on the established principle of Mississippi law that "as an insured, [Haggans] is deemed to have knowledge of the contents of [his] insurance policy" whether he read it or not. *Id.*

Mississippi law in this area is not unique. Courts in Georgia, Alabama, and North Carolina[9] have all recognized that an insured's failure to examine his insurance policy and timely object to any insufficiencies therein will bar any subsequent failure to procure claims against the insured's agent. For example, in *Turner, Wood & Smith, Inc. v. Reed*, 311 S.E.2d 859, 861 (Ga. Ct. App. 1983), the Georgia Court of Appeals applied the same failure to procure standard followed in Mississippi to hold that the plaintiffs' failure to read their policy precluded recovery

[9] *See Willis v. Allstate Ins. Co.*, No. COA04-877, 2005 WL 1804334, at *3 (N.C. App. Aug. 2, 2005) (holding that Plaintiff's breach of duty to read policy prevented her from asserting claim for coverage that was excluded in policy by "clear, unambiguous, and easily understood language") (internal quotations & citations omitted).

against their agent because "examination would have made it readily apparent that the coverage contracted for was not issued."[10] (Internal quotations & citations omitted); *see also Greene v. Lilburn Ins. Agency, Inc.*, 383 S.E.2d 194, 195 (Ga. Ct. App. 1989) (citing *Reed* to hold that insured's failure to read policy precluded recovery against agent for failure to obtain theft coverage because examination of policy would have revealed that coverage contracted for was not issued). The supporting rationale for this rule was stated most clearly in *S&A Corp. v. Berger Co.*, 140 S.E.2d 509, 511 (Ga. Ct. App. 1965) (emphasis added) as follows:

> [I]t was the plaintiff's own negligence in failing to check the amount of the policy coverage that was the proximate cause of plaintiff's loss.... Having the policy in its possession prior to the fire plaintiff was charged with the knowledge of the terms and conditions of the policy, namely and in particular that the policy coverage was for only $3,000 and not $7,500 as contracted for between the parties.... Consequently ***the plaintiff being, under the law, charged with knowing the terms and conditions of the policy any negligence, if any, on the part of the defendant in failing to procure the amount of insurance coverage contracted for could have been avoided by the plaintiff*** and therefore a finding for the defendant is demanded.

Alabama courts also have held that an insured's breach of the duty to read his policy (and verify coverage is provided) is the true proximate cause of any loss resulting from insufficient coverage. In *Torres v. State Farm Fire & Casualty Insurance Company*, 438 So. 2d 757, 759 (Ala. 1983), *overr'd on other grounds by Hickox v. Stover*, 551 So. 2d 259 (Ala. 1989), *reinstated by Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997), the plaintiffs alleged that they requested flood insurance in the wake of Hurricane Frederick, but such coverage was never procured by their agent. Like the Mladineos, the plaintiffs in *Torres* admitted that they received a copy of their homeowners policy, but claimed not to know that the policy did not provide flood coverage. *Id.* at 759. Under those facts, the Alabama Supreme

[10] Specifically, the Court recognized that insurance agents who undertake to procure a policy of insurance, but negligently fail to do so, generally will be liable for any resulting loss. *Reed*, 311 S.E.2d at 860.

Court considered the plaintiffs' failure to read their policy and discover its contents, and ultimately found that "the failure to procure flood insurance which would have covered the loss was attributable to the plaintiffs' carelessness and neglect rather than to [any] misrepresentation." *Id.*; *see also Merritt v. Beville*, No. 1:98CV548-BH-C, 1999 LEXIS 11644, at *13-14 (S.D. Ala. July 12, 1999) ("If [plaintiffs] suffered any damage, that damage was proximately caused by their willful failure to pay attention to the information they were given, and not by the defendants' alleged failure to disclose.").

The Mladineos also cite several cases which they contend stand for the proposition that issuance and receipt of a policy does not bar a failure to procure claim. A mere cursory examination of each case reveals that they do not actually stand for such a proposition, nor do they undermine the authority cited by Appellees and relied upon by the trial court. Despite the Mladineos' description of *Taylor Machine Works, Inc. v. Great American Surplus Lines Insurance Co.* 635 So. 2d 1357, 1362 (Miss. 1994) as "particularly instructive," the court in that case said nothing about the plaintiffs' failure to procure claims other than generally reciting the governing standard under Mississippi law. Indeed, the Court only remanded the failure to procure claim because it had already determined that the lower court erred in deciding the separate issue of whether a "claim" had been properly submitted under the policy, and the parties' briefs, "addressed only the 'claim or no claim' issue." *Taylor Machine Works*, 635 So. 2d at 1362. As a result, the plaintiff's duty to read and imputed knowledge of its policy's terms were never submitted to the court for determination.

Furthermore, the court in *Smith v. Nationwide Ins. Co.*, No. 1:08CV683-LTS-RHW, 2009 WL 736199 (S.D. Miss. Mar. 18, 2009) also simply recited the general standard for a cause of action for failure to procure. Notably, however, the Court then proceeded to find that the

plaintiff failed to state such a claim against the agent in that case. There, the court found that a valid claim had not been stated ***because there were no allegations in the Complaint that did not concern the terms of the policy***. The court explained, "While the Smiths may have made incorrect inferences concerning their insurance coverage, [their agent] is not responsible for those inferences if they are contradicted by the terms of the policy itself." *Smith*, 2009 WL 736199 at *5, citing *Stephens v. Equitable Life Assur. Soc'y of the United States,* 850 So. 2d 78, 82 (Miss. 2003) and *Cherry v. Anthony,* 501 So. 2d 416 (Miss.1987). Thus, *Smith* actually reaffirms the basis upon which summary judgment was correctly granted in this case regarding both misrepresentation and failure to procure: "Because the water damage exclusion is clear and unambiguous, and because the plaintiffs are charged with knowledge of the terms of their policy" the plaintiffs' claims cannot succeed. *Smith*, 2009 WL 736199 at *1.

In this case, John Mladineo admitted during his deposition that he received a copy of his policy from Nationwide approximately six (6) weeks after the March 10, 2005 closing, but he never read it. (R. 871, R.E. 36 at p. 55). That policy provided fair, unambiguous notice of the terms of coverage procured by Richard Schmidt. The Mladineos then had nearly four months – one third of the entire policy period and more than ample time – to review those terms and reject them if they considered the coverage inadequate.[11] Indeed, John Mladineo admitted during his deposition that, had he read his policy, he would have known before the hurricane that flood damage was unambiguously excluded. (R. 880, R.E. 45 at pp. 90-92). However, in those four months, John Mladineo did not read his policy, and at no point between the time the insurance

[11] *Compare Syx v. Midfield Volkswagen, Inc.*, 518 So. 2d 94, 97 (Ala. 1987) (finding that five months is enough time for an insured to familiarize himself with provisions of insurance policy).

was procured and the date of Hurricane Katrina did he complain about the coverage that was provided.

As in *Atlas*, *Haggans*, *Reed*, and *Torres*, the damages the Mladineos claim to have suffered as a result of Richard Schmidt's alleged failure to procure flood coverage could have been avoided had the Mladineos simply read their policy. Indeed, John Mladineo admits as much. As a matter of both sound policy and Mississippi law, the Mladineos must not be permitted to ignore the terms and conditions of the insurance policy they possessed for four months and then complain about those terms and conditions only after sustaining a loss that could have been avoided.

Nor can the Mladineos avoid summary judgment based on their other general allegations of "negligent conduct" by Schmidt. None of the "facts" to which Plaintiffs point have any material relationship to the claims – and alleged damages – at issue in this lawsuit. The crux of this case is Plaintiffs' claim that Schmidt told them they would be getting a "hurricane policy" that provided coverage for all wind and water damage associated with hurricanes. Thus, because Plaintiffs' homeowners policy excluded flood damage, Plaintiffs seek to recover for such uncovered property damage resulting from Hurricane Katrina.

Whether Schmidt kept a file, obtained a signed policy application, inspected the property, or took specific notes regarding his dealings with Mladineo are irrelevant to this equation. There is no evidence whatsoever in the record that signing an application would have indicated anything to Mladineo about the coverage that would ultimately be provided in his policy. Furthermore, once the policy was delivered, it controlled the coverage provided, a fact which Mladineo admitted he understood during his deposition. Additionally, whether Schmidt did or did not inspect the rear of the property is inconsequential, because it is undisputed that Schmidt

was familiar with the property location, including the fact that it was on the water. That a portion of the property touching the water may have been in a flood plain is likewise irrelevant because the structure actually being insured – the residence – was not, and Mladineo is not seeking to recover for flood damage to anything other than the structure itself. Finally, the type or specificity of any "notes" or "files" Schmidt may have taken and maintained regarding his dealings with Mladineo is absolutely immaterial to this case, and has no connection to Mladineo's claim that he was uninsured for flood damage

Ultimately, Plaintiffs' other allegations of negligence are mere makeweight, which the lower court did, and this Court should, readily dismiss. The Plaintiffs' policy – which they received – controls all coverage issues in this case. The Mladineos' attempt to distract from this fact is unavailing.

D. APPELLEES DID NOT "WAIVE" THEIR RIGHT TO MOVE FOR SUMMARY JUDGMENT BASED UPON ESTABLISHED PRINCIPLES OF MISSISSIPPI LAW.

In what appears to be a "throw it against the wall and see if it sticks" argument, the Mladineos claim that Appellees should have affirmatively pled that they failed to read their policy, and that by waiting until after discovery was complete (but before the motion deadline) to file their Motion for Summary Judgment, Appellees waived their right to rely on the policy language. Thus, the Mladineos essentially suggest that, by actively participating in the lawsuit the Mladineos instituted, Nationwide, Schmidt, and the Felsher Agency waived their right to rely upon established principles of Mississippi law and file a summary judgment motion.

Generally speaking, a defendant only waives an affirmative defense "if the defense is not asserted prior to or simultaneously within the answer." *Rains v. Gardner*, 731 So. 2d 1192, 1197 (Miss. 1999); *see also Collom v. Senholtz*, 767 So. 2d 215, 218 (Miss. Ct. App. 2000). The

Mladineos' waiver argument, however, rests on the additional principle that "where ... there is a ***substantial and unreasonable delay in pursuing the right,*** coupled with active participation in the litigation process," a defendant may be found to have waived his right to pursue an affirmative defense. *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167, 180 (Miss. 2006) (emphasis added). Here, the *Horton* line of cases is inapplicable for two reasons: ***first***, the Mladineos' so-called "duty to read" their policy is not an affirmative defense that can be waived; and ***second***, Appellees have not delayed in pursuing their rights under Mississippi law.

The "duty to read" is not an affirmative defense. It is not listed as an affirmative defense in Mississippi Rule of Civil Procedure 8, nor is it a matter of avoidance. Instead, the "duty to read," and the resulting imputation of knowledge, is a settled principle of Mississippi law. As noted above, each person is deemed to know the contents of his contracts, whether he reads them or not. *Oaks,* 953 So. 2d at 1082. Here, the insurance policy which the Mladineos had in their possession for over four months before Hurricane Katrina specifically excludes damages for flooding. By operation of law, therefore, that policy refutes the Mladineos' claim that they had flood coverage.

The Mladineos' entire lawsuit relies on the allegation that their agent, Richard Schmidt, misrepresented the terms of the subject insurance policy to them – specifically, their allegation that he somehow represented that they would have total coverage. One of the essential elements of that claim, which the Mladineos must prove, is their reasonable reliance upon the alleged misrepresentation. As discussed in detail above, the Mladineos cannot prove this element of their claim because one cannot reasonably rely on a "misrepresentation" that would have been revealed by reading the contract. *See id.* Settled precedent therefore creates a defect in the Mladineos' proof and establishes an element on which they cannot, as a matter of law, create a

jury question. That defect is not the result of any affirmative defense which Defendants did or did not raise; it is the result of the Mladineos' inability to create a *prima facie* case of misrepresentation.

Nonetheless, even if one could argue that imputed knowledge of policy language were an affirmative defense, Defendants did in fact raise that "defense" in their Answers to both the original Complaint and the Second Amended Complaint. Among its Affirmative Defenses, Nationwide pled that the Mladineos' claims were barred by the language of the policy, including specifically the "water or water-borne material exclusion." (R. 302-303). Further, throughout their Answers, Defendants affirmatively stated "that the subject policy speaks for itself, and that a copy of the policy was at all times available for Mladineo to review upon request. Defendants [further] affirmatively state[d] that a copy of the policy was delivered to and received by the Mladineos after purchase." *See* R. at 303. Thus, the Mladineos were certainly on notice that the Defendants intended to rely on the policy language and its exclusions, and cannot reasonably argue that they were not.

Nor can the Mladineos reasonably contend that Defendants substantially and unreasonably delayed in pursuing the so-called "duty to read" or "implied knowledge" defenses in this case. For months, ***both parties*** conducted discovery, much of which specifically addressed the Mladineos' duty – and failure – to read their insurance policy, as well as notice of the actual policy provisions. *See, e.g.,* R. 871, R.E. 36 at p. 55 ("Q: And did you read your policy when you received it? A: No. Q: Okay. Did you read your policy at any time prior to August 29th of 2005? A: No."); R. 880, R.E. 45 at 92 ("Q: Now, Dr. Mladineo, again, if you had read this provision of Nationwide's homeowners policy . . . you would have known that – that flood damage from Hurricane Katrina was not covered; is that correct? A: Correct ....").

Furthermore, as Plaintiffs admit, "an Amended Agreed Scheduling Order was entered on May 8, 2008 with new deadlines for discovery and trial preparation." (R. 969-970, R.E. 128-129). Included in that Order was a mutually agreed-upon October 24, 2008 deadline for filing dispositive motions, including motions for summary judgment. (R. 969, R.E. 128). Thus, Defendants neither substantially nor unreasonably delayed in pursuing the defenses available to them under Mississippi law. To the contrary, Defendants operated within the parameters of the case management deadlines set forth in the Amended Agreed Scheduling Order by conducting discovery aimed at developing the claims and defenses of this lawsuit and by filing their Motion for Summary Judgment more than four weeks ahead of the October 24, 2008 motions deadline.

Plaintiffs' waiver argument suggests that Defendants should have immediately filed a motion for summary judgment without ever conducting or completing discovery in this case. This position is neither practical nor supported by Mississippi law. Defendants chose to initially preserve their policy-based defenses by raising them in the Answer to Plaintiffs' Second Amended Complaint, and by reserving their right to raise additional defenses as additional facts became known over the course of discovery. Thereafter, ***both parties*** participated actively in discovery regarding the specific issue of Plaintiffs' duty – and failure – to read the subject insurance policy. Once substantial discovery on the necessary issues had been completed, Defendants prepared and filed their Motion for Summary Judgment on September 17, 2008 – ***more than one month in advance of the agreed-upon October 24, 2008 deadline for filing dispositive motions***. Plaintiffs cannot reasonably contend that a motion filed more than four weeks early is untimely. For these reasons, the waiver principles set forth in the *Horton* line of cases are simply inapplicable to this case. Defendants did not waive their right to move for

summary judgment on Plaintiffs' claims, and the trial court correctly rejected such an argument as a matter of Mississippi law.

Finally, even if the Court were to assume the Mladineos' failure to read the policy is an affirmative defense which the Appellees failed to raise, the trial court clearly allowed the defense, which is well within its discretion. *See Moeller v. Am. Guar. & Liability Ins. Co.*, 812 So. 2d 953, 961 (Miss. 2002) (amendment of pleadings is within sound discretion of trial court). Moreover, it was a proper exercise of discretion to permit the defense because the Plaintiffs have not asserted, and the record does not contain, any evidence of prejudice resulting from permitting the defense. *See id.* (reversible error to deny amendment when no prejudice would result therefrom). No new discovery was needed as a result of the defense, as ample discovery had already been conducted on it. Nor did the Mladineos change their position in any way as a result of some "reliance" on the existing pleadings. There simply is no prejudice here.

Ultimately, Appellees did not waive their rights to rely upon the language of the policy or to impute knowledge of the contents of the policy to the Mladineos. The lower court properly denied the Mladineos' waiver claims.

E. APPELLANTS HAVE NO CLAIM AGAINST NATIONWIDE RELATED TO ITS HANDLING OF THE AGENT LIABILITY INCIDENT REPORT SUBMITTED BY RICHARD SCHMIDT.

The Mladineos devote a substantial portion of their brief and argument to the claim that Nationwide somehow acted in bad faith by investigating their negligence claims against Richard Schmidt. It is undisputed that the only insurance policy Nationwide issued to the Mladineos is a homeowners policy, which includes an unambiguous flood exclusion. It is further undisputed that Nationwide properly inspected, adjusted, and paid the Mladineos for every penny of damage caused to their house by wind. (R. 883, R.E. 48 at p. 105). Because Nationwide does not sell a

homeowners policy with coverage for flood damage, the Mladineos allege that Schmidt either misrepresented the coverage provided under their homeowners policy, or he should have gotten them a flood policy. After John Mladineo voiced this complaint directly to Schmidt after Hurricane Katrina, Schmidt submitted an Agent Liability Incident Report to Nationwide. As a result, Nationwide investigated the Mladineos' claim against Schmidt. Although not altogether clear, the Mladineos attempt to parlay that investigation into a breach of the duty owed to them. But Nationwide had no duty to investigate the incident report at all, much less a duty to the Mladineos to do so. Instead, Nationwide simply chose to investigate a claim against its agent to see if the agent had any liability for alleged negligence.

The Mladineos' convoluted attempt to assert claims against Nationwide for breach of the duty of good faith and fair dealing, tortious breach of contract, and bad faith in this context fails as a matter of law. Each of these claims is premised on the Mladineos' allegation that Nationwide engaged "in a course of conduct . . . calculated ***to evade, or having the foreseeable effect of evading, the spirit of the subject policy*** . . . " (R. 291-292, R.E. 11-12). Yet, John Mladineo admitted during his deposition that his Nationwide homeowners policy – the only policy at issue in this lawsuit – did not provide coverage for flood damage. (R. 880, R.E. 45 at pp. 90-92). Simply stated, Nationwide cannot "evade" benefits that were not available under the subject policy. This is the very reason that there can be no breach of the duty of good faith and fair dealing unless there is a denial of benefits or failure to provide benefits that could have been expected under the contract. *Frye v. Southern Farm Bureau Cas. Co.*, 915 So. 2d 486, 492 (Miss. Ct. App. 2005).

Apparently recognizing that Nationwide does not owe them a duty as their flood insurer, the Mladineos suggest that Nationwide was acting as Schmidt's E&O carrier regarding the Agent

Liability Incident Report and therefore somehow owed the Mladineos a duty in investing that report. There are three problems with this argument: (1) Nationwide is not Schmidt's E&O carrier; (2) even if Nationwide were Schmidt's liability insurer, Nationwide's duty would be to its insured (Schmidt), not to the third parties who have asserted the tort claims against Schmidt (Plaintiffs); and (3) settled Mississippi law prohibits Plaintiffs from making a direct claim against an alleged tortfeasor's liability insurer. Thus, as a matter of law, the Mladineos cannot create a bad faith claim based on Nationwide's alleged failure to adequately and properly investigate whether Schmidt and Felsher committed negligence in procuring the subject policy.

To begin, Nationwide and its Agent Support Unit are not Richard Schmidt's errors and omissions insurer. Nationwide's Agent Support Unit is a group of Nationwide employees tasked with conducting internal investigations of claims against Nationwide agents. Because, in certain circumstances, Nationwide may potentially be liable for the conduct of its agents acting within the course and scope of their authority, Agent Support sometimes investigates purported negligence claims against agents as part of an internal review of agent activity. Nationwide does not, however, provide any type of insurance policy or errors and omissions coverage to its agents as the Mladineos seem to suggest.

Nonetheless, assuming for the sake of argument that Nationwide was Schmidt's E&O carrier, neither Nationwide nor its Agent Support Unit owed any duty to the Mladineos, and the Mladineos have no standing to raise these purported claims. Even if Nationwide were Schmidt's insurer, it would still owe no duty to the Mladineos. In fact, Mississippi law does not permit an injured party to maintain an action against an alleged tortfeasor's liability insurer. *Poindexter v. Southern United Fire Ins. Co.*, 838 So. 2d 964, 972 (Miss. 2003). Whether Nationwide failed to pay a claim on behalf of Richard Schmidt is legally immaterial to the Mladineos unless and until

they have both a judgment against Schmidt, and a judgment that Nationwide is vicariously liable for Schmidt's conduct. Nonetheless, the Mladineos contend that Nationwide somehow owed them a duty separate and apart from its duty as their homeowners insurance carrier. In essence, the Mladineos suggest that Nationwide owed them a duty to investigate the incident report submitted by Richard Schmidt, to decide that the Mladineos were automatically correct, and to pay them benefits under an E&O policy that does not exist and to which they are not parties.

In *Poindexter*, the Mississippi Supreme Court reviewed an action between a vehicle owner and the alleged tortfeasor. *Id.* at 965-66. After the tortfeasor's insurer declined to pay the plaintiff's damages, the tortfeasor attempted to join the insurer as a party. The Court, however, held that the insurance company was not a proper party to the proceedings against the tortfeasor, and made clear that ***a liability insurer's duty is to its insured, not to the allegedly injured third party***. *Id.* at 968. Moreover, the injured third party must first obtain a verdict against the insured before it can make a claim against the insured's liability carrier. The court pointed out "in attempting to litigate these issues under the guise of a Rule 57 claim for determination of coverage, Poindexter [the plaintiff] has gotten the cart before the horse. He either misunderstands the distinction between coverage under the policy and recoverable damages under the law, or is deliberately attempting to create the illusion of a coverage issue." *Id.*

The Mladineos are attempting improperly to expand the duty insurers owe their insureds regarding the investigation of claims made under a policy of insurance, to third parties who may assert claims for negligence against the insured. Such is not actionable under Mississippi law. If Nationwide had a duty regarding the investigation of the Agent Liability Incident Report, which Nationwide denies, such duty would have been owed solely to Schmidt – its agent. No flood insurer/insured relationship was created between the Mladineos and Nationwide merely because

Mladineo contends Schmidt did not obtain the flood coverage he decided he wanted after Hurricane Katrina hit. The Mladineos are "attempting to create the illusion of a coverage issue" under a policy that does not exist and to which they are not a party. There is no support under Mississippi law for such a claim and, indeed, Mississippi law would require dismissal of that claim even if Nationwide had issued an E&O policy to Schmidt and Felsher.

Finally, even assuming *arguendo* that Nationwide owed a duty to the Mladineos regarding its investigation of Schmidt's agent liability incident report, the Mladineos' bad faith claim still fails as a matter of law for the simple reason that Nationwide's "adjustment" of that claim was correct. For all of the reasons previously discussed, neither Schmidt, the Felsher Agency, nor Nationwide have any liability to the Mladineos' for Schmidt's actions in procuring the subject insurance policy as a matter of Mississippi law. Consequently, there is no causal connection between Nationwide's agent support investigation (or lack thereof) and the Mladineos' alleged damages in this case.

The trial court therefore correctly granted summary judgment on Plaintiffs' claims of bad faith. That judgment should be affirmed.

F. PUBLIC POLICY REQUIRES THIS COURT TO AFFIRM THE LOWER COURT'S ENTRY OF SUMMARY JUDGMENT.

In a final overarching attempt to escape what Mississippi law has, for years, commanded, the Mladineos contend that "considerations of public policy" support the premise that insureds should not have to read their insurance policies. To support this claim, the Mladineos attempt to portray themselves as helpless and uneducated consumers at the mercy of their insurance agent and claim that "there should be a remedy for every wrong done to one by another," *see* Br. of Appellant at 65.

Not only was no "wrong" committed by Appellees toward John Mladineo – who, coincidentally is a well educated and successful surgeon who admits that he has handled all of his personal and family insurance matters since 1978 – the position more firmly supported by public policy is that advanced by Appellees, taken by the trial court, and repeatedly reaffirmed by Mississippi courts: insurers must be permitted to rely upon and enforce their policies ***as written***. *See generally South Carolina Ins. Co. v. Keymon*, 974 So. 2d 226 (Miss. 2008); *Farmland v. Mut. Ins. Co. v. Scruggs*, 886 So. 2d 714, 717 (Miss. 2004) ("We must refrain from altering or changing a policy where the terms are unambiguous, even if there is a resulting hardship on the insured party."); ENCYCLOPEDIA OF MISSISSIPPI LAW § 40:5 ("No rule of construction requires or permits the Court to make a contract differing from that made by the parties themselves, or to enlarge an insurance company's obligations where the provisions of its policy are clear."), citing *Leonard*, 499 F. 3d 419.

A contrary rule would effectively strip insurance policies from having any true legally binding effect. Any person could knowingly underinsure himself, ignore the terms conditions of the coverage for which he actually bargained, and then – only after sustaining a loss that could have been avoided – complain that he did not get the coverage he requested. Such a result is neither anticipated nor supported by public policy or Mississippi law and must not be permitted to occur in this matter.

IV. CONCLUSION

For all of the foregoing reasons, the judgment of the trial court was correct and should be affirmed.

It is undisputed that the Mladineos' policy excluded damage caused by flooding. It also is undisputed that the Mladineos had their policy – with the clear exclusion – for at least four

months before Hurricane Katrina made landfall. As a result of the hurricane, the Mladineos suffered some covered wind damage and some excluded flood damage. They have been fully compensated for all covered damages under the policy they purchased. All of the Mladineos' current claims therefore arise from their failure to purchase flood insurance. Mississippi law bars these claims.

The Mladineos' policy clearly excludes coverage for the flood damages they suffered – a fact they would have known had they read their policy. Thus, the trial court properly granted summary judgment as to the Mladineos' claims, all of which stem from their allegation that Schmidt misrepresented that he would obtain a "hurricane policy" covering all wind and water damage. Because the Mladineos are charged with knowledge of and bound by the unambiguous flood exclusion in the policy they received, they cannot as a matter of law be heard to complain of this alleged misrepresentation. The Judgment should be affirmed.

Respectfully submitted, this the 4th day of January, 2010.

RICHARD EARL SCHMIDT, MICHAEL FELSHER INSURANCE AGENCY, AND NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, Appellees

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CERTIFICATE OF SERVICE

I, H. Mitchell Cowan, one of the attorneys for Appellees, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

The Honorable Billy G. Bridges
Jackson County Special Circuit Court Judge
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THIS the 4th day of January, 2010.

H. Mitchell Cowan

H. MITCHELL COWAN